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# ACCEPTANCE OF DEEDS

ACCEPTANCE OF DEEDS.—In discussions of delivery of deeds consideration is commonly given to the element of acceptance, as if that were a part of delivery. In the ordinary case of delivery there is an acceptance by the grantee, but, it is submitted, when delivery is properly analyzed it will be found that acceptance is no proper part thereof, whatever may be said as to the necessity for assent in effectuating a change in ownership.

As has been so well pointed out by Dean Wigmore,[1] delivery is that final step, whatever it is that may be deemed sufficient, that manifests the completion or execution of a legal act, the passing from preparation to accomplishment. The deed, and the same may be said of bonds, bills, notes, etc., is the act of the grantor or party whose instrument the document purports to be, and delivery thereof is necessarily the act of that party. In its very nature it is unilateral.

If we may except those instances in which one becomes owner by force of some positive rule of law, as in the case of descent, one may not be forced at least permanently into a position of ownership. The prospective, new owner is allowed a freedom of choice, to take or reject.

In an early case[2] it was a much mooted question whether one might become an owner, or, from the other side of the picture, whether one could divest himself of his ownership, without an actual, conscious, affirmative acceptance on the part of the conveyee. It was ultimately ruled in that case that such acceptance was not necessary, that acceptance might be presumed even by one in ignorance of the attempted conveyance. Curiously the distinguished judge[3] whose dissenting opinion was approved on appeal to the

[1] EVIDENCE, 2nd ed. sec. 2408.
[2] Thompson v. Leach, 2 Vent. 198 (1691).
[3] Ventris.

House of Lords started out with the proposition that acceptance was necessary because a conveyance was a contract; he then concluded that such acceptance, however, could be presumed. This conclusion as to presumption of assent has been followed in England and by some states in this country.[4] If the conveyee dissents, the ownership which was vested in him is cast back by "remitter."[5] This presumptive acceptance has been vigorously and soundly criticized on the ground that it is absurd to indulge in a presumption of assent on the part of one who has no knowledge of the event.[6] If there had been no talk of conveyances being contracts, which certainly they are not,[7] it is possible that there would have been no suggestion of acceptance as a requisite and therefore no presumptions in that direction.

In a considerable number of states, it is held that without a showing of assent there is no operative conveyance.[8] It is interesting that in a leading case[9] holding this view the court starts off with the same fundamental mistake made by Mr. Justice Ventris, that since a conveyance is a contract there must be assent. The presumptive acceptance doctrine of the early English case, however, was rejected. According to this second view, ownership remains in the conveyor until assent by the conveyee and therefore the latter may be prejudiced by the lapse of time with intervening circumstances.

Either view presents difficulties in some situations. For example, under the first may the conveyee refuse the conveyance to the prejudice of those who may claim some rights in the land by virtue of his ownership for the time being? In *Welch v. Sackett* doubt was expressed as to how, upon the conveyor's disclaimer, the ownership could get back to the conveyor. Under the second view how would conveyances to children of tender years, insane persons, etc., be made? How does the ownership get from one to the other when there is a later acceptance?[10] And what are the rights of those who claim

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[4]Standing v. Bowring, 31 Ch. D. 286; Mallott v. Wilson, [1903] 2 Ch. 494; Gideon v. Gideon, 99 Kan. 332, 161 Pac. 595; Burch v. Nicholson, 157 Ia. 502, 137 N. W. 1066; Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525; Mitchell v. Ryan, 3 Ohio St. 377. Of course the question usually arises in those instances in which there has been a delivery by the grantor to a third party for the grantee.

[5]See 32 L. QUART. REV. 82.

[6]The leading case is Welch v. Sackett, 12 Wis. 243. See also Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46; Day v. Griffith, 15 Ia. 104; Harrison v. Trustees, 12 Mass. 456; Parmelee v. Simpson, 5 Wall. 81. Many other cases might be cited, both in this note and note 4 *supra*. See 2 TIFFANY, REAL PROPERTY, 2nd ed. sec. 463.

[7]Surely the feoffment, the grandfather, so to speak, of many of our conveyances, by no stretch of imagination could be called a contract. So with that other very common type of conveyance, the devise. There would be more reason for dealing with those conveyances derived from the bargain and sale and covenant to stand seised in terms of contract law, but in the discussions of this problem no distinctions appear to have been drawn along such lines. Under modern conveyancing it is doubtful whether the one-time contract features of these conveyances operating under the Statute of Uses are any longer significant.

[8]See cases in preceding note.

[9]Welch v. Sackett, *supra*.

[10]There is probably as much need for explaining how ownership comes to the grantee who accepts after the delivery becomes effective as there is for pointing out how ownership gets back to the grantor, under the view first suggested, upon dissent.

interests in the subject matter by proceedings against or dealings with the conveyor between the delivery of the deed and the acceptance?

In *Meade et al. v. Robinson*[11] the Michigan court had occasion to pass upon one phase of this vexing question. An old lady, owner of a tract of land, had a realtor prepare a deed thereof in favor of her daughter, but reserving a life estate. The scrivener at the direction of the grantor had the deed recorded. She further directed him to keep the deed, after its recordation, until her death, when he was to give it to the grantee, in the meantime, however, keeping secret the execution of the instrument. Some years later the grantor, unmindful of this deed, sold the premises to the husband of a granddaughter. Upon performance of the terms of sale, a deed was made to this second grantee who learned of the earlier deed only when an examination was made of the records preparatory to a sale. In an action by the second grantee against the grantor and the first grantee both defended, the former alleging procurement of the plaintiff's deed by fraud, but this was not proved. The court held in favor of the plaintiff, first, following that line of authorities to the effect that a conveyance is effective only on actual acceptance, second, considering the plaintiff's rights, "founded on good faith and a valuable consideration" superior to those of the grantee in the earlier deed.[12]

While it is believed, as indicated above, that the view that acceptance is not essential to a conveyance is preferable, still the court in following the contrary doctrine probably aligns itself with the more commonly accepted view. But what of the conclusion that the transaction with the plaintiff cut off the first grantee's power or privilege of acceptance?

Is not the situation here presented fairly analogous to the common one arising out of escrow transactions? If A executes a deed by delivering it in escrow it is substantially agreed that the grantee upon performance of the escrow conditions acquires the ownership not only as against the grantor who may in the meantime become incompetent, his heirs or devisees, in case of his death, but also against others who may have acquired rights in the land between the time of delivery and the performance of the conditions. Such grantee's rights, however, are not good against intervening bona fide purchasers.[13] It would seem that under the view of the necessity of assent applied in the principal case the delivery of the deed should operate to create in the grantee a power —by acceptance—to draw the ownership out of the grantor, just as the performance of the escrow conditions operates to draw over the ownership. As in the escrow cases this power should be effective even as against intervening rights claimed by parties standing no more favorably than the grantor. Since the first deed in the principal case was on record might it not more reasonably have been concluded that the second grantee took with notice?

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[11]234 Mich. 322, 208 N. W. 41 (1926).

[12]In Mitchell v. Ryan, 3 Ohio St. 377, a father made a deed in favor of his daughter and delivered it. Nevertheless he later sold the premises to a purchaser who apparently knew nothing of the earlier deed. The daughter died without learning that a deed had been made in her favor, yet the court held that deed effective against the later grantee.

[13]This general question is fully discussed in 26 HARV. L. REV. 565. See, too, 16 MICH. L. REV. 569. In the escrow cases the priorities are worked out in terms of relation—back of the operation of the deed.