From Hard Ball to the Four Corners

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Any legal instrument, including a deed of conveyance, is subject to judicial interpretation to the extent that the draftsman creates ambiguities in the text or ignores existing rules of construction. In the past, North Carolina courts, as well as courts in other jurisdictions, mechanically enforced common law rules of construction and law that were designed to promote greater certainty in the interpretation of deeds. Often the application of these rules of construction served to frustrate the true intention of the grantor. Nevertheless, our courts played hard ball.

Strict Construction

Prior to 1968, North Carolina courts generally adhered to the rule that where the granting and habendum clauses of a deed indicated the conveyance of a fee simple absolute, other provisions in the instrument that limited the estate were deemed ineffective.

In *Artis v. Artis*,[1] the North Carolina Supreme Court construed a conveyance in which the granting clause read that the grantor "has bargained and sold, and by these presents doth grant, bargain, sell and convey to said Ida L. Artis and Mark Artis their heirs and assigns" the property thereafter described. The habendum was consistent with the granting clause. Following the description and preceding the habendum, the draftsmen inserted the following: "[a]t the death of Ida L. Artis, if no bodily heirs by Archie C. Artis, then the above lands or her part of same shall be divided between the Archie C. Artis heirs also Archie C. Artis holds his lifetime right to the above described property [sic]."

The Court noted that the granting clause was the essence of the agreement and that the purpose of the formal habendum was to quantify the estate granted. Since these formal parts of the deed were in harmony, the Court held that the additional language in the deed that limited the estate was repugnant to the grant and was rejected.

In reaching its decision, the Court relied on a long line of cases construing both wills and deeds, but essentially disregarded the provisions of N.C. Gen. Stat. § 39-1, which provides:

When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word 'heir' is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity.

Although recognizing that the principal rule in construing instruments is to effectuate the intent of the parties, the Court apparently felt constrained by precedent and the formal parts of the deed to ignore the limitation placed in the deed by the draftsman.

Intention of the Parties Prevails

The rule in *Artis* has since been applied in a series of cases: *Oxendine v. Lewis*,[2] *Lackey v. Hamlet City Bd. of Education.*[3] But, the rationale in *Artis* did not control in those cases where the granting and habendum clauses were in conflict. Although the habendum is not an essential element of a deed, the courts apparently considered it a formality that could not be disregarded and where conflict between the granting and the habendum existed, the courts felt compelled to resolve it. In such cases, the courts focused on the intent of the parties in order to determine the proper effect of the deed. For example, the court concluded in *Triplett v. Williams*,[4] that where a deed's granting clause conveyed a fee, and the habendum read, "to herself, the said Margaret Greenwood during her life time, and at her death said land is to be equally divided between the children of said Margaret Greenwood," the deed created a life estate with a remainder over.

In 1967, the general assembly enacted N.C. Gen. Stat. § 39-1.1 (an elaboration of N.C. Gen. Stat. § 39.1), which provided prospectively that any conveyance which contains inconsistent clauses shall be construed on the basis of the intent of the parties as evidenced by all of the provisions of the instrument. For deeds executed after January 1, 1968, a court must look to the four corners of the instrument to render an interpretation thereof.

By its terms, the statute leaves the common law intact for conveyances made prior to October 1, 1968, (the title examiner should be cognizant of that time frame) and the *Artis* rule still controls the construction of those deeds.[5] Further, N.C. Gen. Stat. § 39-1.1 specifically provides that it "shall not prevent the application of the rule in *Shelley's* case," and thus maintains the viability of an ancient rule of real property law.

The Rule in *Shelley's* Case

The classic statement of the rule in *Shelley's* case is as follows: "If in a conveyance or a will a freehold estate is given to a person and in the same conveyance or will a remainder is limited to the heirs or to the heirs of the body of that person, that person takes both the freehold estate and the remainder."[6]

The rule was originally invoked to protect the incidents of feudal tenure by establishing a fee in the grantee which could descend on his death to the grantee's heirs. Absent the rule in *Shelley's* case, such language would be interpreted as words of purchase, which would make the grantee's heirs contingent remaindermen at the time of the conveyance. The original purpose of the rule – the protection of feudal rights existing in medieval England – has long since disappeared, but the rule was established in many of the United States via adoption of the English common law and it has persisted nearly to the twenty-first century.

In a very early case, the North Carolina Supreme Court recognized that the rule in *Shelley's* case was in fact a rule of law and not a rule of construction. Thus, the rule must be given effect unless there is included in the deed or will "such explanatory and descriptive words or phrases as make it perfectly clear that the words 'heirs' or 'heirs of the body' mean and refer to certain particular individuals answering the description of heirs at the death of the ancestor." *Nichols v. Gladden.*[7] The rule has been applied to a deed which granted property to A and "her children or heirs" when at the time of

execution of the conveyance, A had no children. However, the rule apparently would not apply if in fact A had children at the time the deed was made. *Davis v. Brown.*[8]

The North Carolina legislature abolished the rule in *Shelley's* case effective October 1, 1987, through N.C. Gen. Stat. § 41-6.3, but prospectively only. The result of this legislation appears to make N.C. Gen. Stat. § 39-1.1(a) in force as to all conveyances executed after 1987, including those which would otherwise have been subject to the application of the rule in *Shelley's* case.

Construction Today

The construction of a deed is therefore controlled by the date of its execution. Consider the various interpretations of the following hypothetical deed:

Granting clause:	A bargains, sells, and conveys to B.
Description:	Blackacre
Clause following description:	to B for life, remainder to the heirs of B.
Habendum:	to have and to hold to B, his heirs and assigns

Prior to 1968, the conveyance would be deemed to give B a fee simple absolute in Blackacre. Under *Artis*, the additional limiting language is disregarded as repugnant to the fee which is referenced in the consistent granting and the habendum clauses.

After January 1, 1968, and prior to October 1, 1987, arguably B receives a fee simple absolute. Under N.C. Gen. Stat. § 39-1.1, the court must consider all provisions of the deed, but must also respect the rule in *Shelley's* case. If effect is given to the additional clause, the rule of law determines B takes the fee.

After 1987, arguably the court could find that B has a life estate with a remainder over in the people who are heirs of B at death. Under N.C. Gen. Stat. § 39-1.1, the court considers all provisions of the deed but the rule in *Shelley's* case no longer applies.

More than 200 years after the American Revolution, our view of construing deeds has settled on the purpose to effectuate the intention of the grantor. Of course, that leaves the often difficult task of determining intent. Tracing the movement of our law from stricter, more arbitrary construction of deeds to the intent-based, but less certain evaluation required today, one message should be clear: today's draftsman must know what he wants to accomplish and then state it unambiguously.

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[1] 228 N.C. 754, 47 S.E.2d 228 (1948)
[2] 252 N.C. 669, 114 S.E.2d 706 (1960)
[3] 258 N.C. 460, 128 S.E.2d 806 (1963)
[4] 149 N.C. 394, 63 S.E. 79 (1908)
[5] See *Gamble v. Williams*, 39 N.C. App. 630, 251 S.E. 2d 625 (1979).
[6] Browder, Cunningtiam & Julin, Basic Property Law 240 (2d ed)

[7] 117 N.C. 497, 23 S.E. 459 (1895)
[8] 241 N.C. 116, 84 S.E.2d 334 (1954)