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Deed of Conveyance of Land in Kentucky

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where the prospective law student may receive his preparatory work
before beginning the study of law. We have strong Law Schools within
our State where the proper training in law can be had, and for those
who may not attend a Law School, there can be found in most every
county, well trained lawyers who are willing to give of their time and
learning, to properly teach such students, to enable them to meet the
requirements for admission to the bar.

When Kentucky builds up this branch of learning the whole educa-
tional scheme will take on the appearance of modern progress. This
branch of learning is the last to start. It should have been the first.
It should be advanced from the rear ranks to the foremost position
which is the proper place for the lawyer.

A bill will be introduced during the first week of the next session
of the Kentucky General Assembly, setting forth in substance the above
recommendations, and all the members of the profession as well as
those who feel an interest in the profession or an interest in the gen-
eral advancement of the State, should lend a helping hand in order to
secure the enactment of the bill into law.

DEED OF CONVEYANCE OF LAND IN
KENTUCKY.

By JUDGE LYMAN CHALKLEY

Professor of Law, State University of Kentucky, College of Law.

The statute of Kentucky has recognized and affirmed the operation
of the Statute of Uses in three conveyances, viz; the deed of bargain
and sale, the deed of release, the deed of covenant to stand seised. The
statute, enacted in 1873, (Carroll’s Statutes, Sec. 491, provides:

“All deeds of bargain and sale, deeds to stand seised to use,
deeds of release and deeds of trust, shall be held to vest the pos-
session of the grantor in the grantee to the extent of the estate
intended to be conveyed.”

This statute supersedes the statute of 1843, which enacted as
follows: (Stanton’s Revised Statutes, 182, Vol. 1, P. 270):

“Conveyances by deed of bargain and sale, or deed of release,
or by covenant to stand seised to use, or deed operating by way
of covenant to stand seised to use, or by grant, shall be held to
transfer the possession of the bargainor, releasor, covenantor, or
grantor, to the bargainee, releasee, grantee, or person entitled to
the use for the estate or interest which he has or shall have in
the use and intends to convey.”

The statute of 1843 superseded that of 1796, which was as follows:
(Littell’s Laws of Kentucky, Vol. 1, P. 572):

“By deed of bargain and sale, or by deeds of lease and release,
or by covenant to stand seised to use, or deed operating by way
of covenant to stand seised to use, the possession of the bargainor,
releasor, or covenantor, shall be deemed heretofore to have been
and hereafter to be transferred to the bargainee, releasee, or per-
son entitled to the use of the estate or interest which such person
hath or shall have in the use as perfectly as if such bargainee,
The statute of 1796 was a re-enactment of the Virginia statute to the same purport of 1792.

"The statute of uses of Henry VIII was a part of the colonial law of Virginia, but the revised statutes of Virginia, since 1792, adopted as a substitute the provisions which only execute the seisin to the use in the case of deed of bargain and sale, of lease and release, and of covenants to stand seised to use. The statute only executes the seisin to the use in those specified cases, and does not, like the English statute, include every case where any person should stand seised to the use of any other person." (Note to Kent's Commentaries, Eleventh Edition, Vol. 1, P. 188, citing Lomax's Digest of the laws respecting real property.)

The statute of uses of Henry, which was a part of the laws of colonial Virginia, and became to this limited extent a part of the law of Kentucky by the statute of 1796 and has been continued to the present time through the statutes of 1843 and 1873, is as follows, (redundant expressions eliminated):

"Where any person * * * * is seised * * * * of and in any lands, tenements, * * * * or other hereditaments, to the use, confidence or trust of any other person * * * * by reason of any bargain sale," feoffment, fine, recovery, covenant, contract, agreement, * * * * that in every such case, all and every such person that have any such use, confidence or trust in fee simple, fee tail, for term of life or for years, or otherwise * * * * shall stand and be deemed and adjudged in lawful seisin, estate and possession, of and in the same lands, tenements, or other hereditaments * * * * to all intents, constructions and purposes in the law, of and in such like estates as they had in the use in the same: and that the estate, title, right and possession that was in the such persons that were seised of any lands, tenements, or hereditaments, to the use, confidence or trust of any such person, be clearly deemed and adjudged to be in him or them that have such use, confidence, or trust, after such quality, manner, form and conditions as they had before in the use, confidence or trust that was in them."

The difference, it will be noticed, between the original statute of uses, and the Virginia and Kentucky statutes, is that, while the original provides for the operation of the rule in all cases where one is seised to the use of another "by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement," the latter only does away with the necessity for livery of seisin,—or delivery of possession—in case one is seised to the use of another by reason of a bargain and sale, lease, covenant to stand seised. Broadly, the original statute provides that where a use is raised by any form of agreement, then the possession is passed without livery, while the Kentucky statute gives that operation and effect only to cases where the agreement is by bargain and sale, lease and release, covenant to stand seised. Thus, contrary to the provisions of the original statute, no agreement to convey but the three mentioned, i.e., bargain and sale, lease and release, covenant to stand seised, will under the Kentucky
statute, operate to raise such a use as will be executed by the statute of uses, by transmutation of the possession without livery.

It will be noticed also that the original statute of Henry does not recite the lease and release, or the release. These are first mentioned in the Virginia and Kentucky statute of 1792 and 1796. In these statutes are included the deeds of lease and release. In the act of 1843, the recital is of a "deed of release." It must be noted, however, that this statute (granting that any effect can be given to it; it is unintelligible) makes a radical change in the law, in that it, in effect, provides that land shall lie in grant. If land lies in grant as well as in livery, then the deed of release will be as effectual as any to bring about a conveyance of the entire title. This statute was in effect from 1843 to 1873. The present statute, however, omits the words "or by grant," but does not return to the lease and release. This leads to a very complicated situation. It is submitted that the word "release" in the statute of 1873 should be read in the light of its historical setting, and thus be confined to the second of the two deeds which operate under the statute of uses by way of bargain and sale for a term which puts the bargainee in possession, whereupon the owner of the freehold may release to him. For which reason (if the difficulty can be solved at all) the release would not be effectual except where the releasee was already in possession. The release at common law does not permit of livery as the releasee is already in possession, and consequently no question as to transmutation of possession is involved which would warrant its being classed with instruments whose purpose is to accomplish livery of possession. See Minor and Wurtz Real Property, Sec. 976. It is certain, however, that land does not lie in grant in Kentucky at present, (with the possible exception of the deed of trust), and never did lie in grant except between the years 1843 and 1873.

It is necessary to the raising of a use by any of these agreements, that the agreement be supported by a consideration actually paid, or in the case of the covenant to stand seised, by a good consideration. See Graves Real Property, Sec. 115. Without such consideration, the deed is void as a conveyance.

It will thus be seen that the only modes by which the conveyance of the complete title to land can be accomplished under the Kentucky statute, without livery of possession, are confined to the agreements to convey by bargain and sale, (lease and) release, covenant to stand seised, and the trust, in every case, supported by sufficient consideration and reduced to the form of a deed. The transmutation of possession to the bargainee is accomplished by operation of the statute without actual delivery. Such has always been the law of the state with the exception, perhaps, of the period from 1843 to 1873.

The "deed of trust" was included for the first time, in the statute of 1873. It apparently is to be confined to the active trust and appears to recognize that land lies in grant for the purpose of a conveyance in trust.

For all these instruments of conveyance there are proper "operative words," settled by long usage and recognition by the courts, by
which the purport of the instrument and the intent of the parties will be disclosed, and, when used, require no further evidence. In the case of bargain and sale, the words "bargain and sell": in the release, "re-"mised, released, and forever quitclaimed": in the covenant to stand seised, "covenant to stand seised": in the grant, (deed of trust) "give and grant." These specific words are not essential, but if they are used, then further question will arise as to the purport and intent. They may be supplied by other words, synonymous or equivalent, but where this takes place, it gives rise to the need of evidence or construction. That the forms of these deeds in common use at the dates of the enactments are thereby made statutory forms can hardly be doubted. That the exact form shall be followed, however, is not essential under the peculiar wording of the statute which, at most, is permissive. The more difficult question presents itself: What is such a substantial compliance with the usual form as to phraseology and structure as will meet the requirement?

In the case of HOWE vs. WARNOCK, 4 Bibb, 234, decided in 1815, the form of the instrument was as follows:

"That the said W has bargained and sold to the said H a certain tract of land lying in Greenup county on the Little Sandy river, which said tract of land, the said W pays the said H as locator, and hereby conveys, etc."

The question raised was whether there was any consideration sufficient to support a bargain and sale. The court held that the word "pays" imports a valuable consideration, and sustained the instrument as a bargain and sale. In order to reach this conclusion, however, the court took judicial notice that it was customary to "pay" for the services of a locator in land; and also presumed that the recital necessarily indicated such a transaction in this case—both violent assumptions at best. The word "pays" imports a past or executed consideration and a discharge of the obligation arising therefrom which would not be sufficient to support a present agreement to convey upon a present consideration.

In BEALLE vs. SCHOAL, 1 Mar. 475, decided in 1819, the instrument was:

"Whereas, I, W. B., hath this day sold unto S, two half acre lots in Bardstown, etc."

The court held that this was an acknowledgement by B that he had sold, from which acknowledgement, there was to be inferred, a contract to convey. The court illustrated its position by the expressions in common use that a man has "sold and conveyed" and "sold but not conveyed." This implies that the conveyance is an independent act on the part of the grantor, apart from, and in addition to, in furtherance of, his contract to convey; that is, that the grantor, must first make a contract to convey, and then by some act of his own, bring about the actual transmutation of possession. The court said: "The instrument certainly is not as explicit as it might have been: but we think the recital by Bealle, that he "hath this day sold unto Thomas School two half acre lots" must be construed to amount to a covenant to convey the lots. Whatever may be the acceptance of the term sold when used in a tech-
nical sense, it is clear, that in its popular acceptation it implies, when 
used in relation to real estate, that there was a contract to convey. And 
hence we hear it said every day, not only by the unlearned, but by 
the learned, that a man has "sold and conveyed" or that he has "sold, 
but has not conveyed." Thus, plainly using the terms sold and con-
vveyed, contradistinguished from each other, and referring, by a former, 
to the executory, and by the latter to the executed contract. When, 
therefore, Bealle says he had sold, he must be understood to mean that 
he had agreed to convey, and not, as contended by his counsel, that he 
had conveyed."

Such a holding is founded upon a total misapprehension of the 
operation and effect of the deed of bargain and sale. The conveyance, 
that is, the transmutation of possession, follows the contract to convey, 
by operation of the statute, and is not the act of the grantor. Both 
this case and that of HOWE vs. WARNOCK seem to proceed upon the 
theory that land lies in grant which was not the case at that time.

In the case of PATTERSON vs. CARNEAL, 3 A. K. Marshall, 618, 
decided in 1821, the circumstances were these. Patterson was mort-
gagee of lands mortgaged to him by C. P secured a decree of fore-
closure, but before the commissioners acted, P endorsed on a copy 
of the decree "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 James Coleman, all my rights, title, claim and interest in 
the said decree and all my right and title in and to the mortgage and 
the mortgaged property therein specified, and do hereby authorize 
the said James Coleman, in my name and for me, to act in the premises 
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 pur- 
pose of obtaining the amount of the said decree." Here the court 
held unequivocally that the word "convey" constituted a grant and 
accomplished a transfer of the title and possession to Coleman. But 
land did not lie in grant at that time.

In YOUNG vs. RINGO, 1 T. B. Mon. 30, decided in 1824, the 
deed used the words "and the said R. in consideration of the services 
* * * * doth hereby give, grant and convey, unto the said M and J 
and their heirs, jointly * * * * " The court said:

"That the instrument in question must have the effect of con-
vveying the legal title, cannot, we think, admit of a reasonable 
doubt. It is not, indeed, drawn with technical skill, nor clothed 
in all the formalities which an artful scrivener would have be-
stowed upon it; but the intention of the parties to convey the 
legal title is obvious, and the words used are apt and sufficient 
in law for that purpose. The words employed, "give, grant and 
convey," are as comprehensive as any which could have been em-
ployed, and are as efficient in law to transfer the title."

There is no pretense in this case of the conditions necessary for 
the operation of the statute, and it cannot be construed otherwise than 
as a grant. Moreover neither the form of the bargain and sale nor 
the statute requires any expression or exhibition of intention to make 
a conveyance. The word "intended" in the statute, qualifies land, but
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has no reference to any state of mind on the part of the grantor essential to the operation of the conveyance. The statute will operate in invitum.

In the case of BRECKINRIDGE vs. ORMSBY, 1 J. J. Mar., 224, decided in 1829, the court indicates the same view when it says:

"In this country, there is no livery of seisin. A deed, when delivered, passes the whole right, has the same effect here to pass the title, that a feoffment with livery had in feudal times."

That each of the deeds mentioned in the statute will have this effect by force of the statute, is undoubtedly true; but that any deed, ex vi termini, will have this effect, is not warranted.

In CHILES vs. CONLEY'S Heirs, 3 Dana, 21, decided in 1834, the instrument was:

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

(Signed) WILLIAM BRIDGES. (SEAL).
J. R. BOYD.

The court said:

“The literal import of this writing is that of an executed agreement or conveyance of the title which the vendor held. It contains all the essential requisites of a conveyance in fee simple. It is informal and unusually summary, when compared with the redundant, quaint, and prolix style of modern conveyances by deed * * * * It is sealed and signed and attested properly; it shows a valuable consideration; it identifies the parties; describes the land and acknowledges an absolute executed sale in fee of the vendor's right. These constitute a deed of conveyance; and * * * * this court cannot by any allowable process of interpretation, give to it any other character or effect than those of a deed of bargain and sale.”

Apparently a modest and true deed of bargain and sale, pure and simple, operating under the statute, caused doubts on account of its singularity.

In the case of FRY vs. SMITH, 2 Dana, 38, decided in 1834, the instrument purporting to be a conveyance, as well as can be made out from the report, “grants and conveys the land to the Vaughans and Flatt, to be held by them and their heirs, to their own proper use and behoof, with a declaration on the part of the Vaughans that their names are used in trust only, and to and for the use of Flatt.” There were two Vaughans. The purchase price was paid by Flatt alone. From the meager statement by the court, it is impossible to arrive at any fair understanding of the material facts. But enough appears to show that if the deed contained the words “grant and convey,” the court proceeded on the theory that land lay in grant. If the conveyance was by a sufficient bargain and sale, indicating a use in Flatt in the two-thirds conveyed to the Vaughans, then there was here a use upon a use and the court properly refused to execute the second use. The case is instructive as showing that the court was still of the opinion that land lay in grant; and also, inferentially, that the court would enforce the principle of the statute of uses in a proper case.
There is a distinct lull in the controversy about the sufficiency of the deeds of conveyance from this time until 1892. It will be remembered that in 1843, the second statute was enacted which declared, in effect, that land lies in grant. This was, no doubt, a legislative declaration of the law to be what had been repeatedly laid down by the courts. Very few questions of sufficiency could arise under such a statute. If the words "grant and convey" or their equivalent, were used, the statute would operate or the possession be transferred by force of the statute. The statute is, however, unintelligible by reason of the addition of the words "and intends to convey." There is no subject to the verb "intends." The statute has not been construed by the court, which might, without too great stretch, disregard these last words. In such a form, there are two changes to be noticed: The introduction of the words "or deed operating by way of covenant to stand seised to use," and the words, "or by grant." As the "grant" does not require either consideration or the effect of the statute of uses to effectuate a transmutation of possession, it is plain that the legislature mistook the meaning and operation of the statute of uses and the statute of 1796. There is no such relationship between the deeds of bargain and sale, lease and release, and covenant to stand seised, on the one hand, and the "grant" on the other, as to warrant their being grouped together. It would be difficult to escape the conclusion that the legislative intent was to carry into effect by enactment what had already been decreed by the courts, in effect, namely, that land lies in grant as well as livery. It will throw light upon the controversy that Virginia, about the same time, enacted that lands should lie in grant as well as in livery.

This statute of 1843 was superseded in 1873 by the present statute, which omits the objectionable features of the former enactment and returns to the form of that of 1796 except that it retains the "release" instead of "lease and release" and inserts "deeds of trust." This statute, as well as the preceding, the courts do not seem to have taken seriously.

In the case of DUMESNIL vs. DUMESNIL, 92 Ky. 526, decided in 1892, the court said:

"The English doctrine of uses, and as introduced into this country, is very complicated and many of its rules exceedingly technical. We shall not attempt to review them, although the counsel for appellants have done so in an interesting brief showing great research and learning. The law upon this subject has been greatly simplified by decisions and statutory provisions. For the most part, the refined distinctions of the ancient law as to conveyances of different descriptions have been swept away and technical rules relating to them are no longer in force.

"Thus, the general statutes, ch 24, sec. 3, provides, (Carroll's Statutes, 1909, sec. 491):

"This statute swept away all the ancient and technical distinctions between the different kinds of conveyances as to the transmutation of possession."

It is fortunate for Judge Holt's reputation that his remarks were only obiter, and the evidence of the generosity of a kind heart which bleeds at being compelled to laugh out of court misguided
counsel who insist upon pester ing the court with the results of great research and learning. The question was not whether "the law upon this subject has been greatly simplified in this state by decisions and statutory provisions," but how such simplifications affected the law governing the cause, and counsel were entitled to a fair hearing upon that.

In E. J. COAL COMPANY vs. JONES, 141 Ky. 306, decided in 1910, the facts were that in February 1889, three of the heirs of R (all married) out of five heirs, united (but without joining their spouses) in a conveyance to Bays of their interest in their ancestor's land. There were other conveyances also imperfect and defective as conveyance of the whole title. In 1896, all the five heirs united in one deed which had the following recitals:

"Now in order to correct and make good said conveyances, they each, together with their respective husbands and wives, join in this deed * * * * now, therefore, in order to correct all errors and imperfections in former deeds made by any of the parties of the first part herein, and K, party of the second part,—Witnesseth, that parties of the first part, have sold, and by these presents, grant and convey, to the party of the second part, and his heirs, all our respective interest and etc."

The court said:

"A deed need not contain words of conveyance. It is sufficient if it contains other words of equivalent meaning, and when the writing recited the making of a former deed and then sets out that it is made to correct and make good the former deed, this is all that is required" * * * * and, "But the recital of an agreement in a deed, is, in law equivalent to an agreement made by the deed, and hence it is said that upon such recited agreement, an action of covenant will lie. (Quoting Bank of Kentucky vs. Vance, 4 Litt. 168.) And, "While the language used does not purport a conveyance of the Bays land (deed of 1889) by this instrument; it constitutes a statement in writing that they have sold and conveyed the land to Bays, and they stipulate that they join with their husband in this deed, in order to correct and make good the previous deed. Mrs. Jones could not demand from Bays the land that she had sold to him without returning the consideration which he paid her, and so this money which was then in her hands, was a sufficient consideration to support the agreement contained in the writing in question."

The language and position of the court are far from being free of difficulty, but it reasonably appears that the purpose of the court was to work out an agreement to sell supported by a valuable consideration, in other words, a bargain and sale, which would operate under the statute to carry the possession. The success of the judge in making out a sufficient agreement may be open to question, but the words and reasoning of the opinion, disclose the old vice of supposing that the conveyance is a thing to be done by the grantor separate and apart from the agreement to sell. The conveyance of the possession is, of course, accomplished through the operation of the statute, and not through the act of the party and even if the agreement is established, the consideration was a past one and would not support a present agreement. Moreover, there was no consideration ever paid to the husband and wife who did not join in the deed of 1889 and the posi-
tion of the court fails as to them. It seems more consistent that the parties granting intended a release, which, upon the authority of Conn's Heirs vs. Manifee, 2 A. K. Mar. 396, will operate as a bargain and sale if supported by a consideration, or at common law and under the statute, will carry over the possession without consideration.

From this survey, it appears that the judicial mind has been uniformly obsessed, from the beginning to the present, by the false premise that a deed in any of the forms mentioned in the statute is in itself a conveyance and conveys. In fact, the deed and its efficiency to bring about a transmutation of possession are distinct and separate processes. The deed is essential to set up the conditions under which the statute conveys, and, those conditions being established, the statute alone brings about the conveyance. The deed is the form in which the law requires a contract to convey, executed on one side by payment of the consideration, to be clothed. This being established, the legislature declares through the statute that the actual conveyance takes place. The use of the word "convey" in such a deed can only have the effect to indicate the intention of the parties to have the statute act, which is entirely superfluous, as the statute will act under the proper conditions whether the parties intend it or not. It is the will of the legislature that brings about the conveyance and not that of the parties. The declaration of the legislative intent removes the necessity for any act or ceremony or declaration by the parties. The grantor contracts; the legislature conveys.

THE NEW FEDERAL EQUITY RULES.

The new rules of practice for the United States Courts of Equity, which have been in preparation for more than a year, became effective February 1, 1913. This is one of the most important changes in procedure that has ever been made. Judge Amidon of the District of North Dakota, calls the attention of the profession to the importance of the change in rules:—"The new rules as a whole, constitute a splendid piece of constructive work. They will be a vital force in the courts whose practice they define. After they take effect, counsel cannot safely take a single step in an equity cause without consulting their provisions."

The rules superseded were those of 1842, which have stood almost wholly unchanged for three quarters of a century, although they themselves had been for the most part an elaboration of the first Federal Equity rules adopted in 1822.

The ordinary practitioner has had to brush up his knowledge of this special practice for every case on the equity side in the Federal Courts, doubling his labor. He will scarcely be relieved of this burden by the new rules, though it may be lightened. The rules just adopted tend to simplicity and the elimination of delay by doing away with many of the technicalities which have obstructed the direct,