



1955

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## Recommended Citation

Gilmer, Wesley Jr. (1955) "Formalities and Requisites of a Deed in Kentucky," *Kentucky Law Journal*: Vol. 43 : Iss. 4 , Article 2.  
Available at: <https://uknowledge.uky.edu/klj/vol43/iss4/2>

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# Formalities and Requisites of a Deed in Kentucky

By WESLEY GILMER, JR.\*

## I. INTRODUCTION

The most oft done work of the general practitioner in law today involves the law of deeds. It may be the drafting of a deed, the examination of several deeds in a chain of title, or the passing upon a deed's sufficiency for a client who is a purchaser.

Historically, the term "deed" included all varieties of sealed instruments, but by common usage today it has come to be limited to an instrument for the conveyance of real property.<sup>1</sup> In view of the fact that at common law real property was conveyed by a ceremony, or an act, a written instrument today takes the place of that act, but bears a name which suggests the idea of an act, to-wit a "deed".<sup>2</sup>

## II. STATUTORY DIRECTIVES

In many states the law of deeds has been simplified and made uniform by statutes which provide that a writing in a prescribed form shall be effective to transfer the title to real property.<sup>3</sup> We in Kentucky have not been so fortunate, however, and the statutory directions are few. The main statute in Kentucky simply provides that an owner may convey any interest in real property, not in the adverse possession of another, and it further provides that no estate of inheritance or freehold, or for a term of more than one year, shall be conveyed except by deed or will.<sup>4</sup>

It might be interesting to note here that the legislature has not seen fit to leave the drafting of deeds to lawyers, but has provided that the Court of Appeals' rules governing the practice of

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<sup>1</sup> 16 AM. JUR., *Deeds* 437 (sec. 2) (1938).

<sup>2</sup> 16 AM. JUR., *Deeds* 444 (sec. 12) (1938).

<sup>3</sup> 16 AM. JUR., *Deeds* 446 (sec. 17) (1938).

<sup>4</sup> KY. REV. STAT., sec. 382.010. The subject of wills will not be dealt with in this article.

law shall not prevent a person (not holding himself out as a practicing attorney) from writing a deed, mortgage, or will.<sup>5</sup> Such legislation accounts in part, no doubt, for the odd instruments that we, who read this article, shall observe passing through our courts.

### III. LAW OF THE CASES

In view of the lack of statutory direction available to us in Kentucky, we must find our law of deeds in the decided cases of the state.

#### A. *Operation and Purpose*

We shall first observe some Kentucky cases in which the instrument under consideration was not a deed, or was not sufficient to convey any title from one party to another.

In an early case the Court of Appeals considered an instrument in writing, written on a deed to the signer, which read as follows:

I do hereby relinquish all the right and title to the within mentioned tract of land, that I hold by deed or any other claim whatsoever; as witness my hand and seal, this 7th day of July, 1812.

Thomas Garnett (Seal)

This instrument was held to be of no force and effect to transfer any title. Was it because it lacked formality? Was it because there was no source of title, no elaborate description set out, or no certificate of acknowledgment? No, this instrument was valueless because it did not tell us *to whom* the relinquishment was made. The court said that Thomas Garnett could not purport to give *to anyone*, and no one could make a claim under it.<sup>6</sup> A similar case was presented many years later; and the court decided it the same way. In that case there was an indorsement on the margin of a deed record, in which record the deed reserved a life estate, the indorsement stating that the indorser relinquished all his right or claim in the deed. The court there stated that this surely was not a conveyance, because there was no grantee named, there was no description of what was granted,

<sup>5</sup> Subsection (8), KY. REV. STAT. sec. 30.170.

<sup>6</sup> Garnett v. Garnett's Lessee, 23 Ky. 545, 7 T. B. Mon. 545 (1828).

and there was no statement of consideration.<sup>7</sup> Both cases are apparently the law in Kentucky today.<sup>8</sup>

Another abortive instrument is revealed by the case of *Stamper v. Lunsford*,<sup>9</sup> wherein an instrument was signed, acknowledged, and recorded, that recited that the owner of certain real property "willed" it to his wife for life, and that the son should take the balance of the land. The instrument began with the words, "This indenture . . .". The court held that the described instrument was not valid as a deed because it didn't pass a *present* interest, there was no grantor or grantee, there was no consideration, and there was nothing to indicate that the instrument was intended to be a deed except the beginning words, "This indenture . . .".

An interesting case was presented by the facts of *Morgan v. Big Woods Lumber Company*<sup>10</sup> in which a father of several children had a plat made with his children's initials on certain parcels on that plat. The court held that this did not invest the intended grantee with title, because mere intention is insufficient. This article, as it progresses, will present more vivid reasons for the decision, particularly in *F., Conveying Function, infra*.

### B. Bare Essentials and Informal Instruments

Let us now turn to the other side of the picture, and take a look at some instances where the Court of Appeals has found that a writing, though informal or inartfully drawn, is sufficient to constitute a deed of conveyance, and the reasons for the decisions.

In 1834 the court was called upon to consider an instrument that was written as follows:

For value received, I bargain and sell unto Arthur Conley, my whole right of improvement made by John Brown, and all the land as far as Thomas Miller's claim interferes with my claim. Given under my hand and seal, this 7th day of February, 1806.

William Bridges (Seal)

Test. Thomas Boyd )  
John Robinson )

<sup>7</sup> *Miller v. Prater*, 267 Ky. 11, 100 S.W. 2d 842 (1937).

<sup>8</sup> A search of Shepard's Kentucky Citations reveals nothing that would indicate otherwise.

<sup>9</sup> 185 Ky. 553, 215 S.W. 297 (1919).

<sup>10</sup> 198 Ky. 88, 249 S.W. 329 (1923). See also *City of Bowling Green v. Board of Ed'n of Bowling Green*, 278 S.W. 2d 726 (Ky. 1955).

The instrument, as can be seen, was simple, direct and without formality. The court expressly held, and such is the law today, that the instrument is a conveyance in fee simple, because its literal import is of an executed agreement, or conveyance of title. The court called it a deed of bargain and sale, citing *Coke on Littleton* and *Kent's Comentararies*.<sup>11</sup>

Another old Kentucky case that bears on the problem is *Patterson v. Carneal's Heirs*.<sup>12</sup> There the Court of Appeals considered the following informal instrument, written upon a copy of a decree of foreclosure, and held that it was a good deed of conveyance:

For and in consideration of the full amount specified in the foregoing decree, paid to me by James Coleman, in his individual capacity and not as administrator, I do hereby transfer, assign and convey to said James Coleman, in his own right, all my right, title, claim and interest in the said decree, and all my right and title in and to the mortgage and mortgaged property therein specified, and do hereby authorise the said James Coleman, in my name and for me, to act in the premises as fully as I might or could do, if personally present, and to make use of my name in any legal manner that may be deemed necessary for the purpose of obtaining the amount of said decree. Given under my hand and seal this 9th day of May, 1812.

William May (Seal)

The court said that regardless of how informal an instrument may be, the words "Transfer, assign and convey", especially the word "convey", are sufficient to answer the requisites of a common law grant, to carry a legal estate, and to vest it in the grantee under statute. This is apparently still good subsisting law in Kentucky.<sup>13</sup>

More recently the court had before it the problem of an instrument that had no habendum or tenendum clause, and in which the covenants preceeded the words of grant. Nevertheless, the court upheld the instrument as a deed of conveyance, and said that it was sufficient to convey title because it stated: the names of the parties; the consideration for its execution; the instru-

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<sup>11</sup> *Chiles v. Conley's Heirs*, 32 Ky. 21, 2 Dana. 22 (1834).

<sup>12</sup> 10 Ky. 618, 3 A. K. Marsh. 1380, 13 Am. Dec. 208 (1821).

<sup>13</sup> See *supra* note 8.

ment's purpose to convey title to the grantee; a certain description; and a general warranty. The court also considered the fact that there was no repugnancy in the instrument.<sup>14</sup>

*Babb v. Dowdy*<sup>15</sup> presented the Court of Appeals with a very poorly written instrument that the court held to be a valid deed. The material parts of the deed are as follows:

Dowdy & Wilson to Fannie Davinie, et al.

For the consideration of the sum of one dollar and other valuable consideration paid and to be paid as follows, viz.:

\* \* \* \*

We, C. L. Dowdy and wife, Jennie Dowdy, C. W. Wilson and wife, Adella Wilson, have sold and hereby convey with covenant of General Warranty to Fannie Davinie, the fee simple title in and to said real estate, subject to the mineral rights of W. M. Babb, his heirs and assigns. The mineral rights in and to the hereinafter described land being conveyed to the said W. M. Babb, his heirs and assigns, the following described real estate lying in district No. 6, Graves County, Kentucky, viz.

The court held that this instrument was a valid conveyance of the mineral rights to W. M. Babb, and the remaining fee to Fannie Davinie. It stated that although a deed is inartfully drawn, in construing it the court endeavors to ascertain the intention of the parties, and that the trend of decisions is to uphold a deed as any other contract, however informally it may be drawn, when the terms of the instrument are sufficient to express the intention of the parties. Such seems to be the general rule.<sup>16</sup>

### C. Grantors

If a person is not named, or identified in some way, as a grantor or mortgagor in the instrument, he is not usually bound by the deed or mortgage, although it is signed and acknowledged by him.<sup>17</sup> One Kentucky case goes so far as to say that no representa-

<sup>14</sup> *Meisberg v. Bryant*, 184 Ky. 600, 212 S.W. 600 (1919). Some of the reasons used to support the court's decision seem unnecessary in view of other cases that will be pointed out *infra*.

<sup>15</sup> 229 Ky. 767, 17 S.W. 2d 1014 (1929).

<sup>16</sup> 16 AM. JUR., *Deeds* 467-8 (sec. 47) (1938).

<sup>17</sup> *Goodrum's G'd'n. v. Kelsey*, 244 Ky. 349, 50 S.W. 2d 932 (1932), and *Whitaker v. Langdon*, 302 Ky. 666, 195 S.W. 2d 285 (1946).

tion or conduct on the signer's part amounting to an estoppel is to be taken from the fact that the person did sign the deed.<sup>18</sup>

It is not necessary that the full and complete names of the grantors be set out, however. In *Stephens v. Perkins*<sup>19</sup> the deed named the grantors only as "we, the heirs of Whitmill Stephens", but the court held such a description of grantors to be sufficient because the deed was signed by the heirs, and because they were sufficiently described so that they could be identified.

Attaching no importance to the fact that a mortgage recited that it was given to secure the indebtedness of *N. H.*, the court held that *N. H.* was not bound by the mortgage which he signed and acknowledged, but in which he was not named or identified as a grantor or mortgagor.<sup>20</sup>

A deed of a wife's land, in which she was not named as a grantor, but in which the wife joined and signed "to relinquish all right to dower" was held of no effect as to the wife's land, because she did not join with the husband as a grantor.<sup>21</sup>

#### D. Grantees

In *Huntsman v. Bryant*<sup>22</sup> the court considered a well drawn deed that had just one shortcoming. That deficiency was the odd fact that there was no one named as grantee, or "parties of the second part" as used in the instrument. The court held that nothing passed by that instrument because in every grant there must be a grantor, a grantee, and a thing granted. The general rule is that the instrument must purport to pass title to *someone*.<sup>23</sup>

There are exceptions to that rule, however, as pointed out in a 1939 Kentucky case.<sup>24</sup> In that case there was a lease in which the name of the lessee was left completely blank. The court,

<sup>18</sup> *Hall v. Ditto*, 11 Ky. L. Rep. 667, 12 S.W. 941 (1890).

<sup>19</sup> 209 Ky. 651, 273 S.W. 545 (1925). This case distinguished *Parsons v. Justice*, 163 Ky. 737, 174 S.W. 725 (1915) wherein *S.D.* and her husband weren't mentioned or identified in the body of the deed as grantors.

<sup>20</sup> See *supra* note 17. *Accord*, *Shaver v. Ellis*, 226 Ky. 806, 11 S.W. 2d 949 (1928).

<sup>21</sup> *Bankston v. Crabtree Coal Mining Co.*, 95 Ky. 455, 25 S.W. 1105 (1894). The proposition for which this case is cited, however, was dictum, because the court went on to hold that if she did have any cause of action, it was barred by the statute of limitations.

<sup>22</sup> 196 Ky. 312, 244 S.W. 701 (1922).

<sup>23</sup> *Caddell v. Eagle Coal Company*, 144 Ky. 396, 138 S.W. 304 (1911); *Miller v. Prater*, *supra* note 7; *Garnett v. Garnett's Lessee*, *supra* note 6.

<sup>24</sup> *Foley v. Givens*, 277 Ky. 584, 126 S.W. 2d 1123 (1939).

however, construed the receipt for down payment, which was simultaneously executed, to supply the omitted name of the lessee, because there was but one transaction.<sup>25</sup>

This problem of naming the grantees is particularly important in the cases of husband and wife. Following the principal rule, the words "and wife" appearing after the name of the grantee in the caption of the deed, without naming her anywhere or mentioning her in the granting or habendum clauses, is not sufficient designation of her as a grantee to convey her any interest in the property.<sup>26</sup>

A case with facts a bit more in the favor of the wife's receiving an interest presented a deed as follows:

The deed read 'to J. and his wife, N. grantees' in the caption; in the conveying clause it read 'to grantee, his heirs and assigns'; and the habendum stated that 'grantees' were to have and to hold, followed by 'the said J. and his heirs and assigns forever.'

Admittedly this was a rather confusing set of words, but the court held that the deed conveyed the land in question to J. alone, and not to J. and N. Accordingly, the court ordered reformation of the deed to allow an interest to the wife, N.<sup>27</sup>

In *Clark v. Northern Coal & Coke Company*<sup>28</sup> a deed called for the grantees to be "Russell Pinson and wife, heirs of Henry Pinson, deceased" and appeared to be a settlement of an estate. The court held that the wife took nothing, because of the apparent nature of the deed, the fact that the wife assumed no legal obligation under the deed (the consideration being a promise by Russell Pinson), the fact that the wife was not an heir of Henry Pinson, deceased, and because the court concluded that the wife was mentioned by inadvertence.

While we are still dealing with the subject of parties to a deed, it seems valuable to note here that Kentucky Revised Statute section 382.430 requires of the draftsman as follows:

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<sup>25</sup> In doing so, the court followed *Hardin v. Kazez*, 238 Ky. 526, 38 S.W. 2d 438 (1931) which interpreted a check and deed as one instrument on an issue of delivery of the deed.

<sup>26</sup> *Russell v. Clemons*, 264 S.W. 2d 879 (Ky. 1954). Where she *was* named in the caption, the result was the same. *Loughridge v. Ball*, 30 Ky. L. Rep. 1123, 118 S.W. 321 (1909).

<sup>27</sup> *Saylor v. Helton*, 194 Ky. 195, 238 S.W. 405 (1922).

<sup>28</sup> 33 Ky. L. Rep. 1047, 112 S.W. 629 (1908).



(1) No mortgage, conveyance or other instrument or writing constituting a lien or other security for any note or other evidence of indebtedness shall be received for record by any county clerk unless such mortgage, conveyance or other writing gives the county and state of the residence and the post office address of the person or corporation owning or holding the note or other evidence of indebtedness, or liable for the payment of taxes thereon.

(2) Should there be an assignment of such note or other evidence of indebtedness, of record in the clerk's office, the assignment shall state the county and state of the residence and post office address of the assignee. Unless any assignment is made of record, the original holder or owner shall be liable for taxes as though no assignment had been made.

### *E. Consideration*

Does there have to be a consideration, or a recital of one, for the deed to be a valid conveyance?

An early Kentucky case presented the problem of an obligation, under seal, given by a father to his son, for the conveyance of land.<sup>29</sup> The only consideration for the obligation was the relationship of father and son, and the son sought specific performance of the obligation after the death of his father. The court allowed specific performance of the agreement, reasoning that the Statute of Uses allows it, and prior to the time of the Statute of Uses, chancery courts in England must have allowed it, because the Statute of Uses only operates to transfer possession of a use where there is a valid use created.

In 1923 the Court of Appeals stated that when the grantee knows all the facts, a *grantor* is not bound by a deed which is executed without consideration if the grantor sues for cancellation of the deed.<sup>30</sup>

Following the 1923 decision, the court again was presented with the problem of consideration in a 1940 case.<sup>31</sup> The suit involved a petition by deceased's daughter and her mother after the death of the father, to determine whether a deed from the

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<sup>29</sup> *M'Intyre v. Hughes*, 7 Ky. (4 Bibb.) 186 (1815). This was a case of an executory contract, however; not of an executed deed.

<sup>30</sup> *Beliles v. Whittaker*, 199 Ky. 431, 251 S.W. 190 (1923). The case was reversed on procedural grounds, however.

<sup>31</sup> *Saylor v. Saylor*, 282 Ky. 246, 138 S.W. 2d 316 (1940).

father, then deceased, to the mother was good. The court flatly stated that there need be no consideration to support the conveyance, and so held. Another case decided that year illuminated the problem more, when the court stated that a person possessed of sufficient mental capacity to understand, etc., could *give* or sell his property to whomsoever he chooses.<sup>32</sup>

In two subsequent cases, decided in 1943 and 1946, the Court of Appeals has held that a deed is not void for want of consideration, because a person in his right mind may give away what he owns without regard to the wishes of those who are without legal demands against him.<sup>33</sup>

Let's now pass on to the situation where a deed is made in consideration of grantee's agreement of future support. The law in such case is that if there is a failure to support as agreed, the conveyance is valid, but is subject to rescission at the complaint of the grantor.<sup>34</sup>

The matter of inadequacy of consideration is dealt with in the same way as the matter of lack of consideration, the cases holding that it is for the contracting parties to judge the sufficiency of the consideration, and a party possessing his faculties may do as he pleases with his property because of his right to will it away upon death.<sup>35</sup>

An issue of reasonable importance is what should be done when a deed on its face lacking consideration appears in a chain of title. In the case of *Prewitt v. Morgan's Heirs*<sup>36</sup> the court tells us what the presumption is, when the deed recites the consideration to be "\$..... in hand paid." The court said that although the consideration was left blank in the deed, the certificate of acknowledgment is *prima facie* evidence of execution, importing a valuable consideration, and that he who attacks the deed must show the negative fact of lack of consideration.

There is a statute relative to consideration which should be

<sup>32</sup> *Tarter v. Eaton*, 282 Ky. 219, 138 S.W. 2d 342 (1940).

<sup>33</sup> *Damron v. Damron*, 301 Ky. 636, 192 S.W. 2d 741 (1946); *Sullenger v. Baker*, 296 Ky. 240, 176 S.W. 2d 382 (1943).

<sup>34</sup> *Bostic v. Bostic*, 264 S.W. 2d 59 (Ky. 1954); *Bracken v. Johnson*, 249 S.W. 2d 149 (Ky. 1952). (The case of *Bracken v. Johnson* also involved undue influence.)

<sup>35</sup> *Hatfield v. Pond Creek Coal Company*, 201 Ky. 644, 258 S.W. 98 (1924); *Todd's Heirs v. Wickliffe*, 57 Ky. (18 B. Mon.) 866 (1858).

<sup>36</sup> 119 S.W. 174 (Ky. 1909).

noted here, which provides that when any real property is conveyed, and any part of the consideration remains unpaid, the grantor must state in the deed what part remains unpaid, or he shall not have a lien for the unpaid consideration against *bona fide* purchasers and creditors.<sup>37</sup>

For other reasons than matters pertaining to the law of deeds, however, we must state that a consideration, if there in fact be one, should always be recited in the deed.<sup>38</sup>

### F. *The Conveying Function*

As was pointed out in A., *Operation & Purpose, supra*, the case of *Stamper v. Lunsford*<sup>39</sup> presented to the court a very badly drawn instrument. There the instrument took on the form of a deed, but was worded like a will. The court held that the instrument, although styled an indenture, was not valid to convey any title to anyone, because it did not convey any present interest.

Going on with that particular phase of the requisites of a Kentucky deed, we point out that parties may call an instrument whatever they please, but the test for determining what the instrument really is—for our purposes whether it is a deed—is to find *what the instrument does*. If the effect of the instrument is to sever the estate and vest title in another, it is a deed regardless of how it is styled.<sup>40</sup> That principal was applied in *Duncan v. Greene*,<sup>41</sup> where the instrument under consideration granted a privilege to reduce minerals to the possession of another, but did not grant the minerals in place in the ground. The instrument was called an indenture, but did not provide for the severance of the estate in the minerals. The court held that the instrument was not a deed.

On the other side of the mineral picture, where the words "grant", "bargain", and "sell" are used in connection with minerals in place, adding words of inheritance, it is presumed that the instrument is a deed, regardless of what the parties call it.<sup>42</sup>

<sup>37</sup> KY. REV. STAT. sec. 382.070.

<sup>38</sup> 16 AM. JUR., *Deeds* 472-474 (secs. 57-58) (1938).

<sup>39</sup> *Supra* note 9.

<sup>40</sup> *Duncan v. Mason*, 239 Ky. 570, 39 S.W. 2d 1006 (1931).

<sup>41</sup> 253 S.W. 2d 592 (Ky. 1952).

<sup>42</sup> *Kentucky Natural Gas Corp. v. Carter*, 303 Ky. 559, 198 S.W. 2d 311 (1946).

Accordingly, it was held<sup>43</sup> that a certain instrument was a deed of mineral rights, rather than a deed, because: (1) the instrument purported to be an absolute conveyance, with the usual granting and habendum clauses, and words of inheritance; (2) the consideration was adequate (\$1.00 per acre in 1930), plus payment out of oil that might be produced; (3) no time for oil operations was provided; and (4) there was an agreement that pipelines should be buried below plow depth, and further agreement that the land should be protected against drainage by offset walls, all of which are consistent with a parting with the title to the minerals and a desire to protect the remaining surface rights.

Strict formal words of conveyance are not required for the conveyance of property by deed. When words of equivalent meaning are used, that is satisfactory. When a writing recites the making of a former deed, and then sets out that the writing is made to correct or make good that former deed, such is a valid deed of correction, because the court looks to the words of the instrument to see what was *intended* by the "fair and natural meaning of the language."<sup>44</sup>

A similar case with a like result was *Taylor v. Kleier*<sup>45</sup> in which a deed recited that a certain trustee joined in the conveyance "to release any claim he may have on said trust property herein conveyed". The instrument conveyed good title because the manifest purpose of the parties was to part with all of the trustee's title.<sup>46</sup>

Covenants of warranty do not constitute any operative part of the instrument, says one Kentucky case,<sup>47</sup> and a quitclaim deed conveys land as well as any other deed.<sup>48</sup> That Kentucky case was criticized, however, in a later federal decision,<sup>49</sup> which said that the test in the case is inaccurate. That case says that the distinguishing characteristic of a quitclaim deed is that it conveys the *grantor's title* in the property, rather than the *property itself*.

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<sup>43</sup> *Ramsey v. Yunker*, 311 Ky. 820, 226 S.W. 2d 14 (1950).

<sup>44</sup> *East Jellico Coal Co. v. Jones*, 141 Ky. 306, 132 S.W. 411 (1910).

<sup>45</sup> 15 Ky. L. Rep. 859, 26 S.W. 3 (1894).

<sup>46</sup> The court went on to support its reasoning with the facts that the trustee had title, the deed was for a consideration, and that the trustee had power to sell.

<sup>47</sup> *Hosman v. Willett*, 32 Ky. L. Rep. 906, 107 S.W. 334 (1908).

<sup>48</sup> The words used in the deed, however, were of bargain, sale and conveyance.

<sup>49</sup> *Brown v. Harvey Coal Corp.*, 49 F. 2d 434 (D.C., E.D. Ky., 1931). This case contains a good survey of Kentucky, and other, cases on the problem of quitclaim deeds.

The distinction may appear to be splitting hairs, but the practical application is set out in the federal case thus: A title acquired by a grantor of a quitclaim deed after making that deed does not inure to the benefit of the grantee in that quitclaim deed, but if the deed purports to convey an estate in land, subsequently acquired title inures to the benefit of the grantee.

### G. Description

In order to convey a title to something, that "something" must be *certain* and *ascertained*.<sup>50</sup> The description need not be elaborate, but must be more than "it."<sup>51</sup> The county and state where the property is located, however, need not be set out to make a deed valid.<sup>52</sup> Nor must the deed describe the land by metes or bounds, or give the number of acres.<sup>53</sup>

The test of sufficiency of a description is whether the land can be *located* from the description,<sup>54</sup> and where the description is uncertain, but can be made certain, the conveyance will pass the title.<sup>55</sup> The limitation of the rule seems well illustrated by the case of *Fordson Coal Company v. Roark*<sup>56</sup> wherein the issue was adverse possession under color of title. The court found that no surveyor could locate any boundary by the vague and indefinite description in the deed, and thereupon concluded that the deed did not divest title, furnish evidence of a claim, or notice thereof. (The deed failed to describe completely more than one side of the tract which it purported to convey).

The deed description is sufficient to convey title, if a surveyor, using the deed and extrinsic evidence, can locate the land and establish its boundaries. Thus, a description in a deed that reads, "beginning at a white oak, thence to a beech" is not so indefinite as to invalidate the deed, when there is extrinsic evidence that

<sup>50</sup> 16 AM. JUR., *Deeds* 584 *et seq.* (secs. 260-261) (1938).

<sup>51</sup> *Strode v. Ackerman*, 141 Ky. 700, 133 S.W. 767 (1911). The case involved an action for specific performance of a contract to sell, in which the writing under the statute of frauds was a letter referring to the sale of something called "it". The court said that this was not a sufficient description to comply with the statute of frauds.

<sup>52</sup> *Perry v. Wilson*, 183 Ky. 155, 208 S.W. 776 (1919). A deed was good that conveyed all of grantor's interest in the real estate of his father, R. H. H., deceased.

<sup>53</sup> *Ison v. Wolf*, 153 Ky. 650, 156 S.W. 128 (1913). Deed only described the land conveyed as all of grantor's interest in their father's estate.

<sup>54</sup> *Culton v. Napier*, 272 Ky. 384, 114 S.W. 2d 480 (1938).

<sup>55</sup> *Armstrong v. Mudd*, 49 Ky. (10 B. Mon.) 144 (1849).

<sup>56</sup> *Fordson Coal Co. v. Roark*, 214 Ky. 247, 283 S.W. 106 (1926).

such lines have been surveyed, marked, and located on the ground.<sup>57</sup> Therefore, a deed description is sufficient if it names the abutting owners,<sup>58</sup> or names the boundaries, such as a creek and named adjoining owners, with a statement of acreage.<sup>59</sup>

Various descriptions that have been upheld by the Court of Appeals include: all of grantors' interest in their father's estate;<sup>60</sup> all of grantor's interest in the real estate of his father, *R. H. H.*, deceased;<sup>61</sup> land on Buck Creek known as the Hail's Mill property near the mouth of Hound Hollow;<sup>62</sup> "my undivided interest and share to a certain tract or parcel of land of which my father, *S. O.*, aforesaid, died siesed and possessed, lying on the waters of *L. S.* fork of *C.* river in *W.* county, containing about 356 acres in all";<sup>63</sup> and "lying in *B.* County, Kentucky, and described as follows: Our entire interest in the *P.* farm, except 1/2 acre, more or less, on the northeast corner of said farm where *J.* now lives".<sup>64</sup>

The law does not require that the description be completely accurate, because the test of sufficiency is whether the land can be located from the description.<sup>65</sup> The court follows a maxim which means, "that is certain which may be rendered certain".<sup>66</sup> Thus, where it is apparent from the description that something is omitted, those omitted words may be inserted to identify the land conveyed;<sup>67</sup> and a deed was upheld where there was a misnomer of the creek upon which the land is situated.<sup>68</sup> Although "east" was used instead of "west" in the description, the title was merchantable when the parties agreed upon the exact piece of ground conveyed, because of the contemporaneous construction.<sup>69</sup> Where two tracts of land were embraced in the same deed, the

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<sup>57</sup> *Ken-Tex Exploration Company v. Conner*, 251 S.W. 2d 280 (Ky. 1952).

<sup>58</sup> *Lawrence Oil Corp. v. Metcalfe*, 241 Ky. 353, 43 S.W. 2d 986 (1931).

<sup>59</sup> *Superior Oil Corp. v. Alcorn*, 242 Ky. 814, 47 S.W. 2d 973 (1932).

<sup>60</sup> *Ison v. Wolf*, *supra* note 51.

<sup>61</sup> *Perry v. Wilson*, *supra* note 50.

<sup>62</sup> *Jones v. Hargis*, 286 Ky. 353, 150 S.W. 2d 928 (1941).

<sup>63</sup> *Foster v. Roberts*, 179 Ky. 752, 201 S.W. 334 (1918).

<sup>64</sup> *Porter v. Porter*, 135 Ky. 813, 123 S.W. 302 (1909). This was a good description because *P.* only owned one farm in *B.* county, it was known as the "*P.* land", and *J.* had purchased 1/2 acre of that tract.

<sup>65</sup> *Culton v. Napier*, *supra* note 54.

<sup>66</sup> *Casteel v. Pennington*, 228 Ky. 206, 14 S.W. 2d 753 (1929). (*Id. certum est quod certum reddi potest.*)

<sup>67</sup> *Ibid.*

<sup>68</sup> *Culton v. Napier*, *supra* note 54.

<sup>69</sup> *Fidelity Realty Co. v. Flahaven Land Co.*, 193 Ky. 355, 236 S.W. 260 (1922).

omission of the closing line in the boundary in describing one tract was immaterial where the omitted line was the one separating the two tracts.<sup>70</sup>

*Hensley v. Burt & Brabb Lumber Company*<sup>71</sup> presented a case of a mistake in a patent, and the court held that it was permissible to look to any other document of record called for or alluded to, to ascertain where the error was and thereby correct it, in order to find the intention of the grantor. In following the *Hensley* case, *Thurman v. Leach*<sup>72</sup> held that to locate the lines of a patent was the ascertainment of a fact, and evidence was admitted, such as recitals of other patents calling for that line, recitals of the grant in question, testimony of witnesses who had seen the marked lines or any of the corners, and evidence of reputation as to the true location.

A different problem was presented in *Johnson v. Harris*,<sup>73</sup> wherein the deed called for a line, but didn't state whether its course was straight or curved. The plaintiff said that it was straight, and the defendant contended that it was shaped like an arc that followed natural topographic contours. The court held that in such a case, there was presented a question for the jury under the evidence.

Though a deed may contain different calls from those contained in the deed to grantor, if it refers to land as the *same* land conveyed to grantor by a certain other deed, it conveys the same tract conveyed to grantor by that other deed.<sup>74</sup>

In *Grant v. Armstrong*<sup>75</sup> a wife executed a deed to her land, but after a more particular description, described the land as her husband's interest that he received as heir to *M*. In reality, the wife had received the land from *M*., and the court held that the deed passed good title to the land that she had received from *M*. because the nomenclature was merely an error, and if it had been left completely out of the deed, the deed would have passed good title.<sup>76</sup>

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<sup>70</sup> *Johnson v. Harris*, 24 Ky. L. Rep. 449, 68 S.W. 844 (1902).

<sup>71</sup> 132 Ky. 112, 116 S.W. 316 (1909).

<sup>72</sup> 116 S.W. 300 (Ky. 1909).

<sup>73</sup> *Supra* note 68.

<sup>74</sup> *Bassett v. Lush*, 156 Ky. 490, 161 S.W. 227 (1913). Reference was to a deed, giving date and record page.

<sup>75</sup> 13 Ky. L. Rep. 187, 16 S.W. 531 (1891).

<sup>76</sup> The court further found that the wife *intended* to sell her interest.

The phrase in a deed description, "more or less", relieves the quantity with which it is used of exactness, and indicates that the parties risk a slight deviation.<sup>77</sup>

The reader's attention is called to Kentucky Revised Statute section 382.110 which requires that a deed, to be recordable, shall state the grantor's source of title, including names of immediate remote grantors, the page and book of the record on which the deed is recorded, and the date thereof. This statutory requirement is a prerequisite to recordation, but if such requirement is not met, the deed still conveys good title between the parties.<sup>78</sup>

We might here note the requirement for descriptions in conveying an easement, which is simply that in order to convey an easement, the description need only be of the land which is the subject of the easement. When the right of way is not defined or bounded, the law provides for a manner of bounding it.<sup>79</sup>

It is prudent to also note here that under the provisions of Kentucky Revised Statute section 381.200, every deed, unless an exception is made in the deed, shall be construed to include all buildings, privileges and appurtenances of every kind attached to the lands therein conveyed.

### H. *Habendum*

The habendum clause in a deed is that part of a formal instrument that sets forth the estate to be held and enjoyed by the grantee, but in modern conveyancing the habendum clause has degenerated into a mere useless form in the normal case of a good, well drawn instrument.<sup>80</sup> Under the common law a man

<sup>77</sup> *Goodloe v. Wallace*, 269 S.W. 2d 718 (Ky. 1954); *Eastland v. Robinson*, 233 Ky. 403, 25 S.W. 2d 1028, 70 A.L.R. 365 (1930). See *Boggs v. Bush*, 137 Ky. 95, 122 S.W. 220 (1909) (where court found that discrepancy between deed and survey amounted to 13%, and intimated that where deficit is less than 10%, relief should not be granted, and if 10% or over relief should be granted); *Rust v. Carpenter*, 158 Ky. 672, 166 S.W. 180 (1914) ("It is a well-known rule in this jurisdiction that where, in the sale of a tract of land, there is a deficit of as much as 10 per cent or more in the quantity, the purchaser will be entitled to relief to the extent of the value of the deficit . . ."); and *Lassiter v. Farris*, 202 Ky. 330, 259 S.W. 696 (1924) (holding that a deficit in quantity of more than 10% authorized relief). As to remedy, however, see *Woods v. Mason*, 279 S.W. 2d 243 (Ky. 1955).

<sup>78</sup> *Perkins v. J. M. Robinson etc. Co.*, 124 S.W. 310 (Ky. 1910).

<sup>79</sup> *Saulsberry v. Saulsberry*, 121 F. 2d 318 (C.C.A. 6th, 1941). Although a federal case, Kentucky law was applied, and in the case the manner of bounding the right of way, as provided by law, is well described at 323.

<sup>80</sup> 16 AM. JUR., *Deeds* 471 (Sec. 53) (1938).



could not deprive his heirs of their inheritance except that he use express words, and a grant without words of inheritance operated to convey only a life estate.<sup>81</sup> Under the statute now in force in Kentucky<sup>82</sup> and in most other states, no words of inheritance are necessary to pass a fee simple title to the grantee. In general practice today, a formal habendum clause is usually inserted.

The granting clause of a deed will control in the case of an irreconcilable conflict between it and the habendum clause, but only in the case where grantor's intention can not be otherwise ascertained. The habendum clause, therefore, may result in effecting an ascertainment of the intention of the grantor.<sup>83</sup>

We might say, therefore, that a major function of a habendum clause in today's deed in Kentucky is to remedy poor draftsmanship that is not discovered until the deed is almost drawn.

### J. Signatures

An unsigned deed, though acknowledged by the grantor, is not valid,<sup>84</sup> and such is a well recognized rule throughout the United States.<sup>85</sup> There is no requirement that a signature by mark be attested by a witness before the instrument is valid, but as a matter of safety it ought to be done.<sup>86</sup>

### K. Acknowledgment

Although it is not a requirement effecting the validity of a deed itself,<sup>87</sup> for all practical purposes a deed must be acknowledged by the grantor, because the county court clerk can not record it if it is not acknowledged.<sup>88</sup> Although there are statutory alternatives of acknowledgment, the usual form of acknowledg-

<sup>81</sup> *Ibid.*

<sup>82</sup> KY. REV. STAT. sec. 381.060.

<sup>83</sup> *Stambaugh v. Stambaugh*, 288 Ky. 491, 156 S.W. 2d 827 (1941).

<sup>84</sup> *Helton v. Asher*, 103 Ky. 730, 46 S.W. 22 (1898). The decision was based upon the statute of frauds.

<sup>85</sup> 16 AM. JUR., *Deeds* 491 (sec. 92) (1938).

<sup>86</sup> *Blair v. Campbell*, 19 Ky. L. Rep. 2012, 45 S.W. 93 (1898). Aside, the court said that if there was any such requirement, the certificate of acknowledgment of the county court clerk is sufficient in that respect.

<sup>87</sup> 16 AM. JUR., *Deeds* 489-490 (sec. 90) (1938); and cases cited 2 KY. DIG., ACKNOWLEDGMENTS sec. 5 (1951).

<sup>88</sup> KY. REV. STAT. sec. 382.130-382.170.

ment is for the grantors to appear before a notary public or county court clerk and acknowledge the instrument.<sup>89</sup>

*L. Revenue Stamps*

Congress has enacted a document tax, requiring stamps on deeds, which is purely a revenue measure. The absence of the stamps neither invalidates the deed, nor makes it inadmissible in evidence.<sup>90</sup>

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<sup>89</sup> *Ibid.*

<sup>90</sup> 16 AM. JUR., *Deeds* 490 (sec. 91) (1938).