1982 WL 189145 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
January 20, 1982

***1** Mr. Harry D. Johnson
Register of Mesne Conveyances
Sumter County Courthouse
Sumter, South Carolina 29150

Dear Mr. Johnson:
You have asked the opinion of this office as to whether 'the recording officers have the authority to refuse a document for recording based on illegibility?' It is this office's opinion that a recording officer possesses only such authority as is expressly provided him by statute and is necessary to implement his statutory powers.

It will be helpful to first examine the nature of the recording statutes themselves, as well as that of the duties of the recording officer. [1] Our Court has stated that the process of recording is 'purely the creation of the statute law, and therefore [is] subject to such variety as to form, methods, etc. as to the legislative mind may seem best.' Milford v. Aiken, 61 S.C. 110 at 111, 39 S.E. 233. See also, Woolfolk v. Graniteville Mfg. Co., 22 S.C. 332 at 337. Moreover, it is important to remember that a recording officer, when performing his duties pursuant to the recording statutes, is a ministerial officer. 76 C.J.S., Registers of Deeds, § 2. See also, 65A AM.JUR.2d, Clerks of Court, § 24. Generally speaking,
the duty of the register is . . . to receive and record . . . such instruments as by law are entitled to be . . . recorded, and to . . . record them in such manner as to serve all the purposes of the law. In the absence of a statute to the contrary, it is not his province to determine whether the parties have made valid instruments . . .. [emphasis added].

76 C.J.S. Registers of Deeds, § 10. In short, the recording officer's authority with respect to recordation is governed solely by statutory law.

There are, of course, numerous statutory enactments which deal with the various documents and instruments to be recorded by the recording officer. See, generally, Code of Laws of South Carolina (1976, as amended), Title 30. With few exceptions, to be discussed below, the recording officer is statutorily required to record these documents and instruments as they are presented to him for recordation. See especially § 30-5-90.

The General Assembly has, however, enacted several designated prerequisites to recordation. The principal authority for the recording officer to refuse recordation is § 30-5-30 which states that '[b]efore any deed or other instrument in writing can be recorded in this State', the enumerated statutory requirements must be fulfilled. These prerequisites, of course, include proof of execution, or compliance with the Uniform Recognition of Acknowledgments Act. Other prerequisites to recordation contained elsewhere are § 30-5-80 [auditor's endorsement], § 30-7-50 [execution and probate of assignments] and § 30-5-35 [requirement of a derivation clause, etc.]. With respect to these statutory requirements (and any other statutory requirements), there is no doubt that the recording officer is authorized and required to refuse recordation if the statutory requisites are not met. See, e.g., Arthur v. Sereven, 39 S.C. 77, 17 S.E. 640; Watts v. Whetstone, 79 S.C. 357, 60 S.E. 703; Dillon & Son Co. v. Oliver, 106 S.C. 410, 91 S.E. 304; Seale Motor Co. v. Stone, 218 S.C. 373, 62 S.E.2d 824.

***2** However there is no similar statutory provision which generally makes legibility a prerequisite to recordation or authorizes the recording officer to refuse recordation of a, document which might in some respects be illegible.[2] Absent such a statute, the aforementioned legal principles would seem to dictate that no such general authority exists.

An extensive search of South Carolina case law in this area reveals no case on point; however, a close reading of the extant cases supports this conclusion. Virtually every case which deals with whether a particular instrument was 'entitled to record', simply examined the statutory prerequisites (see above). If the instrument failed to meet these, any recordation was void; if however, the statutory requirements were either inapplicable or construed to have been met, the instrument was 'entitled to record'. No case found proceeded beyond the statutory requirements. See, Murphy v. Valk, 30 S.C. 262 [mechanic's lien construed to be outside the ambit of statutory prerequisites, thus, 'entitled to registry']; Woolfolk v. Graniteville Mfg. Co., supra [deed not 'legally recorded because statutory requirement of probate not met']; Dillon & Son Co. v. Oliver, supra [where from face of instrument no appearance of defect in acknowledgment or probate due to involvement of interested party is 'entitled to record']; Seale Motor Co. v. Stone, supra [instrument 'not entitled to record']; McNamee v. Huckabee, 20 S.C. 190 [upon examination of the statutory prerequisites and finding no defect in instrument, the Court determined that 'no prerequisite to registry [was] wanting']. See also, Franklin Savings & Loan Co. v. Riddle, 216 S.C. 367, 375, 57 S.E.2d 910.

However, to conclude a recording officer possesses no authority to refuse recordation on the basis of general illegibility, in no way means that he may not refuse to record if, due to illegibility, he cannot determine, as he must, whether the statutory prerequisites to recordation have been met. The 'duties of a public officer include all those which fairly lie within its scope . . ..' 63 AM.JRR.2d, Public Officers and Employees, § 265. If, for example, the recording officer cannot determine, due to illegibility, that proof of execution or probate of the instrument complies with § 30-5-30(1) and (3), he would clearly possess the authority to refuse to record on that basis until such time as the requisites had been fulfilled. See, Seale Hotor Co. v. Stone, supra.

It should be cautioned that where the necessary information for compliance with the statutory requisites can be gleaned from the face of the record as a whole, it is questionable whether the officer can refuse to record the document altogether. It would appear that even though it could not at first be determined that a statutory prerequisite was met, due to illegibility, where such determination could be made by examining other parts of the document, refusal might well be unauthorised. See, Seale Motor Co. v. Stone, supra. See also, Inashima v. Wardall, Wash., 224 P. 379.

***3** This then raises the issue of the officer's liability with respect to nonrecordation because of illegibility. While the question of liability is not entirely coincident with that of authority, it is an important consideration and certainly the two cannot be divorced. It is well settled that a recording officer may be liable for negligent failure to record, where it is his duty to do so. Burris v. Austin, 85 S.C. 60, 67 S.E. 17. While undoubtedly the officer may raise defenses, especially where the plaintiff contributed to his own injury by presenting an illegible document for recordation, see, Burris v. Austin, supra; Inashima v. Wardall supra, it would seem wise, when in doubt, to simply record the document, in order to avoid liability. Of course, in so doing, the recording officer cannot disregard his statutory duties with respect to determining whether the statutory requisites have been met. Seale Motor Co. v. Stone, supra.

However, the question of indexing is a more difficult question. § 30-9-40 states that the recording officer 'shall immediately upon the filing for record of any deed, mortgage or other written instrument', index the document, and that such index 'shall constitute an integral, necessary and inseparable part of the recordation' of the instrument. As with recordation, failure to properly index may subject the recording officer to liability. See, Armstrong v. Austin, 45 S.C. 69, 22 S.E. 763; Mitchell v. Cleveland, 76 S.C. 432, 57 S.E. 33.

One case concerning the liability of an officer for failure to correctly index due to illegibility has been found. In Inashima v. Wardall, supra, an action brought by the holder of a record against the auditor for failure to properly file and index the record, the Court first noted that:

The question . . . whether the fact of improper record was the fault of the person presenting the mortgage for record is open to the [recording officer] in any action brought by the mortgagor against him to recover as for a neglect to properly file and index the instrument.

Such a conclusion is in accord with the South Carolina Supreme Court's reasoning in Durris v. Austin, supra. See above. The Court in Inashima then concluded as follows, therein stating what would appear to be the law regarding liability of the officer with respect to the recordation and indexing of illegible documents.

Where an instrument is presented for record on which the name of the party bound is so illegibly written as not to be decipherable and there is nothing else on the instrument to indicate what the true name is, unquestionably it would be within the right of the auditor to refuse to accept it until some person having authority to speak for the parties interested vouched for the name and that he would not be liable for such refusal, even though some right of a person affected by the instrument was thereby lost. But where in the body of the instrument the name plainly appears, although the actual signature be illegible it is at least doubtful whether he would have such a right. Clearly, it would be too much to say that if he did accept such an instrument and indexed and recorded it in the name as it appeared in the body of the instrument, he is to be held liable as far as a mistake should it subsequently prove that the name so written was not the true name. [3]

***4** Thus, in conclusion, this office would advise that unless the illegibility of a document or instrument prevents the recording officer from determining whether the statutory prerequisites to recordation have been met, his safest course is to record the document. With respect to indexing, the officer should make every effort to index the document, based upon all information contained in the entire document as well as other information available. Such a reasonable effort to index should preclude any later liability. We would caution that only as a last resort after a substantial effort has been made, should the officer not fulfill his statutory duty to index.

This office would further advise that should illegibility continue to be a major problem, legislation would offer the safest solution, in order to give the recording officer the necessary authority.

Very truly yours,

Robert D. Cook
Assistant Attorney General

Footnotes

1 This opinion is limited to discussion of the 'recording officer' as the term is traditionally used, i.e. Clerk of Court or Register of Mesnes Conveyance.

2 A search of the local laws for Sumter County likewise reveal no such authority. However, see, Acts and Joint Resolution, 1951, at 406, where the General Assembly required that records dealing with personal property in Sumter County be printed or typewritten in order to be entitled to recordation. Neither does the Public Records Act, § 30-1-10, et seq. offer any authority. It would stretch the imagination too far to tie in § 14-17-510, which requires a 'full, fair and correct entry.'

3 Some of the language in the above quote from Inashima, renders the conclusion that there is no authority to generally refuse recordation based on illegibility not free from doubt. The Court in Inashima may be alluding to an inherent 'right' of refusal based on illegibility, There clearly is no support for this conclusion under South Carolina law. Moreover, the emphasis in Inashima was on liability, rather than statutory authority. Theretofore, to the extent that Inashima concludes that there is inherent authority to refuse recordation, absent statutory authorization, this opinion disagrees. Otherwise, however, Inashima appears to well state the law with respect to liability.

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