

1981 WL 157960 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 10, 1981

***1 RE: [Section 30-5-35, Code of Laws of South Carolina, 1976, as amended](#)**

The Honorable Betty L. Williams
Clerk of Court
Georgetown County
Post Office Box 1270
Georgetown, South Carolina 29440

Dear Ms. Williams:

In your letter of August 6, 1981, you requested the opinion of this office concerning the liability which may occur for your refusal to record a deed or mortgage unless it contains a derivation clause.

[Section 30-5-35 of the Code](#) is very specific in requiring that '[a]ll deeds conveying an interest in land and all mortgages of real estate executed after July 1, 1976, shall included a derivation clause.' This section further provides that '[a] clerk of court . . . shall not record any deed or mortgage unless it contains a derivation clause.' [Emphasis added] These provisions are clear and unambiguous and must be interpreted literally. [Green v. Zimmerman](#), 269 S.C. 535, 238 S.E.2d 323; South Carolina Digest, 'Statutes' Key No. 189 (West 1952; 1981 Supp.).

The only reasonable construction of the literal language of [§ 30-5-35](#) is that it is a mandatory provision. Indeed, the word 'shall' and 'shall not' are in themselves mandatory. [See](#), 1960-61 Op. Atty. Gen. 247.

As to your personal liability for enforcing this statute (e.g. refusing to record unless instruments contain derivation clause or otherwise exempted), it is the general rule that a public officer 'is not personally liable to one injured in consequence of an act performed in the scope of his official authority, and in the line of his official duty.' 63 Am.Jur.2d [Public Officers and Employees](#), § 288 p. 798. As previously noted, it is the duty of Clerks of Court to refuse to record such instruments when they do not contain a derivation clause.

Prior to 1976, the year [§ 30-5-35](#) became effective, various acts provided that in certain counties a derivation clause must be included in deeds and mortgages. Thus, in some counties derivation clauses were required while in others they were not. This confusion was remedied by § 4 of Act No. 463 of 1976, which provides that all acts heretofore requiring derivation clauses for particular counties were repealed. Since 1976, derivation clauses have been required in all counties and out-of-town, as well as local attorneys, should be aware of this statutory requirement. In conclusion, it is the opinion of this office that [§ 30-5-35](#) is mandatory in its requirement that a derivation clause be included in all deeds and mortgages.

Very truly yours,

Edwin E. Evans
Assistant Attorney General

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