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Property--Material Changes in Deed by Parties After Delivery

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Property—Material Change in Deed by Parties After Delivery

X, the grantor, signed and delivered a deed conveying to *P* a certain subdivision excepting lots numbered one, two, three, four, etc. Later, with the consent of *P*, *X* struck out the figure three and signed his name beside the change thus including that lot in the grant. The instrument as changed was delivered. *X* subsequently purported to convey lot three to *D*. The trial court held that title to lot three was in *D* because title could not have passed to *P* merely by the change made in the terms of the executed deed. *Held*, reversed and remanded. Where the terms of an executed deed are changed with the consent of the parties, either before or after delivery, the deed remains valid and the change is effective. *Krechel v. Mercer*, 136 S.E.2d 608 (N.C. 1964).

The result in the principal case is supported by the weight of authority. The case is easier to understand if one considers that changing the terms of an executed deed on agreement of the parties is in effect the destruction of that deed and the drafting of a new one. The changed deed is, at least in its effect, a new deed. *City of St. Joseph ex rel. Forsee v. Baker*, 113 Mo. App. 691, 88 S.W. 1122 (1905). This new deed is neither more nor less effective than if it had been drafted on a blank piece of paper. It is exactly as much a new deed in its effect as if it had been written in full at the time of the change. *Jeffrey v. Langston*, 179 Ky. 501, 200 S.W. 917 (1918). The following general rules are essential to support the decision in the principal case. First, the grantor can not convey title to property he does not own. *Marshall v. Francis*, 332 Mass. 282, 124 N.E.2d 803 (1955). Second, a deed must be delivered to be effective. *Crump v. Gilliam*, 190 Va. 935, 59 S.E.2d 72 (1950); *Bennett v. Neff*, 130 W. Va. 121, 42 S.E.2d 793 (1947).

In the principal case the parties did agree to make the change in the executed deed. When the change was made the deed in effect became a new deed. The new deed purported to convey the same property that had been conveyed by the original deed plus lot three. The grantor did not have title to the property he had already conveyed, but he did have title to lot three because he had expressly reserved title to one, two, three, four, etc. Therefore, because of the rule that the grantor must have title, the new deed could be operative only to convey lot three. There was a delivery of the deed as changed, and it had the same effect it would have had had it been written in full at the time of the change.

Although the result in the principal case is correct, the manner in which the opinion is stated appears to be too comprehensive. The court said that a change made in a deed with the consent of the parties is generally held to be valid and effective as between the parties. This is true only in limited situations. Where a change by the parties increases the amount of property described and granted, it is true that generally the grantee will be vested with title to the entire area described and granted in the deeds before and after the change. This is the situation in the principal case. However, where a change purports to reduce the amount of land already conveyed, it is ineffective. 4 TIFFANY, REAL PROPERTY 85 (3d ed. 1939).

This position is borne out when the following rules are carried to a logical conclusion. It is generally recognized that the destruction of a deed will not render invalid the title it conveyed. An estate can exist without a deed, and title will continue in the grantee although the deed that conveyed and evidenced that title has been destroyed. *Kleemann v. Sheridan,* 75 Ariz. 311, 256 P.2d 553 (1953). If the title remains valid in the grantee, obviously the grantor does not have title. Therefore, his subsequent deed, the deed as changed, can not affect the title conveyed because one can not transfer title to property he does not own. *Marshall v. Francis, supra.* Neither the destruction of the original deed nor the delivery of the new deed can reduce the size of the grant already made. *Standard Trust & Sav. Bank v. Fernow,* 317 Ill. 325, 148 N.E. 37 (1925); *Church v. Combs,* 332 Mo. 334, 58 S.W.2d 467 (1933); *Engstrom v. Peterson,* 107 Wash. 617, 182 Pac. 623 (1919).

The following hypothetical situation illustrates the fallacy in supposing that a change could reduce the size of the grantee's estate. *A* conveyed Blackacre and Whiteacre to *B.* Later, *A* and *B* crossed out the word "Blackacre" in *B's* deed. Applying the law as stated in the opinion in the principal case, one would have to conclude that *B* no longer owns Blackacre, because the change became effective. This is not the law. Before *A* can affect the title to property he conveyed to *B, A* must regain that title. There must be a re-conveyance from *B* to *A. Standard Trust & Sav. Bank v. Fernow, supra; Hill v. Hill,* 299 Ky. 351, 185 S.W.2d 245 (1941); *Hensley v. Swann,* 93 W. Va. 49, 115 S.E. 864 (1923); W. VA. CODE ch. 36, art. 1, § 1 (Michie 1961).

A contrary result may be reached where the elements of an estoppel are present. *Simmons v. Simmons,* 203 Ark. 566, 158 S.W.2d 42 (1942); *Huffman v. Hatcher,* 178 Ky. 8, 198 S.W. 236 (1917).

The cases involving a change which increases the amount of property conveyed present few problems, and, as evidenced by the principal case, can be decided correctly without even considering other fact situations. However, a statement purporting to give the law concerning the effect of a change by the parties should be applicable to changes that propose to decrease as well as to those that increase the grantee's estate. In considering situations in which the parties to an excuted deed have changed its terms upon agreement, the following rule controls: The delivery of what is in effect a new deed can not reduce the size of a grant already completed.

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Property—Restraint on Alienation

A conveyed property to *C*, a corporation, for the use and benefit as it might deem proper, for the treatment and care of sick or crippled children and for general hospital purposes for such children. The deed provided that in the event *C* or its assigns should fail to use the property for the named purposes for three years, it would revest in *A* or his heirs. The deed further provided that in the event *C* should attempt to alienate the land within twenty-one years after *A's* death, the land should revert to *A* or his heirs. Subsequently, *C* conveyed to *H*, a successor corporation, and *A* joined in the deed to indicate his approval of the transfer. One year after *A's* death, *H* conveyed to another corporation, *M*. One month later, *M* conveyed to *T*, a municipality. Two years from that date, the heirs of *A* executed a quit claim deed to *T*. Certain interested parties sought a declaratory judgment on the effect of the various conveyances. The trial court held the first conveyance had created a benevolent trust, and the conveyance from *H* to *M* was void because of an error in naming the grantors. The title was still in *H*, and *T* had no interest of any kind in the property. *Held,* reversed. The error in the deed was a simple and obvious one, which could and should have been corrected by the trial court. When *H* conveyed to *M*, without *A's* heirs joining in the same instrument, the title immediately vested in *A's* heirs, because of the clause for-