

1977 S.C. Op. Atty. Gen. 266 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-337, 1977 WL 24676

Office of the Attorney General

State of South Carolina

Opinion No. 77-337

October 27, 1977

*1 TO: Register of Mesne Conveyances
for Spartanburg County

QUESTION:

Upon receipt for recordation of a court order cancelling a mortgage, should the Clerk of Court or Register of Mesne Conveyances immediately cancel the existing entry of said mortgage from the mortgage index, or might the Clerk or Register instead improvise a marginal notation upon the record of the mortgage, reflecting the mortgage book and page number in which such order is recorded, pending any appeal of its issuance?

AUTHORITIES:

§ 29-3-310 through § 29-3-470, Code of Laws of South Carolina (1976) as amended;

[Bragg v. Thompson](#), 19 S.C. 572 (1883);

[Brown v. Wood](#), 1 Bailey 457 (1883);

[State ex rel. Canaday v. Black](#), 34 S.C. 194, 13 S.E. 361 (1891);

[Clanton v. Clanton](#), 229 S.C. 356, 92 S.E.2d 878 (1956);

[State ex rel. McLeod v. Holcomb](#), 245 S.C. 63, 138 S.E.2d 707;

[McSwain v. Holmes](#), S.C. Supreme Court Opinion No. 20499, Aug. 29, 1977;

[Jackson v. Osborn](#), 116 Cal. App.2d 875, 254 P.2d 871;

Vol. 36A Words and Phrases, p. 284 'Regular on Its Face';

15A Am. Jur.2d Clerks of Court § 1, § 21;

14 C.J.S. Clerk of Courts § 1, § 38;

76 C.J.S. Records § 30;

Annot., [119 A.L.R. 1380](#);

Annot., [12 A.L.R.2d 1059](#).

DISCUSSION:

The problem may be separated into three areas for discussion. These include (1) characterization of the Clerk of Court or Register of Mesne Conveyances as primarily a ministerial officer (2) a discussion of those statutory duties imposed upon the Register of Mesne Conveyances or Clerk of Court with respect to the cancellation of mortgages (3) the relationship between (1) and (2) following receipt by the Clerk or Register of Mesne Conveyances for recordation of a court order dealing with the cancellation of a mortgage.

The Clerk of Court acting as Register of Mesne Conveyances or the Register of Mesne Conveyances himself is primarily a ministerial officer. The duties of said officer with respect to the maintenance of public recordation of deeds, mortgages, etc. is largely perfunctory, involving little discretion in the exercise thereof. Such duties are usually prescribed by statute or court rules. See: 15A Am. Jur.2d Clerks of Court § 1, § 14, C.J.S. Clerks of Courts § 1.

With respect to the receipt and recordation of orders of court involving the cancellation of mortgages, the 1976 Code of Laws of South Carolina is quite specific as to the duties of the recording officer. See generally South Carolina Code of Laws (1976) § 29-3-310 through § 29-3-470. Section 29-3-350 mandates that:

All registers of mesne conveyances and all clerks of court in counties in which such clerks are required to perform the duties of registers of mesne conveyances shall enter the word 'cancelled,' together with the signature of such officer, upon the margin or across the indexes of real estate mortgages and chattel mortgages, respectively, when any such real estate mortgage or chattel mortgage is duly cancelled of record by the mortgagee or his assignee. Such cancellation and signature shall be entered in the margin opposite the names of the mortgagor and mortgagee, respectively or across such names. A like cancellation shall, on the demand of the mortgagor or legal representative, be made on mortgages heretofore cancelled of record. Upon the failure of such register of mesne conveyances or clerk of court to comply with this section he shall in each instance, forfeit and pay to the mortgagor the sum of ten dollars, to be recovered in any court of competent jurisdiction . . . Any clerk or other officer wilfully violating this section, shall, on conviction be fined not more than one hundred dollars or be imprisoned not more than thirty days . . .

*2 A second statute, incorporated in § 29-3-360 prescribes the primary procedure for a judicial determination that a mortgage has been satisfied.

Any person who shall be indebted by mortgage may apply to the presiding judge of any court of general sessions and common pleas to be held in the county in which the mortgage shall be recorded for a rule to show cause why satisfaction shall not be entered thereon.

Section 29-3-370 further provides that:

Such judge shall grant such rule, returnable on a day to be fixed by him. The rule shall be served on the mortgagee, his legal representative or assignee or the attorney of any thereof, and if the party so served shall not attend to show cause or, attending, shall show insufficient cause and the judge shall be satisfied that the mortgage has been fully paid, he shall order the proper officer to enter satisfaction on the mortgage.

It is worthy of note, that while § 29-3-350 refers to 'cancellation of record', § 29-3-360 and § 29-3-370 address the procedure for judicial 'satisfaction' of the mortgage. While it would be unwise to attempt to use the terms 'cancellation of record' and 'satisfaction' synonymously, it would seem apparent that the majority of instances requiring 'cancellation of record' would occur as a result of judicial 'satisfaction' or discharge. Reference to § 29-3-390 seemingly substantiates this conclusion.

When the debt or any other obligation secured by any mortgage has been fully paid, released, satisfied, discharged or extinguished or when the lien of any mortgage has been released, discharged or extinguished and for any reason the mortgage

or the record thereof in the office of the register of mesne conveyances or clerk of court has not been satisfied and cancelled . . . (emphasis added),

then a rule to show cause for cancellation of the mortgage may be sought. Moreover, your request for an opinion has limited the factual situation to cancellation by court order. Sec: § 29–3–390 for an ‘alternative procedure for rule to show cause against satisfaction’, see also: [Clanton v. Clanton](#), 229 S.C. 356, 92 S.E.2d 878 (1956).

Upon receipt by the Clerk of Court or Register of Mesne Conveyances of an order or decree to cancel a mortgage pursuant to the aforementioned statutes, it is quite clear that said Clerk or Register must, as a general rule, act in accordance with the order or decree regardless of its invalidity or any prior error as to the merits. The general legal principle is that a ministerial officer must obey any order of court which is ‘regular on its face’; if regular on its face, there is no discretion to choose to obey only those orders which the officer might deem valid. See: 14 C.J.S. [Clerks of Courts](#) § 38. A Clerk or Register's failure to do so may result in the issuance of a writ of mandamus and may even result in a citation for criminal contempt. See: [Annot.](#), 119 A.L.R. 1380. Moreover, said officer will generally be protected from any liability for merely performing his duty regardless of the erroneous nature of the order. [Bragg v. Thompson](#), 19 S.C. 572 (1883); [Brown v. Wood](#), 1 Bailey 457 (1883); [State ex rel. Canaday v. Black](#), 34 S.C. 194, 13 S.E. 361 (1891). The ‘regular on its face’ limitation does not allow the Clerk or Register a great deal of discretion. Process is said to be ‘regular on its face’ when it:

*3 proceeds from a court, officer, or body having authority of law to issue process of such nature and is legal in form, and contains nothing to fairly appraise anyone that it was issued without authority.

See: Vol. 36A [Words and Phrases](#) p. 284, ‘Regular on Its Face’; [Jackson v. Osborn](#), 116 Cal. App.2d 875, 254 P.2d 871. Thus, a ministerial officer must be able to clearly discern from the face of the order or decree that such order or decree is irregular or issued without jurisdiction of the parties or subject matter; otherwise, the order or decree must be obeyed.

The recent case of [McSwain v. Holmes](#), S. C. Supreme Court Opinion No. 20499, Aug. 29, 1977, has been cited in your request for an opinion as authority for the Clerk of Court or Register of Mesne Conveyances to disregard a court order to cancel a mortgage or index entry based upon the ex parte nature of said order. The aforementioned case presents no such authority. In [McSwain](#), the Supreme Court of South Carolina issued a stern warning to the Bench and Bar of the State by noting that ex parte proceedings were, as a general rule, constitutionally impermissible due to the jurisdictional and notice defects created by such proceedings. However, the court in [McSwain](#) in no way adopted a general rule that a ministerial officer might disobey any order which might later be found to be jurisdictionally or otherwise defective. Such a problem was not even addressed in [McSwain](#).

It is true that the rule to show cause is the principal statutory mechanism for the cancellation of the mortgage proper or an index entry; furthermore, the rule itself is usually obtained in an ex parte proceeding. However, the aforementioned statutes mandate that the rule must be served upon all parties to the proceeding and that notice and opportunity to be heard must be had by these parties; otherwise, the court would lack personal jurisdiction to order the mortgage cancelled.

If the Clerk of Court or Register of Mesne Conveyances can discern from the face of the order or decree cancelling the mortgage that the court which issued said order or decree clearly acted without authority, then and only then should the recording officer not obey it. See: 76 C.J.S. [Records](#) § 30. For example, if the Register of Mesne Conveyances obtained an order from a magistrate that a mortgage be cancelled, clearly such an order would lack subject matter jurisdiction, since § 29–3–360 authorizes such an order to issue only from ‘any court of general sessions and common pleas’ in the particular county. Also, if the Clerk or Register of Mesne Conveyances is able to gather from the face of the order that the order itself was a forgery or rendered without personal jurisdiction, again, such an order might be disobeyed without said Clerk or Register facing criminal contempt liability. For analogous cases, see: [Bragg v. Thompson](#), *supra*; [State ex rel. McLeod v. Holcomb](#), 245 S.C. 63, 138 S.E.2d 707. It should be pointed out at this point however, that it would be extremely difficult to make a determination from the face of the order that personal jurisdiction was defective.

*4 A remaining question is whether the Clerk of Court or Register of Mesne Conveyances is obligated to disobey a patently invalid order or risk civil liability for failure to do so. The Supreme Court of South Carolina, quoting general authorities, noted in Bragg v. Thompson, supra at pp. 576–7, that an officer implementing a writ of execution, . . . is protected, whether the execution issued from a court of general or limited jurisdiction although such court has not, in fact, jurisdiction of the case, or even of the debtor, provided it appears on the face of the writ, that the court has jurisdiction of the subject matter, and the process in other respects shows no want of authority . . . The law affords him this protection, for the reason that he, being an officer of the court cannot impugn its authority nor inquire into the regularity of its proceedings, etc.

By inference, such language indicates that where it does not appear ‘on the face’ of the order or decree, ‘that the court has jurisdiction of the subject matter’ or there appears from the face of the document, a ‘want of authority’, then immunity from civil liability is not available to the officer who nevertheless chooses to execute the order or decree.

It must be reiterated that the aforementioned exception to the general rule of obedience of the order by the ministerial officer is a narrow one. Upon receipt of a court order cancelling a mortgage, the Clerk of Court or Register of Mesne Conveyances in virtually every instance should perform his statutory and common law duty and obey the order. Such an order is final until reversed upon appeal. It is not a matter for the recording officer to inquire whether such an order might either be appealed or later reversed upon such an appeal. The recording officer's statutory and common law duty requires that he or she examine the order; if it appears regular on its face, the order should be executed according to its terms. It is thereby a mortgage ‘duly cancelled of record’ and the index entry must be cancelled pursuant to § 29–3–350.

CONCLUSION:

Upon receipt for recordation of a court order cancelling a mortgage which is regular on its face, the Clerk of Court or Register of Mesne Conveyances should always obey the said order and thereby immediately cancel the mortgage and its index entry according to aforementioned statutory provisions.

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