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Chattel Mortgages -- Recordation -- Persons Protected

Emery B. Denny Jr.

encouraged.[17] It is negligence to interfere with the driver in some situations, but in others, non-interference will bar the guest from recovery. Any rigid rule to apply to all situations is undesirable. The probable North Carolina rule is that when danger arising out of the operation of a vehicle by another is manifest to a passenger or guest who has adequate opportunity to control the situation by warning the driver, and he sits without protest and permits himself to be driven to his injury, his negligence will bar a recovery—such negligence is not the negligence of the driver imputed to him as a passenger, but his own negligence in joining with the driver and facing manifest danger.[18] The courts should, however, consider each situation upon its facts, and apply the usual negligence rule of the conduct of the reasonable man under the circumstances. The adoption of a statute to cover this situation in inadvisable because a statute cannot be phrased to cover all the variations that are sure to arise. The rule that a guest must exercise reasonable care under the circumstances should be applied in all cases, regardless of the guest's position in the automobile or his familiarity with automobile travel. Further, unless negligence or the lack of it is clear, the issue of negligence should be submitted to the jury. Constant application of this rule might lead to clarification of an automobile guest's duty to keep a lookout.

HUNTER D. HEGGIE.

Chattel Mortgages—Recordation—Persons Protected

At common law a chattel mortgage was valid as between the parties thereto without change of possession;[1] but, in order to be upheld against the attack of interested third persons, a transfer of possession to the mortgagee was essential.[2] The early registration acts,[3] designed pri-

[17] Hedges v. Mitchell, 69 Colo. 285, 194 Pac. 620 (1920); Bradley v. Interurban Ry., 191 Iowa 1351, 183 N. W. 493 (1921); Chambers v. Hawkins, 223 Ky. 211, 25 S. W. 2d 363 (1930); Young v. White Sulphur Ry., 96 W. Va. 534, 123 S. E. 433 (1924).

[18] 1 LAW OF AUTOMOBILES IN NORTH CAROLINA §35 (3rd Michie ed. 1947).

[1] Williams v. Jones, 95 N. C. 504 (1886); McCoy v. Lassiter, 95 N. C. 88 (1886); Leggett v. Bullock, 44 N. C. 283 (1853); Pike v. Armstead, 16 N. C. 110 (1827).

[2] McCoy v. Lassiter, 95 N. C. 88 (1886); *see* Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); 1 JONES, CHATTEL MORTAGES AND CONDITIONAL SALES §176 (Rev. ed. 1933); cases cited 10 AM. JUR., CHATTEL MORTGAGES, §157.

[3] N. C. Act of 1715, c. 38 §11: ". . . , That every mortgage of . . . goods or chattels, which shall be first registered in the register's office . . . where the mortgager (sic) liveth, shall be taken, deemed, judged, allowed of and held to be the first mortgage, and be good, firm, substantial and lawful; in all courts of Justice within this government; any former or other mortgage of the same . . . , goods or chattels, not before registered, notwithstanding; unless such prior mortgage be registered within fifty days after the date." N. C. Act of 1820, c. 3 §1: "That no mortgage, nor deed or conveyance in trust for any estate, whether real or personal . . . , shall be good and available in law against creditors or purchasers for a valuable consideration, unless the same shall have been proven and

marily to eliminate the necessity of transfer, were often inadequate and led to unfortunate results. In North Carolina under the act of 1715, courts of equity upheld unregistered chattel mortgages against the claims of creditors or purchasers of the mortgagor who had notice of the existence of the mortgage,[4] and this rule was extended to give protection against an incumbrance registered after the execution of such mortgage when there had been actual notice, even though the prior mortgage had not been registered within the statutory time.[5] In order to avoid this result, the act of 1820 was passed, extending the time within which a mortgage could be registered and yet retain its priority, and declaring a mortgage not registered within such time null and void as against purchasers and creditors of the mortgagor. The privilege thus conferred upon the mortgagee was much abused in that he could intentionally withhold his mortgage from record as long as possible in order to allow the mortgagor greater freedom in dealing with his creditors.[6] The Act of 1829,[7] which, in effect, is substantially the same today, was enacted to meet this situation. This statute has not affected the common law rule as to the validity of the mortgage between the parties,[8]

registered . . . , within six months after the execution of such mortgage or deed, or conveyance in trust; but that all mortgages, deeds, and conveyances in trust, not so proven and registered within the time aforesaid, shall be held as against such creditors or purchasers, as utterly null and void."

[4] Pike v. Armstead, 16 N. C. 110 (1827); *see* Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); Robinson v. Willoughby, 70 N. C. 358 (1874); Fleming v. Burgin, 37 N. C. 584 (1843).

[5] Pike v. Armstead, 16 N. C. 110 (1827). This rule was equitable in its operation, if, as appears to have been the case, it applied only when there was actual notice of the existence of the unrecorded mortgage prior to the credit extension. In such case, there could have been no possibility of prejudice through action in reliance on the unincumbered state of the title. There were, however, other considerations which the equity doctrine failed to take into account, namely, the legislative policy of encouraging prompt registration, and the desirability of having the public record full and conclusive.

[6] See, for example, Leggett v. Bullock, 44 N. C. 283 (1853); Fleming v. Burgin, 37 N. C. 584 (1843).

[7] N. C. Act of 1829, c. 20 §1. In its present form this is N. C. GEN. STAT. §47-20 (1943): "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in the case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the state, then in the county where the said personal estate, or some part of the same, is situated; . . ."

[8] See discussion in Leggett v. Bullock, 44 N. C. 283 (1853); 1 JONES, *op. cit. supra,* note 2, §237; cases cited 14 C. J. S., CHATTEL MORTGAGES §134. Since an unrecorded mortgage is binding on mortgagor, it follows that it is binding on all claiming in mortgagor's right: Hinkle Crauge Co. v. Greene, 125 N. C. 489, 34 S. E. 554 (1899); Williams v. Jones, 95 N. C. 504 (1886) (wife's claim for year's allowance or dower); McBrayer v. Harrill, 152 N. C. 712, 68 S. E. 204 (1910); ANNO., 91 A. L. R. 299 (1934) (heir or personal representative).

Although valid, an unrecorded mortgage does not create an equity in favor of the mortgagee in the property which would be superior to the rights of creditors, purchasers or subsequent mortgagees with notice thereof. Such an equity arises only when the transaction need not be in writing and thus is without the purview of the registration statute. Roberts v. Massey, 185 N. C. 164, 116 S. E. 407 (1923)

but its uniform construction has been that mere notice of the unregistered mortgage does not make it valid as against a purchaser for a valuable consideration.[9] Furthermore, if the person taking the property is placed by law in the position of a purchaser,[10] he has been held to be within the protected class who may take advantage of the failure to record.

When the third person claiming against the rights of an unregistered mortgage is of the description "creditor," more difficulty arises. In the case of *Finance Corp. v. Hodges*,[11] recently decided by the North Carolina Supreme Court, a creditor procured a judgment against the mortgagor nine months before a chattel mortgage was given to secure part of the purchase price of an automobile. During the period of less than a month when the mortgage was unrecorded, the judgment creditor caused execution to issue and the sheriff levied upon the chattel. Four days later an assignee of the mortgagee caused the mortgage to be recorded and instituted suit to recover possession. *Held:* The judgment creditor by his levy had obtained the prior lien. The decision appears to be in accord with the settled rule in this state since the creditor had armed himself with legal process which entitled him to an interest in the property *before* the mortgage was registered.[12] A dictum in the case indicated that *only* a creditor who has fastened a lien upon the mortgaged property can claim protection against an unrecorded mortgage. Since the statute does not declare an unrecorded mortgage void, but only that it is invalid to pass any property interest but from registration, this conclusion is logical. There appears to be, however, no direct holding to the effect that it is *absolutely* necessary that a lien

(correction of omission in deed due to mutual mistake); Spence v. Pottery Co., 185 N. C. 218, 117 S. E. 32 (1923) (parol trust); *cf.* Finance Corp. v. Hodges, 230 N. C. 580 582, 55 S. E. 2d 201, 203 (1949).

[9] *E.g.* Weil v. Herring, 207 N. C. 6, 195 S. E. 836 (1934); Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 129 S. E. 414 (1925); Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); Bank of Colerain v. Cox, 171 N. C. 76, 87 S. E. 967 (1916); Robinson v. Willoughby, 70 N. C. 358 (1875). *But cf.* Fleming v. Burgin, 37 N. C. 584 (1843); Note 24 N. C. L. REV. 63, 65-66 (1945). Same rule applies when suit in equity. *See* Leggett v. Bullock, 44 N. C. 283, 286 (1853).

A purchaser for value within purview of statute may be one who takes in payment of preexisting debt. Starr v. Wharton, 177 N. C. 323, 98 S. E. 818 (1919); Brem v. Lockhart, 93 N. C. 191 (1885); Potts v. Blackwell, 57 N. C. 58 (1858). *But cf.* Finance Corp. v. Hodges, 230 N. C. 580, 55 S. E. 2d 201 (1949), Headnote 4 of which states the contrary rule, but this related to dictum dealing with creation of an equity resting in parol. See examples note 8 *supra*.

[10] For example, assignee for benefit of creditors, Starr v. Wharton, 177 N. C. 323, 98 S. E. 818 (1919), and cases cited therein; *cf.* Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925). *But see*, JONES, *op. cit. supra* note 2, §244.

[11] 230 N. C. 580, 55 S. E. 2d 201 (1949).

[12] *E.g.* Salassa v. Mortgage Co., 196 N. C. 501, 146 S. E. 83 (1928) (attachment lien prior to recordation); Jordan v. Wetmur, 202 N. C. 279, 162 S. E. 610 (1932) (subsequent mortgage recorded prior to conditional sale agreement); Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1918) (receiver appointed prior to recordation); *accord* Bostic v. Young, 116 N. C. 766, 21 S. E. 552 (1895).

be acquired prior to registration. Dicta in other cases may be urged in support of conflicting rules,[13] but in view of the doctrine generally accepted by other jurisdictions[14] and the federal construction[15] given the statute, there is little doubt that the court would hold that a general creditor does not come within the class protected. In applying this rule there would be no distinction between a prior or existing creditor, and a creditor subsequently extending credit.[16]

The purpose to be served by a registration statute and the rights and interests to be protected are properly considered in determining whether a particular type of creditor ought to be protected. As has been pointed out, the primary aim in the enactment of the present statute was to provide a satisfactory method whereby the mortgagor, without possible injury to innocent third parties, might retain possession of the property.[17] Another purpose was to encourage prompt registration by making such registration conclusive notice, and to protect the rights of a mortgagee who acted with diligence and good faith.[18] This statute, as it has been construed by the North Carolina Supreme Court, fails to accomplish these purposes in two major aspects: (1) A general creditor, who has extended credit to a mortgagor on the faith of lack of prior existing rights against the mortgagor, may, without fault on his part, find that he must suffer loss upon subsequent registration of a mortgage executed prior to the credit extension; (2) A mortgagee, who with dili-

[13] That all creditors without limitation are included, *see* Ellington v. Raleigh Building Supply Co., 196 N. C. 784, 789, 147 S. E. 307, 310 (1929); Sneeden v. Nurnberger's Market, 192 N. C. 439, 441, 135 S. E. 328, 330 (1926); Harris v. Seaboard Air Line Ry. Co., 190 N. C. 480, 485, 130 S. E. 319, 322 (1925).

That only creditors acquiring liens while mortgage withheld from record are included, *see* Observer Corp. v. Little, 175 N. C. 42, 43, 94 S. E. 526, 527 (1918); Francis v. Herren, 101 N. C. 497, 507, 8 S. E. 353, 358 (1888); *accord,* Williamson v. Bitting, 159 N. C. 321, 74 S. E. 808 (1912).

[14] See note 33 *infra.*

[15] *Creditors* as used in the North Carolina statute means lien creditors only. Southern Dairies v. Banks, 92 F. 2d 282 (4th Cir.), *cert. denied,* 302 U. S. 761 (1937); Elk Creek Lumber Co. v. Hamby, 84 F. 2d 144 (4th Cir. 1936); *In re* Cunningham, 64 F. 2d 296 (4th Cir. 1933); National Bank of Goldsboro v. Hill, 226 Fed. 102 (D. C. N. C. 1915); *see* Hartford Accident & Indemnity Co. v. Coggin, 78 F. 2d 471, 475 (4th Cir.), *cert. denied,* 296 U. S. 621 (1935).

[16] Under the present North Carolina construction the sole question appears to be whether a creditor has acquired a lien prior to recordation, and no distinction is made between a creditor who extended credit prior to the execution of the mortgage and one who extended credit during the interval when the mortgage was unrecorded. That a prior creditor acquiring a lien while the mortgage was unrecorded is included, *see* Finance Corp. v. Hodges, 230 N. C. 580, 55 S. E. 2d 201 (1949); Fleming v. Graham, 110 N. C. 374, 14 S. E. 922 (1892); *cf.* Credit Co. v. Walters, 230 N. C. 443, 53 S. E. 2d 520 (1949). Likewise, subsequent creditors thus acquiring a lien are included. Salassa v. Mortgage Co., 196 N. C. 501, 146 S. E. 83 (1928); Jordan v. Wetmur, 202 N. C. 279, 162 S. E. 610 (1932).

[17] Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); McCoy v. Lassiter, 95 N. C. 88 (1886); *see* Credit Corp. v. Walters, 230 N. C. 443, 447, 53 S. E. 2d 520, 523 (1949).

[18] Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928); Smith v. Fuller, 152 N. C. 7, 67 S. E. 48 (1910); Fleming v. Burgin, 37 N. C. 584 (1843). Compare Note, 27 N. C. L. Rev. 376, 377 (1949).

gence seeks to record and preserve his lien, may find that a creditor with knowledge of the reasonable delay in recordation has acquired a prior lien.

An examination of the recording statutes of other jurisdictions reveals much diversity of phraseology. The types of statutes may be generally classified as follows: (1) Those declaring the mortgage to be a valid and prior lien from the date of recordation,[19] thus dealing only with when the lien of a mortgage shall become effective. No mention is made of the invalidity of the mortgage as to any specified group of persons. (2) Those providing that no mortgage shall be valid against the rights and interests of any third person, or persons other than the mortgagor or his heirs, unless it is recorded.[20] These statutes do not specify the effect a later recordation will have on the rights of those persons as to whom it was once void. (3) Those declaring an unrecorded mortgage void, inoperative, or of no effect against specified types of claimants, including creditors of the mortgagor, until recordation.[21] The principal difference from the second group is the designation of the class protected. Those jurisdictions whose statutes come within the first class have primarily faced the problem of determining whether there has been a sufficient compliance with the statute,[22] and the question of which creditors are protected has apparently not been raised. Since these statutes do not provide that a mortgage is void as to named third persons, but rather that a lien vests in the mortgagee upon recordation, the creditor who has not acquired a prior right in the property would seem to be eliminated. On the other hand, the statutes of the

[19] ARK. STAT. ANN. §16-201 (1947); DEL. REV. CODE §§3333, 3336 (1935); GA. CODE ANN. §§67-108, 109, 2501 (1935); LA. GEN. STAT. §5022.4 (1949 Supp.); MD. ANN. CODE, art. 21 §§45, 52, 54, 56 (1939); MONT. REV. CODE ANN. §§8278, 8279 (1935); PA. STAT. ANN. tit. 21 §§940.5, 13 (1948 Supp.).

[20] COLO. STAT. ANN. c. 32 §§1, 8 (1935); CONN. STAT. tit. 58 §7268 (1949); ILL. ANN. STAT. c. 95 §§1, 4 (1934); ME. REV. STAT. c. 164 §1 (1944); ANN. LAWS MASS. c. 255 §1 (1932); MO. REV. STAT. ANN. §3486 (1942); N. H. REV. LAWS c. 262 §§17 *et seq.* (1942); R. I. GEN. LAWS c. 442 §10 (1938); UTAH CODE ANN. §13-0-1 (1949 Supp.); VT. STAT. §§2713 *et seq.* (1947); WIS. STAT. §§241:08, 241:10 (1947), as amended, Wis. Laws 1949, c. 429.

[21] ALA. CODE ANN. tit. 47 §§110, 123 (1940); ARIZ. CODE ANN. §62-523 (1939); CALIF. CIVIL CODE §2957 (1945 Amdt.); FLA. STAT. ANN. §698.01 (1944); IDAHO CODE §45-1103 (1948); BURNS IND. STAT. ANN. §51-504 (1947 Supp.); IOWA CODE ANN. tit. 24 §556.3 (1950); KAN. GEN. STAT. ANN. §58-301 (1935); KY REV. STAT. §382.270 (1948); MICH. STAT. ANN. §§26.926, 927, 929 (1949 Supp.); MINN. STAT. §511.01 (Henderson 1945); MISS. CODE ANN. §§868, 869 (1942); NEB. REV. STAT. §36-301 (1943); NEV. COMP. LAWS §§987, 988 (Supp. 1931-1941); N. J. STAT. ANN. §§46:28-5, 10 (1940); N. MEX. STAT. ANN. §63-502 (1941); N. Y. LIEN LAW §230 (1940); N. D. REV. CODE §35-0406 (1943); OHIO GEN. CODE ANN. §§8560 *et seq.* (1938); OKLA. STAT. ANN. tit. 46 §§57, 58 (1936); ORE. COMP. LAWS ANN. §§68-203, 207 (1943 Supp.); S. C. CODE ANN. §8875 (1942); S. D. CODE §§39.0408; 39.0411 (1939); TENN. CODE ANN. §7192 (Williams, 1934); TEXAS CIVIL STAT. ANN. art. 5490 (1949 Supp.); VA. CODE ANN. §§5194; 5200 (1942); WASH. REV. STAT. ANN. §3780 (1943 Supp.); W. VA. CODE ANN. §3993 (1943); WYM. COMP. STAT. ANN. §§59-105, 113 (1945).

[22] Gasconade Development Co. v. Trust Co., 195 Ark. 404, 112 S. W. 2d 653 (1938).

second class are as broad as possible in their terms, thus admitting of almost any interpretation to effectuate their purposes. Generally, these jurisdictions have given protection to the general creditor.[23] There are, however, other states,[24] which have narrowly defined the class protected, excluding general creditors whether prior or subsequent. Those states having statutes of the third type make up by far the largest group. Of these, Idaho and New Mexico have given an express legislative mandate that only lien creditors are intended.[25] The legislatures of Kentucky and Washington have specified otherwise, expressly providing that the term "creditors" shall include all creditors irrespective of whether they have acquired a lien.[26] The South Carolina statute is limited in its operation to those creditors extending credit while the mortgage is withheld from record.[27] Aside from these exceptions, no qualification or limitation is attached to designate those classes of creditors intended, thus leaving the courts to their own determination.

In the construction of recordation statutes the courts have followed various lines of reasoning. Several jurisdictions[28] have treated the situation as involving two separate consideration: the first, the legal right of protection; the second, the procedure necessary before a creditor with such legal right is in a position to derive benefit therefrom. Following this approach, there is *prima facie* agreement that a general creditor, whether prior or subsequent, is given the legal right of protection.[29] This apparent uniformity ceases when it is sought to determine what the protected creditor must do to keep his protection. At this point some jurisdictions make a distinction between prior and sub-

[23] Basing their decisions on the policy of the statute and a comparison of the broad phraseology of their statutes with those of other jurisdictions, Utah and Missouri have reached the result that a mortgage is void as to those extending credit while unrecorded and no lien is required before recordation. Volker Lumber Co. v. Utah and Oregon Lumber Co., 45 Utah 603, 148 Pac. 365 (1915); Harrison v. South Carthage Min. Co., 95 Mo. App. 80, 68, S. W. 963 (1902). Connecticut, Illinois, Maine, Massachusetts, and Rhode Island, whose statutes provide that mortgages must be recorded within a designated time have concluded that a mortgage not so recorded remains void as to interim creditors even though subsequently recorded. Collateral Finance Co. v. Braud, 298 Ill. App. 130, 18 N. E. 2d 392 (1938); *compare* Drew v. Streeter, 137 Mass. 460 (1884) *with* Connecticut Valley Onion Co., 281 Mass. 287, 183 N. E. 526 (1932); Bordick v. Coates, 22 R. I. 410. 48 Atl. 389 (1901).

[24] Bogdon v. Fort, 75 Colo. 231, 225 Pac. 247 (1924); Graham v. Perry, 200 Wis. 211, 228 N. W. 135 (1929).

[25] IDAHO CODE §45-1103 (1948); N. MEX. STAT. ANN. §63-502 (1941).

[26] KY. REV. STAT. §382.270 (1948); WASH. REV. STAT. ANN. §3780 (Supp. 1943).

[27] S. C. CODE ANN. §8875 (1942).

[28] *E.g.* Cameron v. Marvin, 26 Kans. 612 (1881); Harrison v. South Carthage Min. Co., 95 Mo. App. 80, 68 S. W. 963 (1902); *In re* Shay's Estate, 157 Misc. 615, 285 N. Y. Supp. 379 (1935); Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034 (1892); Raney v. Riedy, 70 S. D. 174, 16 N. W. 2d 194 (1944); Wasatch Live Stock Loan Co. v. Nielson, 90 Utah 307, 56 P. 2d 613 (1936); 10 AM. JUR., CHATTEL MORTGAGES, §103.

[29] Cases cited note 28 *supra.*

sequent creditors, requiring the prior creditor to arm himself with a lien prior to recordation, while allowing a subsequent creditor to retain protection without a lien.[30] In such a case, even though the subsequent creditor can claim no interest in the chattel until he has acquired a lien, this may be done at any time, and a later transfer of possession or recordation of the mortgage is ineffective even though made before the creditor obtains his lien. Other jurisdictions treat prior and subsequent creditors alike. Several of these, while professing to give general creditors protection, require the procurement of a lien before recordation in both instances.[31] Others hold the statute absolute in its terms, and a mortgage not recorded as required is void as to all creditors. Subsequent action by the mortgagee cannot give it validity.[32]

The great majority of courts[33] have made no attempt to divide their holdings into legal rights and procedure, but have flatly announced that "creditors" as used in their statutes does not include "mere general creditors." Thus, unless a creditor has perfected a lien prior to recordation, his rights and interests are subordinated to those of the mortgagee. The reason generally assigned for this holding is that any debtor has a right to prefer one creditor over another, and general creditors should not be allowed to complain when priority is given a mortgage upon its recordation, since they are then in the same position as if the mortgage had been executed at the time of recordation.[34] Such reasoning is logically sound in so far as it applies to creditors who extended credit prior to the original execution of the mortgage.[35] When applied to a creditor

[30] Ransom & Randolph Co. v. Moore, 272 Mich. 31, 261 N. W. 128 (1935); Harrison v. South Carthage Min. Co., 95 Mo. App. 80, 68 S. W. 963 (1902); Wilkinson, Gaddis & Co. v. Bolen, 88 N. J. L. 680, 97 Atl. 279 (1916); Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034 (1892); Hollenbeck v. Louden, 36 S. D. 320, 152 N. W. 116 (1935).

[31] Such jurisdictions claim allowance of protection since general creditors are free to acquire a lien, a right they would not otherwise have. When the lien must be acquired prior to recordation, the apparent leniency disappears, and the result is the same as if the court had declared only lien creditors protected. See Cameron v. Marvin, 26 Kans. 612 (1881). *But cf.* Campbell v. Killion, 124 Kans. 124, 257 Pac. 752 (1927).

[32] Chelhar v. Acme Garage, 18 Calif. App. 2d 755, 61 P. 2d 1232 (1936) (lien acquired after possession taken by mortgagee); Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073 (1893); Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790 (1906) (lien acquired after unreasonable delay in recording). See generally: Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034 (1892).

[33] *Compare* Moore v. Chilson, 26 Ariz. 244, 224 Pac. 818 (1924) *with* C. I. T. Corp. v. Seaney, 53 Ariz. 72, 85, P. 2d 713 (1938); Bogdon v. Fort, 75 Colo. 231, 225 Pac. 247 (1924); McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939); *In re* Lewis' Estate, 230 Iowa 694, 298 N. W. 842 (1941); Munck v. Security Bank, 175 Minn. 47, 220 N. W. 400 (1928); Boody v. Star Furniture Co., 45 S. W. 2d 291 (Tex. Civ. App. 1931); 1 JONES, *op. cit. supra* note 2, §247b; 14 C. J. S., CHATTEL MORTGAGES, §137.

[34] Cases cited 14 C. J. S., CHATTEL MORTGAGES, §137.

[35] But prior creditors are entitled to some protection notwithstanding this reasoning. "The injury that an unfiled chattel mortgage may occasion an antecedent creditor is likely to arise from the apparent unincumbered ownership of the property in the possession of the debtor, justifying the inference of perfect security,

subsequently extending credit, the consideration is overlooked that he may have acted on the assumption that there were no outstanding rights against the property, and although the debtor may prefer in the future, the creditor contemplates that risk.[36]

In recent years a growing minority of states have realized that those constructions adopted by their courts are failing to carry out the policy behind recordation. These states have modified their statutes in order to compel a result giving adequate protection to subsequent creditors even though they have acquired no property interest prior to recordation.[37] If the recordation statute of North Carolina were modified in this aspect, its operation would be logically sound and in accord with the purposes of such statutes.

The second failure of the North Carolina rule, although not as great as the first, should be given consideration. If protection is to be extended to third persons when they adhere to the policy of the law, in all fairness equal protection should be extended to innocent and diligent mortgagees. In attempting to meet this situation a few jurisdictions have given the mortgagee a limited time within which to record his mortgage and preserve his lien against others intervening between the making of the mortgage and its recordation.[38] Although the early rule in this state to this effect proved unjust in its operation,[39] this was due largely to the long period of time allowed within which to record. A short, designated period of grace, consistent with the use of due diligence, would accomplish the desired results.[40]

EMERY B. DENNY, JR.

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and inducing delay in the enforcement of his claim. Were none but subsequent creditors within the purview of the statute, the [prior] judgment creditor may also be injured by the levying of an execution on property described in a secret mortgage, instead of the unincumbered property of the judgment debtor; . . ." Pierson v. Hickey, 16 S. D. 46, 91 N. W. 339 (1902). *But cf.* Credit Corp. v. Walters, 230 N. C. 443, 447, 53 S. E. 2d 520, 523 (1949).

[36] Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034 (1892).

[37] Conn. Pub. Acts 1945, c. 274 §905h; Mass. Stat. 1874, c. 111 §1; Me. Laws 1919, c. 121 §1; R. I. Acts 1899, c. 614 §1 (a mortgage must be recorded within a specified number of days, and recording thereafter void. If a creditor acquires a lien before the mortgage recorded, it is prior even though mortgage subsequently recorded within the time specified); Ill. Laws 1931 p. 669 §1 (mortgage not valid as against creditors unless filed or recorded within 10 days. Construed to include general creditors when compared with other provisions. Collateral Finance Co. v. Braud, 298 Ill. App. 130, 18 N. E. 2d 392 (1938), 27 ILL. BAR. JOUR. 345 (1939)); Ky. Acts 1916, c. 41; Wash. Laws 1915, p. 277 §1 (express provision inserted that *creditors* shall include all creditors irrespective of whether they have acquired a lien).

[38] DEL. REV. CODE §§3333, 3336 (1935) (10 days); ME. REV. STAT. c. 164 §1 (1944) (20 days); WASH. REV. STAT. ANN. §3780 (Supp. 1943) (10 days).

[39] See note 3 *supra*. Also discussion in Leggett v. Bullock, 44 N. C. 283, 286 (1853).

[40] Compare Note 26 N. C. L. REV. 173, 178 (1948).