1978 S.C. Op. Atty. Gen. 7 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-4, 1978 WL 27411

Office of the Attorney General

State of South Carolina
Opinion No. 78-4
January 5, 1978

***1** 1. Changes made in written instruments before final execution and delivery are given full legal effect, as the parties are presumed to have agreed upon the writing which they execute, although the presumption is rebuttable by evidence.

2. Generally deeds are construed strictly against the grantor, and when a deed contains no terms or conditions of forfeiture or reversion, mere expression in the deed that property is to be used for a particular purpose will not convert a fee simple deed into a determinable fee.

Office of the Adjutant General

QUESTION:

1. What effect does a portion of a deed being crossed out when recorded have upon the deed?

2. What effect does the inclusion of a statement of the purpose for which a parcel of land is deeded in both the granting and habendum clauses have upon the quantum of the estate granted?

STATUTES & CASES:

Cases: Abel v. Girard Trust Co., 365 P. 34, 73 A.2d 682 (1950);

Byars v. Cherokee County, 237 S.C. 548, 118 S.E.2d 324 (1961);

Collins v. Boring, 96 Ga. 360, 23 S.E. 401 (1895);

Duncan v. Hodges, 4 McCord 239, 15 S.C.L. 90 (1827);

Furman University v. McLeod, 238 S.C. 475, 120 S.E.2d 685 (1961);

Hagaman v. Board of Education of Woodbridge Tp., 117 N.J.Super. 446, 285 A.2d 63 (1971);

Martin v. Hall County, 134 Ga.App. 775, 216 S.E.2d 655 (1975);

McManaway v. Clapp, 150 S.C. 249, 148 S.E.2d 18 (1929);

Miller v. Village of Brookville, 152 Ohio St. 217, 89 N.E.2d 85 (1949);

Rowe v. Chesapeake Mineral Co., 61 F.Supp. 773 (E.D.Ky.1945), aff'd, 156 F.2d 752 (6th Cir.1946).

Sandy Island Corporation v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965).

Statutes: Code of Laws of South Carolina (1976) § 25–1–1650.

Miscellaneous: 28 Am.Jur.2d Estates § 29 (1966);

28 Am.Jur.2d Estates § 30 (1966);

30 A.L.R.2d 571.

3A C.J.S. Alteration of Instruments § 58 (1973);

26 C.J.S. Deeds § 110 (1956);

Means, "Words of Inheritance in Deeds of Land in South Carolina.

A Title Examiner's Guide," 5 S.C.L.Q. 313 (1953);

Restatement of Property § 35 (1936);

Restatement of Property § 44, Comment in (1936);

DISCUSSION:

1. As a general rule, changes made in written instruments before final execution are alterations which are given full legal effect since the parties are presumed to have agreed upon the writing which they execute. 3A C.J.S. Alteration of Instruments § 58 (1973). A deed is not completely executed until delivered and, therefore, a grantor may make any changes in it he desires before delivery. 34 C.J.S. Alteration of Instruments § 58 (1973); See, Duncan v. Hodges, 4 McCord, 239, 15 S.C.L. 90 (1827).

The relevant question, then, is at what point in time the alteration of the instrument deed was made. In the final analysis this question can only be resolved by adequate proof. However, several factors should be considered. First, where an alteration appears upon the face of a deed, the widely recognized principle is that there is either a presumption or a burden of proof imposed which favors the conclusion that in the absence of suspicious circumstances, the alteration was made prior to or contemporaneously with the execution of the deed. Martin v. Hall County, 134 Ga.App. 775, 216 S.E.2d 655 (1975); Rowe v. Chesapeake Mineral Co., 61 F.Supp. 773 (E.D.Ky.1945), aff'd, 156 F.2d 752 (6th Cir.1946); 30 A.L.R.2d 571.

***2** Second, the fact that the deed was recorded in its present condition, i.e., with the alteration, buttresses this presumption. In Collins v. Boring, 96 Ga. 360, 23 S.E. 401 (1895), the court held that since registered deeds are admissible in evidence without further proof and the law presumes that a deed's recorded in the same form it was executed, alterations on a registered deed will be presumed to have been made by the parties at on before the time of the execution of the deed.

Third, the instant deed contains a type-written notation immediately above the signatures of the witnesses to the deed that the stricken sentence was struck before delivery.

These considerations lead to the conclusion that the alteration was made before delivery and, therefore, effectively eliminates the stricken line from the deed.

2. To determine what quantum of estate was granted by the instant deed, an analysis of the following language used in the granting clause is necessary:

... grant, bargain, sell and release unto the said State of South Carolina, for the uses and purposes of a National Guard Armory ...

The question presented is whether this language creates a fee simple subject to a condition subsequent, a fee simple determinable or a fee simple absolute.

In South Carolina, forfeitures are not favored and the court uniformly construes conditions subsequent strictly against the grantor. McManaway v. Clapp, 150 S.C. 249, 148 S.E.2d 18 (1929). The deed not contain language constituting a right of re-entry by the grantor or of forfeiture of estate for breach of condition. In the absence of such language, South Carolina courts have held that the conveyance does not create a condition subsequent. See, McManaway v. Clapp, supra; Furman University v. Glover, 226 S.C. 1, 83 S.E.2d 559 (1954).

It should also be noted that the generally accepted terms of art used to convey a fee simple subject to a condition subsequent are not used in the instant deed. Those terms are" "on condition that" or "provided that". Hagaman v. Board of Education of Woodbridge Tp., 117 N.J.Super. 446, 285 A.2d 63 (1971); See, 26 C.J.S. Deeds § 110 (1956) and Byars v. Cherokee County, 237 S.C. 548, 118 S.E.2d 324 (1961).

The deed also does not convey a fee simple determinable. "The general rule is well settled that the mere expression that property is to be used for a particular purpose will not in and of itself suffice to turn a fee simple into a determinable fee." 28 Am.Jur.2d Estates § 29 (1966); Accord, Restatement of Property § 44 Comment (1936).

In Miller v. Village of Brookville, 152 Ohio St. 217, 89 N.E.2d 85 (1949), the Supreme Court of Ohio held that a conveyance to the village of Brookville of a tract of land for use in perpetuity as a public park conveyed a fee simple absolute to the village because the deed contained no forfeiture or reversion clause. Similarly, there is no such provision in the instant deed. Accord, Abel v. Girard Trust Co., 365 Pa. 34, 73 A.2d 682 (1950) (Purpose stated in habendum clause).

***3** Further, the terms usually construed as conveying a fee simple determinable are not used in the instant deed. These terms are: "so long as," "during," or "while". Hagaman v. Board of Education of Woodbridge Tp., supra, See, 28 Am.Jur.2d Estates § 30 (1966).

In construing a deed, the cardinal rule of construction is to ascertain the intent of the parties, unless that intention contravenes some well settled rule of law or public policy. Sandy Island Corporation v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965). In the instant deed certain language which provided that the property should revert to the grantor should it cease to be used for the purpose stated in the deed was deleted. The obvious intent of the grantor was to alter the effect of the grant. By eliminating the very language which would have tended to evidence the conveyance of a fee simple determinable the indication is that the grantor chose not to convey such title.

In Furman University v. McLeod, supra, it is significant to note that the court emphasized the fact that the proceeds from the sale of some of the university's properties would be reinvested in new school property and other educational projects. Therefore, the court felt that the subject property was still being used as intended by the original grantor. Similarly, in the present case, the proceeds from the sale of old armories is reinvested in the construction of new armories. See, Code of Laws of South Carolina (1976) § 25–1–1650.

The grant does not contain the terms "and heirs" as is generally required to convey a fee simple absolute in South Carolina. However, since the grant is to the State, these terms are not necessary. Means, "Words of Inheritance in Deeds of Land in South Carolina: A Title Examiner's Guide", 5 S.C.L.Q. 313 at 326 (1953); Restatement of Property § 35 (1936).

CONCLUSION:

The words stricken from the deed are not to be given effect since they were stricken before delivery of the deed. Therefore, the deed is treated as if it had never contained the words. In light of the general strict construction by the courts against the grantor and the fact that the instant deed contained no terms of forfeiture or reversion (such terms having been eliminated prior to delivery of the deed), by the grantor a statement of purpose alone is not enough to create a defeasible fee. Therefore, the deed in question conveyed to the State a fee simple absolute title to the armory property.

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