

1975 WL 29712 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 14, 1975

***1 Re: Mortgages Uniform Recognition of Acknowledgments Act**

Honorable Olanthe L. Ashe
Clerk of Court for Allendale County
Post Office Box 126
Allendale, South Carolina 29810

Dear Mrs. Ashe:

You have inquired whether a certain mortgage, which was submitted to you for filing bearing an irregular form of acknowledgment, is recordable under the Uniform Recognition of Acknowledgments Act, Sections 49-61, et seq., Code of Laws of South Carolina (1962), as amended.

Section 60-51 of the Code concerns prerequisites to recording. The scope of that Section was expanded in 1972 to take into account the Uniform Recognition of Acknowledgments Act, which was also passed in 1972. Your inquiry concerns whether the subject acknowledgment exhibits sufficient compliance with Code Section 60-51 and the Uniform Recognition of Acknowledgments Act.

The acknowledgment was taken within the State of Florida by a notary public of that State. The notary public certified: ' . . . Before me personally appeared [the two mortgagors] and made oath that they did sign, seal, and as their act and deed, deliver the within written Deed . . . '

The words 'acknowledged before me' were not used; however, the quoted language probably constitutes 'their substantial equivalent'. See Code Section 49-64(3). Therefore, it is the opinion of this office that the acknowledgment would comply with the Uniform Recognition of Acknowledgments Act and Code Section 60-51.

There is apparent on the face of the mortgage, however, a fatal defect which I must call to your attention. Although subscribed by the mortgagors, it is apparent that the mortgage was not executed in the presence of and subscribed to by two or more credible witnesses as required by Code Section 57-251. This office has previously advised that neither the Uniform Recognition of Acknowledgments Act nor the amendments to Code Section 60-51 supercede or repeal any portion of Code Section 57-251 or affect in any manner the requirement as to the number of witnesses to a deed or other instrument. 1972 Ops. Atty. Gen., #3373, pg. 225.

A mortgage not attested by two witnesses is invalid as a legal mortgage (although good between the parties). Code Section 57-251, [Farmers' Bank and Trust Company v. Fudge](#), 113 S.C. 25, 100 S.E. 628 (1919), [Arthur v. Hollowell](#), 111 S.C. 444, 98 S.E. 202 (1919), [Harper v. Barsh](#), 10 Rich. Eq. (31 S.C.E.) 149 (1858), [Craig v. Pinson](#), Cheves (25 S.C.L.) 272 (1840). And, such an irregularity must be regarded as a material one disqualifying the instrument for record. See: Means, [The Recording of Land Titles in South Carolina](#), 10 S.C. Law Quarterly 346, 407 (1958). Accordingly, it is the opinion of this office that the subject mortgage is not entitled to be recorded.

I have enclosed copies of several recent opinions considering similar matters which may be of interest to you.

Very truly yours,

Wade S. Kolb, Jr.

*2 Assistant Attorney General

ATTACHMENT

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