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Acceptance of Deeds

James Collier
University of Kentucky

ACCEPTANCE OF DEEDS

In the recent case of *Fitzpatrick v. Layne*,[1] A, the owner of land, was indebted to plaintiff, and wishing to secure the indebtedness, had his attorney write a deed naming the plaintiff as grantee, and left the deed with the attorney Just before his death, A got this deed and destroyed it. Plaintiff did not know of the existence of the instrument until after the death of A, whereupon plaintiff claimed the land against A's executrix, contending there was a valid transfer. Held: A's executrix keeps the land.

The Fitzpatrick case states the rule of delivery and acceptance of deeds in Kentucky The court said, in part, "The acceptance of a deed, like its delivery is a matter of intention, to be determined by the acts and words, both of the grantor and grantee in relation thereto."[2]

Kentucky follows the general rule as to delivery[3] which requires an intention on the part of the grantor, plus some indication that he is willing to part with title—whether this delivery be actual or constructive—before there can be a valid conveyance.[4]

Kentucky does not follow the common law rule of acceptance. At common law it is not necessary to show actual acceptance by the grantee to make a deed effective, although the grantee may refuse to accept the conveyance on learning about it.[5] This rule is still in effect in England,[6] and in a large number of states in this country However, these states have added the further qualification that the conveyance must be of benefit to the grantee before the presumption of acceptance will arise.[8] In Kentucky a valid transfer requires evidence of acceptance of the conveyance by the grantee with intention of retaining title in himself.[9]

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[1] 295 Ky 523, 165 S.W (2d) 13 (1942)

[2] Preston, et al. v Harlow, 276 Ky 799, 125 S.W (2d) 726 (1939) Ward v Rittenhouse Coal Co., 152 Ky 228, 153 S.W 217 (1913)

[3] 1 BL. COM. (Sharwood's ed. 1859) Book 2, 306, N. 16; EDWARDS, LAW OF PROPERTY IN LAND (4th ed. 1904) 335; CHESHIRE, THE MODERN LAW OF REAL PROPERTY (2nd ed. 1927) 661-662.

[4] Smith v Feltner, 256 Ky 325, 76 S.W (2d) 25 (1934) Thompson v. Dulaney, et al., 255 Ky 794, 75 S.W (2d) 438 (1934), Justice v Peters, 168 Ky. 583, 182 S.W 611 (1916)

[5] Thompson v Leach, 2 Vent. 198, 86 Eng. Rep. 391 (1675)

[6] 4 TIFFANY, THE LAW OF REAL PROPERTY (3rd ed. 1939) 254.

[7] Note (1927) 25 Mich. L. R. 171.

[8] Gideon v Gideon, 99 Kan. 332, 161 Pac. 595 (1916) Jones v Swayze, 42 N.J.L. 279 (1880), Michell's Lessee v Ryan, 3 Ohio St. 377 (1854). See Tiffany *Delivery and Acceptance of Deeds* (1918) 17 Mich. L. Rev 103, where the author contends the American majority rule is exactly like the English rule in spite of assertions by our courts that the conveyance must be beneficial to the grantee.

[9] Hardin v Kazee, et al., 238 Ky 526, 38 S.W (2d) 438, 440 (1931), where the words "delivery" and "acceptance" are legally defined; Kirby v Hulette, 174 Ky 257, 192 S.W 63 (1917), cited in Sullivan v Bland, 215 Ky 57, 284 S.W 410 (1926)

Thus we have three rules of acceptance:

1. The English rule—presumption of acceptance until disclaimed by grantee.[10]
2. The majority rule in the United States—presumption of acceptance if the conveyance is of benefit to the grantee.[11]
3. The minority rule in the United States (followed by Kentucky)—no presumption of acceptance. The conveyance must be shown to have been accepted by the grantee with intent to take title.[12]

It may be pointed out that where the grantee is an infant, *non compos mentis,* or a trustee,[13] the states following the minority view will presume acceptance if the transfer is beneficial to the grantee. Also it had been held in California,[14] an adherent to the minority rule, that the grantee may accept a deed after the death of the grantor where the grantee had no knowledge of the deed before the grantor's death.[15] In this respect the minority rule is similar to the majority.[16]

Kentucky followed the minority rule and reached a desirable conclusion in the case of *Bell v. Farmers' Bank of Kentucky,*[17] where the rights of a third party were asserted after the grantor had delivered the instrument to the attorney of the grantee, but before the grantee had accepted. The attorney had neither accepted as agent nor informed the grantee that the instrument was in his hands. The court refused to adhere to the legal fiction that upon the grantee's acquiescence in the conveyance the acceptance reverts back to the

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In the above cited cases, as well as in several others—Marler v A. L. Greenburg Iron Co., 216 Ky 682, 288 S.W 674 (1926) Sullivan v Sullivan, 179 Ky. 686, 201 S.W 24 (1918) the court talks about acceptance being an essential part of delivery as if acceptance is merely a subdivision of delivery Tiffany in his article on *Delivery and Acceptance of Deeds* (1918) 17 Mich. L. Rev 103, objects to this. He writes, "It is more satisfactory, conceding that acceptance is necessary, to regard it as something outside of delivery"

[10] Sigger v Evans, 5 E. & B. 367, 119 Eng. Rep. 518 (1855), where the English rule of presumed acceptance without requiring any benefits to grantee is stated.

[11] 4 TIFFANY, THE LAW OF REAL PROPERTY (3rd ed. 1939) 254 refuses to accept this rule. For a case where the conveyance failed for lack of benefit to the grantee, see Healy v Stevens, 347 Ill. 202, 179 N.E. 535 (1931)

[12] Note (1906) 19 Harv L. Rev 216; BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY (1943 ed.)

[13] Combs v Ison, 168 Ky 728, 182 S.W 953 (1916) (an infant case) The other states ruling like Kentucky use the exception of presumption in all three situations, but see Hinton's Ex'r., et al. v Hinton's Committee, et al., 256 Ky 345, 76 S.W (2d) 8 (1934) for a trustee case.

[14] Green v Skinner, 185 Cal. 435, 197 Pac. 60 (1921) Cf. Ward v Small's Adm'r., 90 Ky 198, 12 Ky Law Rep. 58, 13 S.W 1070 (1890)

[15] Note (1932) 13 Mich. L. Rev 125. Also see Kermel and Wife v Alexandra, 4 K. L. R. 142 (1882)

[16] Emmons v Harding, 162 Ind. 154, 70 N.E. 142 (1904), Weuster v Folin, 60 Kan. 334, 56 Pac. 490 (1899)

[17] 74 Ky (11 Bush) 35 (1874) Also see Commonwealth, Thompson's Heirs & c. v Jackson, 73 Ky (10 Bush) 424 (1874)

time of delivery, but construed acceptance as being at the exact moment the grantee actually consented to the transfer. The court deemed it essential for the purposes of justice that the actual time of acceptance be considered as the beginning of ownership of the grantee. Probably this same result is reached in the majority-rule states.[18]

If the American rules were interpreted literally, injustice would result in certain instances. However, the courts have shown a tendency to integrate the two rulings in order to achieve justice in particular cases, e.g., the minority holds like the majority in infant cases, and the majority holds like the minority where the rights of third parties intervene. The two American views are sufficiently flexible to allow a broad interpretation when justice demands. It would therefore appear that there is little difference in many jurisdictions in the application of these rules.[19]

JAMES COLLIER

THEORIES AS TO THE NATURE OF EQUITABLE SERVITUDES

The entire subject of equitable servitudes is somewhat confused, most of the confusion probably arising because of a failure to understand their nature. It is generally agreed that an equitable servitude is a restriction on the use of land enforceable in equity between contracting parties or their successors with notice. Their development may be accredited to judicial legislation originating with the English case of *Tulk v. Moxhay*.[1] The result in this case was obtained on the theory that the covenant should be enforced in order to prevent unjust enrichment on the part of the purchaser who presumably had paid less for the property because of the servitude. This rationalization has, however, been definitely repudiated.

Several other theories have been advanced by courts of equity in enforcing such agreements. The two theories most often relied upon by the courts are; first, such restrictions are enforceable as contracts concerning the land;[3] and second, they are enforceable substantially as servitudes attached to the land.[4]

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[18] Arnegaard v Arnegaard, 7 N.D. 475, 75 N. W 797, 41 L.R.A. 258 (1898)

[19] If the different jurisdictions are to reach the same results, facts similar to those in the principal case would perhaps cause the greatest difficulty

[1] 2 Phillips 774, 41 Eng. Rep. 1143 (1848)

CLARK, PRINCIPLES OF EQUITY (1937) 117-118; Royes v Hosegood, 2 Ch. 388 (1900)

[3] See 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1434-1438; Stone, *The Equitable Rights and Liabilities of a Stranger to a Contract* (1918) 18 Col. L. Rev 291, Ames, *Specific Performance for and Against Strangers to a Contract* (1904) 17 Harv L. Rev 174; Giddings, *Restrictions Upon the Use of Land* (1892) 5 Harv L. Rev 274.

[4] POUND, PROGRESS OF THE LAW (1918-1919) Pound, *Equitable Servitudes* (1920) 33 Harv L. Rev 813; CLARK, EQUITY (1919) 118-119; Keasbey, *Restrictions Upon the Use of Land* (1893) 6 Harv L. Rev 280; POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) Secs. 1295, 1693.