Maryland Law Review

Volume 12 | Issue 2 Article 6

Absolute Necessity of Acknowledging a Deed of Gift in Maryland - Berman v. Berman

ABSOLUTE NECESSITY OF ACKNOWLEDGING A DEED OF GIFT IN MARYLAND

Berman v. Berman[1]

Meyer Berman was the owner of nine leasehold lots. Desiring to make a gift of these leaseholds to his two nephews (plaintiffs in the subsequent litigation), he signed, sealed and delivered to the nephews a deed purporting to convey the lots to them. The conveyance was intended as a gratuitous gift and was so declared by the grantor to one Weinberg, who witnessed the instrument. Approximately three months later, Mr. Berman died. By his will he bequeathed all his personal property to his "estate". An estranged wife and a brother, Jacob, were the nearest kin of the deceased. The deed to the nephews had not been acknowledged or recorded at the time of Mr. Berman's death. Following his death, the nephews filed a bill in equity, asking a decree declaring the deed in question to be an absolute and irrevocable gift of the lots therein described, for an accounting, and for further relief. The estranged wife, individually, and as administratrix, c.t.a., together with the brother, Jacob, were named as respondents in the bill. To this bill the widow of Mr. Berman demurred, and the court sustained the demurrer. When plaintiffs declined to plead further, the Circuit Court No. 2 of Baltimore City dismissed their bill. Upon this action—the sustaining of the demurrer and dismissal of the bill, — the plaintiffs took an appeal,[2] and the Court of Appeals affirmed. The decision evinces an extension of the Maryland rule exacting a strict compliance with the conveyancing statutes[3] in order to effect a valid conveyance in the case of a deed of gift.

In affirming the decision of the lower court, the Maryland Court of Appeals cited the Maryland statutory requirements that:

> "No estate of inheritance or freehold, or any declaration or limitation of use, or any estate above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged and recorded as herein provided; . . ."[4]

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[1] 69 A. 2d 271 (Md. 1949).

[2] *Ibid.*

[3] Md. Code (1939 and Suppl.), Art. 21.

[4] Md. Code (1939), Art. 21, Sec. 1.

and

> "Every deed of real property, when acknowledged and recorded as herein directed, shall take effect as between the parties thereto from its date."[5]

The Court did not mention an equally pertinent statutory stipulation:

> "No deed of real property shall be valid for the purpose of passing title unless acknowledged and recorded as herein directed."[6]

The Court of Appeals stated that the two sections which it cited were "plain and unambiguous", that the deed which was unacknowledged and unrecorded was void and passed no title, and that there can be no delivery to effectuate a gift if the written instrument relied on to evidence the gift is void, even though, at the time of delivery of the void instrument, the donor proclaims his intention to effectuate a gift.

It must be remembered, as the Court recognized, that the instrument in order to be effective at all had to be valid as a deed. In many cases it is possible for a court of equity to regard such an instrument, although unacknowledged or otherwise invalid as a deed, as a contract to convey and grant specific performance of the contract, by ordering the grantor, or his estate, to execute a valid and effective deed.[7] But in order for Equity to so treat it, there must be consideration for the conveyance. If actual value was paid to the grantor, or, if the grantee, relying on the deed, had entered into possession of the premises and expended money for improvements thereon, that would be a sufficient consideration for equity to enforce the instrument as a contract to convey.[8] But no such element was present in this case; the deed was admittedly gratuitous, and there was no making of improvements by the grantees, nor did they even enter into possession. The case, therefore, makes it plain that the Maryland rule is that the acknowledgment is an essential part of the deed, and that without it the instrument is invalid and void, *even as between the parties.*

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[5] Md. Code (1939), Art. 21, Sec. 15.

[6] Md. Code (1939), Art. 21, Sec. 16.

[7] See Price v. McDonald, 1 Md. 403 (1851), in which the Court recognized the power of a court of equity to enforce a deed defectively acknowledged or recorded, except as against a *bona fide* purchaser.

[8] See Schluderberg v. Dietz, 156 Md. 547, 144 A. 774 (1929), with respect to possession and Hall v. Sharp Street Station, 155 Md. 654, 142 A. 508 (1928), with respect to improvements.

The rule in most jurisdictions of the United States is otherwise. In a majority of the States, the acknowledgment is not an essential part of the deed of conveyance, but is merely a pre-requisite to recording.[9] Under this theory, an unacknowledged deed is a valid instrument. Being unacknowledged, it is not entitled to recording, and hence constructive notice of the transfer of title cannot be given. Therefore, as a practical matter, an acknowledgment, under the majority rule, would also be required so that the instrument could be recorded and the conveyance thereby given protection through the doctrine of constructive notice. But, under this view, an unacknowledged deed even while unrecorded is effective between the parties to it, and enforceable against the grantor, his heirs and privies. In a majority of the American jurisdictions, therefore, the unacknowledged and unrecorded deed in the *Berman* case would have been valid as against the grantor, his heirs, or the administratrix or other representatives of his estate.

Thus it is obvious that the Maryland rule, as indicated in this case, follows a strict minority view. The leading case on the strict view is *Lewis v. Herrera.*[10] In that case Lewis made a deed of gift to his wife. The deed was not acknowledged. Lewis subsequently became insolvent and a judgment of record was obtained against him by the receiver of a bank. Lewis then acknowledged the deed. The court there held that the deed, as originally given, was, for lack of acknowledgment, ineffective to convey title and that before the deed was acknowledged the litigation instituted by the Bank had removed it from his power to convey. The case is not as clear-cut as the Maryland case and is further complicated by an Arizona statute which stated that such a deed, not for valuable consideration, would be void unless the grantor was possessed of sufficient property to pay his existing debts. On appeal, the decision was affirmed by the U. S. Supreme Court.[11]

In Alabama[12] and Ohio[13] it has been held that an acknowledgment is an essential part of the instrument, and

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[9] See cases collected in 1 C. J. S. 780, Acknowledgments, Sec. 6, ns. 29, 30, 31; 1 Am. Jur. 323, Acknowledgments, Sec. 17, n. 13. See also 1 C. J. S. 781 (n. 46), which indicates that where recording is essential to validity and an acknowledgment is necessary to validly record, failure to acknowledge may prove fatal indirectly.

[10] 10 Ariz. 74, 85 Pac. 245 (1906).

[11] Lewis v. Herrera, 208 U. S. 309 (1908).

[12] Chadwick v. Carson, 78 Ala. 116 (1884); Watson v. Herring, 115 Ala. 271, 22 So. 28 (1897).

[13] Smith's Lessee v. Hunt, 13 Ohio 260 (1844).

yet it is doubtful whether those courts would hold such a deed invalid as against the grantor and his heirs.

In considering the desirability of the strict Maryland rule, it is interesting to note that acknowledgments were unknown at common law. The acknowledgment came into being as commonly desirable to identify the grantor following the enactment of the Statute of Enrollments in England.[14] Although the Statute of Enrollments was not adopted in the United States and has long since ceased to be of any importance in England following the development of the lease and release method of conveying, acknowledgments are still in common use in the United States.

In Illinois the requirement of an acknowledgment on a deed was challenged as an unconstitutional impairment of the right to contract, but the court easily answered this by pointing out that the Legislature could require an acknowledgment of certain types of contracts, just as the right to require a seal upon certain types of contracts had always been admitted.[15]

Maryland also follows a strict view in regard to the necessity of recording. While at common law in England there was no requirement of recording of deeds, such recording has been required in this country since an early date.[16] It should be remembered that the main purpose of recording is to apprise third parties (prospective purchasers, mortgagees, etc.) of the status of the title. Against this background, the Maryland law is strict when it requires:

> "Every deed of real property, when acknowledged and *recorded* as herein directed shall take effect as between the parties thereto from its date."[17] (Emphasis supplied).
>
> "No deed of real property shall be valid for the purpose of passing title unless acknowledged and *recorded* as herein directed."[18] (Emphasis supplied).

In construing these sections, the Maryland Court of Appeals has said:

> "The recording is the final and complete act which passes the title, until this is accomplished everything

[14] Statute of Enrollments, 27 Henry VIII, c. 16.
[15] Parrott v. Kumpf, 102 Ill. 423 (1882).
[16] For a compilation of requirements, see 45 Am. Jur. 434-5, Records and Recording Laws, Sec. 28.
[17] *Supra*, n. 5.
[18] *Supra*, n. 6.

> else is unavailing. As the recording is necessary to the passing of the title, it must follow as a matter of course that until the recording takes place, the title remains in the grantor. The registered deed shows the title; whatever other rights may arise from the unregistered deed, it cannot effect a transmission of the legal title. . . . The faith and credit which the law intends to give to the registry would be greatly weakened if at any moment there could be a legal title by deed, which did not appear upon the registration records."[19]

The Court is here speaking of *legal* title and it would follow in the *Berman* case that even if the deed had been acknowledged, still it would not pass legal title in Maryland if not recorded. The *equitable* title would pass, but, as was pointed out, there was no consideration or other element present to justify equity acting to convert this equitable title into a legal title. Of course, as a practical matter, if there had been an acknowledgment, but not a recording in the *Berman* case, legal title could have been transferred by the simple act of recording the deed at any time prior to trial. For, the recording may be made by anyone and need not be made by the grantor. This is a basic difference between the strict requirement of an acknowledgment and the strict requirement of recording as essential to pass title — the recording, which may be made by anyone, may be made after the death of the grantor; but the acknowledgment can be made only by the grantor, and his death, without acknowledging, means that in Maryland the legal title can never be transferred, except in those cases where equity can act to perfect it. The Maryland rule, therefore, would plainly seem to be that where there is an unacknowledged deed of gift, and the grantor is dead, and there is no ground for equitable intervention, the deed must fail completely.

But there is one other possible way of perfecting such an unacknowledged deed as was present in the *Berman* case, and it would have been most interesting if this means had been attempted in that case. This way is through the medium of the Curative Acts,[20] and whether or not they would perfect the deed in this case would depend upon two questions concerning the Curative Acts which have not, as yet, been determined in Maryland. Would it have been possible for the grantees under the unacknowledged deed,

[19] Nickel v. Brown, 75 Md. 172, 186, 23 A. 736, 739 (1892).
[20] Md. Code (1939 and Suppl.), Art. 21, Secs. 102, 103, 107.

instead of filing their bill in Equity to have their title established, to have waited until the enactment of the next Curative Act, and then to have submitted the deed for recording, on the theory that the Curative Act had cured the lack of acknowledgment? If the Recorder refused to record the deed, the grantees could have sued out a writ of mandamus to compel him to record it. If the mandamus were contested we would then have drawn into issue the two doubtful questions regarding the force and effect of the Curative Acts. The two questions are: (1) Whether the Curative Act operates only upon *recorded* deeds or whether it could operate upon unrecorded deeds as well; (2) Whether the Curative Act cures only defective acknowledgments or whether it would cure the total lack of an acknowledgment.

Looking to the history and nature of the Curative Acts we find that the Curative Acts are attempts, by the Legislature, to cure certain defects in deeds and other instruments so as to afford greater certainty to the merchantability of title. In Maryland these acts originated as private Curative Acts, passed at the instance of individual citizens to cure defective deeds which they held.[21] These were subsequently developed into blanket Curative Acts which operate upon all deeds and other instruments within the scope created by the Legislature. The Acts are retrospective and operate only upon instruments which have been executed prior to the enactment of the Curative Act. For this reason the Acts must be re-enacted periodically so as to take effect upon deeds which are executed subsequent to the passage of the then current Act. At present the Maryland Curative Acts are re-enacted every other year. In the *Berman* case the deed was executed in March of 1948, and the grantor died in June of 1948. Therefore this deed was executed subsequent to the Curative Act which became effective June 1, 1947 and it would have been necessary to wait until June 1, 1949 for the next Curative Act to operate upon it.[22] The question then is, could the Curative Act have operated upon it?

The first problem is whether the Curative Acts may cure unrecorded deeds. Generally speaking, a curative act is capable of curing any defects within the scope created

[21] See Lessee of Dulany et al. v. Tilghman, 6 G. & J. 461 (1834), in which the Private Curative Act of 1787 is discussed.

[22] See Md. Code Supp. (1947). The current Curative Statutes constitute Chapter 159, Laws of Maryland, approved March 31, 1949, to take effect June 1, 1949, repealing and reenacting Art. 21, Secs. 102, 103 and 107, which sections were effective since June 1, 1947.

for it by the Legislature. The scope of an act, therefore, depends upon the language therein.[23] There are several Curative Acts, in Maryland, intended to cure various types of imperfections,[24] but the language of the Curative Act pertinent to the deed in question would seem to be broad enough to permit the Act to operate upon unrecorded deeds. Concerning recording the Act is worded in the disjunctive and reads:

> "All deeds, mortgages, releases, bonds of conveyances, bills of sale, chattel mortgages and all other conveyances, of real or personal property, or of any interest therein or agreements relating thereto, which may have been executed, acknowledged *or* recorded in the State subsequent to the passage of the Act of General Assembly of Maryland, passed at its January session, 1858, Chap. 208, which may not have been acknowledged according to the laws existing at the time of said acknowledgment . . . are hereby made valid. . . ."[25] (Emphasis supplied).

It appears, therefore, that this Act does not require that the deeds be recorded, and this contention is strengthened by a comparison of this section with the Curative Acts in Secs. 102 and 107 of Article 21, both of which expressly require that the instrument be "recorded".[26]

Turning to the second problem, whether the Curative Act will cure a total lack of acknowledgment, the situation is more complicated. The pertinent Maryland Act[27] covers deeds . . . "which may not have been acknowledged according to the laws existing at the time of said acknowledgments", and then goes on to enumerate certain acts which would not fully comply with the formal requirements of an acknowledgment. It is doubtful but still debatable whether these words could be held to be indicative of a legislative intent to cure a complete lack of acknowledgment. Generally throughout the United States curative acts are held to cure only defects in the acknowledgment and will not supply an acknowledgment where there is none.[28] There is also a conflict in other jurisdictions of the United States

[23] Cooper v. Harvey, 21 S. Dak. 471, 113 N. W. 717 (1907), cited in 1 C. J. S. 881, Acknowledgments, n. 93.

[24] *Supra*, n. 20.

[25] Md. Code Supp. (1947), Art. 21, Sec. 103.

[26] Thus, Sec. 107 says "executed *and* recorded". (Emphasis added.)

[27] *Supra*, n. 25.

[28] Williford v. Davis, 106 Okla. 208, 232 P. 828 (1924), affirmed in Davis v. Williford, 271 U. S. 484 (1926); cited in 1 C. J. S. 881, Acknowledgments, n. 95.

over the nature of the defects which may be cured by a curative statute where there has been some attempt to acknowledge. It was once contended that curative acts could cure only immaterial, formal defects and that where the statute required an acknowledgment to pass title, an act which cured a material defect in an acknowledgment would be unconstitutional since its effect would be to divest title from one and vest it in another. But the more reasonable view and the majority view is that such defects may properly be cured by statute.[29] The prevailing thought is that curative acts should be construed liberally. Maryland is in accord with this and has construed its Curative Acts to be capable of curing rather material defects.[30] Considering the power of the Legislature to cure, by Curative Acts, defects in the taking and certification of acknowledgments, there seems to be no reason why the Legislature cannot cure any defect whatsoever. If the Court should hold that the Curative Acts are capable of curing any defects in an acknowledgment, including material, substantial defects, but are incapable of curing a complete want of acknowledgment, then it would appear that any attempt at acknowledging, no matter how ineffective, could ultimately suffice to pass legal title. This would mean that the acknowledgment would be basically a psychological requirement, intended to impress upon the grantor, by its solemnity, the importance of the act of transfer, rather than an identification measure as the acknowledgment was originally intended to be.

Considering that Maryland in its strict requirement of an acknowledgment is following a distinct, minority view, which works a hardship in the limited number of deed of gift cases, the Court would have available an excellent means of alleviating that hardship, if it desires, without changing this strict requirement of an acknowledgment, by simply ruling that Sec. 103 of the Curative Act does operate upon unrecorded deeds and is capable of curing a total lack of acknowledgment.

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[29] See 22 L. R. A. 379 (*Re*-Constitutionality); 31 L. R. A. (N. S.) 1078 (*Re*-Nature of Defects Cured).

[30] See McDivit v. McDivit, 148 Md. 271, 129 A. 291 (1925), in which the Curative Act of 1924, which acted upon deeds "acknowledged or recorded" was held to cure the following very material defects in an acknowledgment . . . (1) Name of the grantor did not appear therein, (2) Not shown from acknowledgment whether it was taken by a justice of the peace or notary public, (3) Not shown thereby that the officer taking the acknowledgment was of Baltimore City or elsewhere. The deed, with the defective acknowledgment had been recorded. Cited in 1 C. J. S. 881, Acknowledgments, ns. 98, 99 and 7.