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THE STATUTE OF USES AND THE MODERN DEED.

TO what extent does the modern conveyance of estates in land in the United States by deed derive its validity from the English Statute of Uses, 27 Hen. 8, c. 10? No doubt the student, and especially the teacher, is inclined to magnify the importance of mere matters of history, because it is so much easier to understand or explain many of the terms and doctrines of real property law by approaching them historically, and, indeed, many of them cannot otherwise be understood at all. And yet we all have this constant, serious, and often difficult task, of separating matter of merely curious speculation for the learned antiquarian from what is still a part of the living law, to say nothing of that which has colored what remains or is of practical value in understanding it. There has always been a mystery to me about the source from which the present day deed of land has its force and validity, and therefore the search for this elusive, evanescent, and largely imaginary unknown quantity has been conducted for some time with much interest and with the results set out below; which, though unsatisfactory, may aid to a better conclusion.

In the first place, as to how the English law acquired importance with us, it is trite learning, that, when our ancestors settled in the American wilderness, they brought with them as one of their most cherished possessions, so much of the common and statutory law of the mother country as would be of value to them and suitable to them in their new condition here, leaving behind all the useless and merely cumbersome part.¹ But the first settlers of a large part of what now constitutes the United States did not come from England; and on the same principle, brought with them the law of their country, not the English law; and in these parts, neither the Statute of Uses nor any part of the common law ever existed except as it has been introduced by statute or otherwise since the settlement. Thus, in Michigan and all the rest of the Northwest Territory that was acquired from the French, the original law was the French or civil law.² Likewise, the original law of Louisiana Territory, out of which we have made the states of Louisiana and most of the states west of the Mississippi, was the French civil law. Again, Florida and Texas, and all the territory acquired from Mexico, including California, Arizona, and New Mexico, was originally

¹ *Marshall v. Fisk* (1809), 6 Mass. 24, 4 Am. Dec. 76.

² In *Crane v. Reeder* (1870), 21 Mich. 24, 61, CAMPBELL, C.J., said: "We are bound to know, as matter of legal history, that the law which governed this territory in civil matters, prior to the taking effect of the ordinance (of 1787), and when Jay's treaty was negotiated, was the French law, including the custom of Paris, as modified by royal edicts."

under the influence of the Spanish branch of the civil law.³ In the older settled communities, especially Louisiana, the influence of the civil law has remained very marked even to this time. In the other parts of the acquired territory the common law has obtained greater influence and is substantially the source of their jurisprudence.⁴ States carved out of what was practically a wilderness at the time of the acquisition were largely settled by immigrants from the older states; and it has been said that these pioneers brought to their new homes that ancient and priceless heirloom which their ancestors had brought with them, the English common law.⁵ In each of these states, old and new, there has been a process of modification of old law and ingrafting new, ever since the settlement; so that now we have some fifty jurisdictions, no two just alike; and from this it results that in the present discussion few propositions of universal application can be given, but only generalizations and local instances.

One important modification of the common law of conveyancing existing in England at the time of the settlement is believed to be universal. Corporeal hereditaments were said to lie in livery, and incorporeal to lie in grant; but now by the abolition of livery of seisin, all hereditaments lie in grant. Any deed that could operate as a grant of an incorporeal hereditament in England will pass any real property with us.⁶

Another principle of general if not universal application, though not of American origin, has, by its liberal interpretation, done much to free us from the technicalities of the old law, and render our deeds effectual notwithstanding failure to comply with the common law requirements. This principle has done much to obliterate the distinctions between deeds operating at common law and those of force by virtue of the statute of uses. The rule is this: If a deed was apparently intended to conform to one species, but, lacking some essential of that, may still be given effect as a deed of any

³ Under the Mexican law land could not be conveyed by parol without writing. Actual possession and acts analogous to livery of seisin were also necessary. *Hoen v. Simmons* (1850), 1 Cal. 119, 52 Am. Dec. 291; *Stafford v. Lick* (1857), 7 Cal. 479, 491, dissenting opinion of BURNETT, J. See also *Steinbach v. Stewart* (1870), 11 Wall. (U. S.) 566, 577.

⁴ In construing a deed made in the Republic of Texas in 1843, the Supreme Court of Texas said the common law was in force in the state at the date of the instrument; but how it was introduced is not stated. See *Harlowe v. Hudgins* (1892), 84 Tex. 107, 19 S. W. 364, 31 Am. St. Rep. 21, 24.

In Missouri the statute of uses was in substance re-enacted at an early day.

⁵ *Horsley v. Hilburn* (1884), 44 Ark. 458, 473.

⁶ *McVey v. Green Bay & M. Ry. Co.*, 42 Wis. 532.

other kind, the courts will give it effect in such other way.⁷ "The courts are said to be anxious so to construe deeds as to carry into effect the intent of the parties, if it do not contravene any fundamental rules of law; and by the word *intent* is not meant the intent of the parties to pass land by this or that kind of deed, or by any particular mode of conveyance, but the intent that the land shall pass at all events, one way or the other."⁸

⁷ Defective Deeds of One Kind Sustained as of Another Kind.

Leading Case: *Roe v. Tranmarr* (1758), Willes 682, 2 Wilson 75, 2 Smith's Leading Cases No. 288, sustaining as a covenant to stand seised, a conveyance intended as a release and as such void, because estate was expectant.

Alabama: *Horton v. Sledge* (1856), 29 Ala. 478, 496, sustaining as a covenant to stand seised a deed purporting to "give, grant, bargain, sell, alien, enfeoff, and convey."

Kentucky: *Conn v. Manifee* (1820), 2 A. K. Marsh 396, 12 Am. Dec. 417, sustaining as a bargain and sale a deed made in form of a release, but void as such, because the land was in adverse possession of another.

Maryland: *Cheney v. Watkins* (1804), 1 Har. & J. (Md.) 527, 2 Am. Dec. 530, sustaining as a feoffment a deed defective as a bargain and sale, for want of proper consideration.

Massachusetts: *Hunt v. Hunt* (1833), 14 Pick. (31 Mass.) 374, 25 Am. Dec. 400;

Trafton v. Hawes (1869), 102 Mass. 533, 3 Am. Rep. 494, sustaining as a covenant to stand seised what was considered a defective bargain and sale, though there was no consideration of blood or marriage; *Packard v. Old Colony Ry. Co.* (1897), 168 Mass. 92, 46 N. E. 433.

Michigan: *Martin v. Cook* (1894), 102 Mich. 267, 60 N. W. 679, sustaining an estate for life "reserved" to grantor and daughter, though she was a stranger to the deed.

Missouri: *Perry v. Price*, 1 Mo. 553, sustaining deed as feoffment which would fail as bargain and sale for want of consideration expressed or proved.

New Jersey: *Havens v. Sea Shore Land Co.* (1890), 47 N. J. Eq. 365, 372; 20 Atl. 497, sustaining as a bargain and sale a conveyance in the words "remise, release and quitclaim," and void as a release because the estate was in expectancy.

Ohio: *Foster v. Dennison* (1839), 9 Ohio 121, 124, in which the Court says: "A deed may be held to operate in any form of conveyance that will carry into execution the lawful objects of the makers."

Oregon: *Lambert v. Smith* (1881), 9 Ore. 185, in which a deed invalid as bargain and sale, for want of recital or proof of consideration, was sustained as a common law grant, on the operative word "convey," though the hereditament was corporeal.

Pennsylvania: *Eckman v. Eckman* (1871), 68 Pa. St. 460, 470; *Sprague v. Woods* (1842), 4 W. & S. (Pa.) 192, holding that intent of parties must be given effect whatever may be determined as to the nature of the deed, whether use or trust.

Tennessee: *Barry v. Shelby* (1817), 4 Hayw. (5 Tenn.) 229, dismissing a bill for waste, because the deed operated as a covenant to stand seised, though very peculiar and inartificial in form, and saying: "The law, then, according to the intent apparent in the deed, will raise the uses to be executed, so moulding and arranging them, that all shall be converted into legal estates according to the intent; the law will also construe the instrument to be of that denomination which will admit of such arrangements, no matter what the parties may have called it."

Virginia: *Rowletts v. Daniel* (1815), 4 Munf. (Va.) 473, a deed defective as feoffment for want of livery, but good as covenant to stand seised.

United States: *Field v. Columbet* (1865), 4 Sawyer 523, 9 Fed. Cas. No. 4764, sustaining release and quitclaim as statutory or customary deed, though release out of possession.

⁸ *Lambert v. Smith* (1881), 9 Ore. 185, 191. See also *Hunt v. Hunt* (1833), 14 Pick. (31 Mass) 374, 25 Am. Dec. 400, in which SHAW, C.J., speaks at some length to the same effect.

Where the operation of this principle has seemed inadequate to carry the intention of the parties into effect, many courts have manifested a disposition not to permit the channels of modern commerce to be obstructed by the driftwood of the feudal ages; but rather to brush all technicalities aside, and give the deed effect if only the requirements of the state statute have been complied with.⁹

⁹ A Deed Complying With Our Statutes Is Sufficient.

Arkansas: Bunch v. Nicks (1887), 50 Ark. 367, 7 S. W. 563.

California: Field v. Columbet (1865), 4 Sawyer 523, 9 Fed. Cas. No. 4764.

Connecticut: Bryan v. Bradley (1844), 16 Conn. 474; Bissell v. Grant (1868), 35 Conn. 288.

Iowa: Pierson v. Armstrong (1855), 1 Iowa 282, 63 Am. Dec. 440.

Maine: Wyman v. Brown (1863, leading case), 50 Me. 139; Abbott v. Holway (1881), 72 Me. 298.

Massachusetts: Thatcher v. Omans (1792), 3 Pick. (20 Mass.) 521.

Michigan: Crane v. Reeder (1870, leading case), 21 Mich. 24; Brown v. McCormick (1873), 28 Mich. 215; Haynes v. Bennett (1884), 53 Mich. 15, 18 N. W. 529.

South Dakota: Evenson v. Webster (1892), 3 S. Dak. 382, 53 N. W. 747, 44 Am. St. Rep. 802.

Tennessee: Taul v. Campbell (1835), 7 Yerg. (15 Tenn.) 319.

Texas: Baker v. Westcott (1889), 73 Tex. 129, 11 S. W. 157.

Vermont: Beardsley v. Knight (1838), 10 Vt. 185, 33 Am. Dec. 193; Gorham v. Daniels (1851), 23 Vt. 600.

Wisconsin: Ferguson v. Mason (1884), 60 Wis. 377, 19 N. W. 420.

Illustrations from the Decisions.

"We think an estate of freehold to commence *in futuro* can also be conveyed under our statutes, independently of the statute of uses. Under our laws real property stands upon ground different in many respects from that upon which it stood at common law." Bunch v. Nicks (1887), 50 Ark. 367, 374, 7 S. W. 563.

"We are not aware that the technical distinctions existing between conveyances at common law have ever been recognized as applicable to conveyances in this state. The statute in force when the instrument under consideration was executed merely required that the conveyance should be in writing and signed and sealed by the grantor in presence of two witnesses, or signed, sealed and acknowledged by him before an officer. * * * No livery of seisin was necessary." Baker v. Westcott (1889), 73 Tex. 129, 11 S. W. 157, holding no consideration necessary.

In sustaining a deed creating a freehold to commence in future, WATSON, J., speaking for the Supreme Court of Maine in Wyman v. Brown (1863), 50 Me. 139, said: "We are also of opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and, being duly acknowledged and recorded as our statutes require, operate more like feoffments than like conveyances under the statute of uses."

In a later case on the same subject, the same court spoke as follows: "Can it be doubted that under such statutes the owner of real estate can convey in the manner prescribed such part or portion of his estate as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of feudal tenures, and all the restrictive effect which they had upon alienations. Why prevent the owner in fee simple from agreeing with his grantee, and setting forth that agreement in his conveyance, as to the time when and the conditions upon which the instrument shall be operative? * * * In other words, the mere technicalities of ancient law are dispensed with upon compliance with statute requirements." Abbott v. Holway (1881), 72 Me. 298.

In Thatcher v. Omans, 3 Pick. (20 Mass.) 521, on p. 525, DANA, C. J., says: "This statute was evidently made to introduce a new mode of creating and transferring freehold estates in corporeal hereditaments; namely, by deed, signed, sealed, and acknowledged, and recorded as the statute mentions."

Where the statute merely authorized a short form of deed (which was in no way followed) and made words of limitation and a seal unnecessary, it was held, without any reference to the statute of uses, that complete legal title passed without livery of seisin, by virtue of the most informal and crude writing imaginable; for the reason that the statute providing that an estate in real property can only be transferred by an instrument in writing signed by the party clearly indicates that nothing more is necessary, if the intention of the parties appears.¹⁰

In a case coming before Mr. JUSTICE FIELD in the California circuit, it was objected that title to the land could not pass because the grantee was not in possession, and the operative words of the deed were those of a common law release. The objection was held to be unfounded. The court said: "The operative words are as significant and potential now as at the common law, and their efficiency under our statute of conveyances is not dependent upon the fact of possession by the releasee. The statute allows the transfer of real property and of interests therein, whether the grantor or grantee be in or out of possession. It designates no form in which the conveyance shall be made, except that it shall be made by deed. Any words in a deed indicating an intention to transfer the estate, interest or claims of the grantor, will be a sufficient conveyance whether they be such as were generally used in a deed of feoffment, or of bargain and sale, or of release, irrespective of the fact of possession of grantor or grantee, or of the statute of uses."¹¹

The Ordinance of 1787, in prescribing the method of transferring lands in the Northwest Territory, provided, that, until otherwise declared, lands might be "conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person being of full age in whom the estate may be, and attested by two witnesses; provided such conveyances be acknowledged or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose." In construing this ordinance CAMPBELL, C. J., speaking for the Supreme Court of Michigan, said: "We think that this statute was designed to cover the whole subject until further legislation, and that it cannot be supposed any common law was to prevail over it, even if there had been any such law in force when the ordinance became operative. A deed at common law was not sufficient without some enrollment, or some act *in pais*, to transfer

¹⁰ *Evenson v. Webster* (1892), 3 S. Dak. 382, 53 N. W. 747, 44 Am. St. Rep. 802.

¹¹ *Field v. Columbet* (1865), 4 Sawyer 523, 527, 9 Fed. Cas. No. 4764.

title, and under the ordinance, which recognized the fact that in this country there must be many non-resident owners, and much unoccupied land, a new rule was devised to take the place of all forms and ceremonies not mentioned there."¹²

The effect of abolishing livery of seisin, the determination of the courts to give the deed effect in one way or another under the old rules of law if possible, and as a statutory conveyance in spite of them if not otherwise possible, would seem sufficient to sustain a conveyance against almost any combination of technical defects from violations of the old common law, without any resort to the statute of uses, and, if need be, in the face of all the doctrines concerning uses. But these are not all. Several courts have declared—with a simplicity that might startle the wise man filled with legal learning, but most acceptable to every one not sufficiently learned to have lost his common sense—that the forms of conveyance in common and inveterate use ought to be, and will be, sustained, without much regard to the requirements of the ancient common law, or whether any statute has altered or abrogated such requirements.¹³

¹² *Crane v. Reeder* (1870), 21 Mich. 24, 61.

¹³ **American Deeds Sustained Because of Mere Usage.**

In sustaining a deed, made at the deathbed of the grantor, to her daughter, in consideration of \$10, and reserving to the grantor an estate for life, the court said: "The mode of conveyance resorted to in this deed has undoubtedly been practiced in this state from a period beyond memory, and probably from the first establishment of the government, especially for the purpose of making family settlements of estates, and has never been attended with any practical inconvenience. * * * This constant and immemorial usage is sufficient to make it a part of our common law, and a deed of this description may be termed one of the common assurances of real estate. As such it stands on the same solid foundation as those common assurances in England, which derive their force and effect from long usage and recognition. On this ground alone, we do not hesitate to hold it good throughout, and should do so, even if it were found to trench upon the rules of the English common law, which, although perhaps anciently founded in practical and substantial reason and good sense, have now become merely technical and formal." *Bryan v. Bradley* (1844), 16 Conn. 474, 479. To same effect *Bissell v. Grant* (1868), 35 Conn. 288, 297; *Fish v. Sawyer* (1836), 11 Conn. 545, 550.

In *Thompson v. Thompson* (1867), 17 Ohio St. 650, the court holds a deed to a son-in-law of grantor in consideration of natural love and affection and to advance the grantee in life is supported by a sufficient consideration, because it would be good as a covenant to stand seised under the statute of uses, though that statute was no part of the Ohio law. In his concurring opinion *Welch, J.*, said he would go further than the rest of the court and put the decision on broader grounds. He said: "Now, I say, in the first place, that our common form of deed in Ohio is no more a deed of bargain and sale than it is a deed of feoffment, grant, or release. It is, in fact, all four combined. It has the operative words of all. It gives, grants, releases, and conveys, as well as bargains and sells. * * * It is no creature of the English statute with us, but, as the court say in the case referred to, 'takes its form and derives its authority from our own statutes and local usages.' * * * We have no statute prescribing a form of deed. Our laws on the subject regard merely the solemnities of their execution and yet it is plainly implied in those laws that if the instrument be a 'deed' and contain apt words for the 'conveyance' or 'incumbrance' of real estate, and have prescribed solemnities, it is sufficient," pp. 663-665.

In holding a release and quitclaim valid, though the releasee was not in possession, the

In addition to all this there are statutes in nearly all the states prescribing short forms of conveyance declared to have all the effect of a duly executed common law conveyance with full covenants of

court said: "It is equally effectual with either of the other forms in transferring existing interests. Such is the common opinion of the profession, and in consequence the quit-claim has become the form most generally in use. To hold that it has no efficiency except where the grantee is at the time in possession would disturb titles to property of the value of millions." *Field v. Columbet* (1865), 4 Sawyer 523, 528, 9 Fed. Cas. No. 4764.

See also many cases heretofore cited in this article, especially *Evenson v. Webster* (1892), 3 S. Dak. 382, 53 N. W. 747, 44 Am. St. Rep. 802; *Pierson v. Armstrong* (1855), 1 Iowa 282, 63 Am. Dec. 440; *Ferguson v. Mason* (1884), 60 Wis. 377, 19 N. W. 420.

Changed Conditions Make Old Rules Obsolete.—A father having conveyed land to his daughter without consideration paid or recited, except natural love and affection, and by a writing not sealed; and the daughter having died, leaving a child that died soon after, the child's father inherited the land from it. The grantor filed a bill in chancery, to have his conveyance declared void and to quiet title in him. He claimed that natural love and affection were not sufficient consideration to support a conveyance in fee, and that the instrument, for want of a seal, could not operate as a covenant to stand seised. The court held that the conveyance was good and could not be avoided, saying in part: "The seal on private instruments had become a pure and useless technicality. The code of Iowa in 1851 abolished the use of them on private instruments, by declaring it to have no effect, and providing that all written contracts should import a consideration. The same statute, in its provisions relating to the transfer of real estate, does not require a seal, and applies the word 'deed' in the statute to an instrument conveying lands, and says that it does not imply a sealed instrument. See §26 pt. 20, §974, 975. We understand that real estate may be conveyed, and by an instrument without a seal, and that all its qualities and incidents will pass without that heretofore important thing, a seal or scrawl. * * * When a question like the above, relating to the words given and granted; or that concerning the consideration of 'love and affection' supporting an estate of inheritance, comes up, the doubt naturally arises whether 'there now remains with us' any of this law. Have we not passed by it and got beyond it? We have not the various estates formerly known in England, with their complication of law. We have no occasion for their former distinction of conveyances, and need not talk of *allodium*, or free and common socage. Saving the rights of creditors and subsequent *bona fide* purchasers, we enjoy the right to do with it as we please; not merely to sell it, but to give it away. If a deed is without any consideration, what matters it between grantor and grantee, and their heirs? Has not the grantor the same right to give away his lot that he has to give his horse or his watch? Is it not the intent and tone and spirit of all our laws and institutions and tenure of lands, that the latter may be conveyed by any words which manifest that purpose, and for any consideration we please, so that others having legal or equitable claims upon us are not injured? These questions naturally arise, though they are not presented for formal adjudication." *Pierson v. Armstrong* (1855), 1 Iowa 282, 63 Am. Dec. 440.

No Deed of Exchange in Vermont.—"In the old law of exchange, something similar to the right here claimed did exist. But that species of conveyance, resulting from the feudal tenures, never existed in this state, and never applied to a case like the present. And it is believed that the division of estates held in common or in coparcenary, or joint tenancy, in this state, has not usually been by deed of partition. The most usual method of division has been that adopted in this case, by deeds from each to the other of his portion." *Beadsley v. Knight* (1838), 10 Vt. 185, 33 Am. Dec. 193, by REDFIELD, Ch.

warranty.¹⁴ And in many of the states there are statutes expressly declaring that a deed or writing signed by the party conveying or by his duly authorized agent, and witnessed and recorded as the statute requires, shall be sufficient to pass any estate, without any other ceremony whatever.¹⁵

Such statutes have been held, by reason of the completeness of their provisions, to abolish and exclude by implication all the old forms of conveyance, including those operating by virtue of the

¹⁴ **Statutory Deeds, Short Form.**

- Arizona*: Rev. Stat. (1901) §721 *et seq.*
California: Civil Code (1901) §§ 1052-1092, 1113.
Illinois: Rev. St. (1903), c. 30 § 9.
Indiana: Burns' Rev. St. (1901) § 3346.
Iowa: Code (1897), 2958.
Kansas: Gen. St. (1901) § 1203.
Michigan: Com. Laws (1897) § 9014.
Minnesota: Laws (1901) c. 197.
Montana: Civ. Code 1501, 1519.
New York: Birdseye's Rev. St. (1901) p. 3055.
South Dakota: Civ. Code (1903) § 940.
Tennessee: Code (1896) § 3680.
Texas: Sayles' Civ. Stat. (1897) §§ 628, 637, authorizing short form of deed and declaring defective deed good as contract to convey.
Utah: Rev. St. (1898) § 1981.
Virginia: Code (1904) §§ 2426, 2437, giving bargain and sale, covenant to stand seised, or lease and release effect of feoffment with livery, and authorizing short form of deed.
Washington: Ball. Ann. Codes (1897) 4519.
West Virginia: Code (1899) c 72.
Wisconsin: Statutes (1898) § 2208.

¹⁵ **Old Technicalities and Ceremonies Expressly Abolished.**

- Arkansas*: Dig. Stat. (1904) § 731.
Georgia: Code (1895) § 3602.
Idaho: Civ. Code (1901) § 2399.
Kansas: Gen. Stat. (1901) § 1205.
Kentucky: Statutes (1903) § 2341.
Michigan: 3 Comp. Laws (1897) § 8956, declaring a deed delivered, acknowledged or proved, and recorded sufficient, without other ceremony. In *Haynes v. Bennett* (1884), 53 Mich. 15, 18 N. W. 529, SHERWOOD, J., said, in holding an infant's deed revoked by recording another without entry: "Title by descent, and our mode of transferring title by deed, are regulated by statute. The old common law doctrine of feoffment with livery of seisin does not constitute any part of our law of conveyancing. Our registry laws supply their place, and furnish the notoriety of transfer intended to be given by that ancient mode of passing title."
Minnesota: Statutes (1894) § 4161.
Missouri: Rev. St. (1899) § 900.
Mississippi: Code (1892) § 2433.
Rhode Island: Gen St. (1896) c. 202 § 11.
Tennessee: Code (1896) § 3671.
Wisconsin: S. & B. Stat. (1898) § 2203.
Wyoming: Rev. St. (1899) § 2731.

statute of uses.¹⁶ But in other states, under quite similar statutes, it has been held that a deed may still take effect as a feoffment or other common law form of conveyance.¹⁷

In several states a conveyance by deed recorded is said to have the effect of a feoffment at common law with livery of seisin, the recording taking the place of the notoriety furnished by the common law livery of seisin.¹⁸

Perhaps the principal purposes for which resort was formerly made to the conveyances operating under the statute of uses were to avoid necessity of making livery of seisin, and to create freeholds to commence in future without a prior estate to support them. Livery of seisin being no longer necessary anywhere in the United States, uses serve no purpose in that regard. Let us see if they aid in creating the future estates. There have been American decisions holding that future freeholds by deed could be supported without

¹⁶ *Stone v. Ashley* (1842), 13 N. H. 38, distinguishing *French v. French*, 3 N. H. 263, under a prior statute, and holding a bargain and sale inoperative unless signed by two witnesses, as the statute required.

Gorham v. Daniels (1851), 23 Vt. 600, in which REDFIELD, J., speaking for the court, said: "It seems to me that our statutes are fully adequate to all ordinary incidents of the subject, and that in those extraordinary occasions where the statute of uses might answer a good end, it will be safer and better every way to have resort to a court of equity, than to introduce a portion of the ancient common law system of conveying real estate."

¹⁷ *Marshall v. Fisk* (1809), 6 Mass. 24, 4 Am. Dec. 76, holding title to pass in favor of attaching creditor by unrecorded deed destroyed after the attachment to defeat it; *Cox v. Edwards* (1782), 14 Mass. 492 sustaining a deed signed by only one witness, though the statute required two, and not acknowledged; *French v. French* (1825), 3 N. H. 234, 259, holding a conveyance good as covenant to stand seised, though not signed by two witnesses to make it good under the local statute. But see to contrary *Stone v. Ashley* (1842), 13 N. H. 38, under later statute.

¹⁸ Recorded Deed Equivalent to Feoffment With Livery.

Witham v. Brooner (1872), 63 Ill. 344;

Matthews v. Ward (1839), 10 Gill & J. (Md.) 443;

Marshall v. Fisk (1809), 6 Mass. 24, 4 Am. Dec. 76;

Perry v. Price (1825), 1 Mo. 553;

Springs v. Hanks (1844), 5 Ired. L. (27 N. Car.) 30; *Mosely v. Mosely* (1882), 87 N. Car. 69;

Lambert v. Smith (1881), 9 Ore. 185. 192;

Eckman v. Eckman (1871), 68 Pa. St. 460, 470.

a particular prior estate if the deed operated as a covenant to stand seised,¹⁹ or as a bargain and sale,²⁰ but not otherwise.²¹

¹⁹ **May Be Freehold Commencing in Futuro by Covenant to Stand Seised.**

Bunch v. Nicks (1887), 50 Ark. 367, 7 S. W. 563;
 Caulk v. Fox (1870), 13 Fla. 149, 160;
 Wallis v. Wallis (1808), 4 Mass. 135, 3 Am. Dec. 210;
 Wall v. Wall (1855), 30 Miss. 90, 64 Am. Dec. 147;
 Exum v. Canty (1857), 34 Miss. 533, 559; McDaniel v. Johns (1870), 45 Miss. 632.
 Jackson v. Dunsbaugh (1799), 1 Johns. Cas. (N. Y.) 92;
 Bell v. Scammon (1844), 15 N. H. 381, 41 Am. Dec. 706; Dennett v. Dennett (1860),
 40 N. H. 498;

Sasser v. Blyth (1796), 1 Hayw. (2 N. Car.) 259;
 Davenport v. Wynne (1845), 6 Ired. L. (28 N. Car.) 128, 44 Am. Dec. 70;
 Wardwell v. Bassett (1866), 8 R. I. 302;
 Chancellor v. Windham (1844), 1 Rich. Law (S. Car.) 161, 42 Am. Dec. 411;
 Kinsler v. Clark (1844), 1 Rich. L. (S. Car.) 170.

Future Use Valid—Presumption.—One who does not prove that he is in fact a disseisor cannot set up the statute of limitations against ejectment by the lessee of one in whose favor the common source of title had covenanted to stand seised from time of death, since such future use is valid and only arises when the person to take is ascertained. Davenport v. Wynne (1845), 6 Ired. L. (28 N. Car.) 128, 44 Am. Dec. 70.

²⁰ **Freehold May Commence in Futuro by Bargain and Sale.**

Chandler v. Chandler (1880), 55 Cal. 267;
 Bryan v. Bradley (1844), 16 Conn. 474;
 Shackleton v. Sebree (1877), 86 Ill. 616;
 Wyman v. Brown (1863), 50 Me. 139, 150 *et seq.*, reviewing the decisions at length and criticising prior decisions of the same court;
 Bell v. Scammon (1844), 15 N. H. 381, 41 Am. Dec. 706;
 Rogers v. Eagle Fire Ins. Co. (1832), 9 Wend. (N. Y.) 611, 5 Gray's P. C. 121;
 Jackson v. Swart (1822), 20 Johns. 85; Jackson v. Dunsbaugh (1799), 1 Johns. Cas. 92;
 Sprague v. Wood (1842), 4 W. & S. (Pa.) 192;
 Cribb v. Rogers (1879), 12 S. Car. 564, in which a deed "in consideration of love and good will" to grantor's step-daughter, reserving the use to grantor for life, was sustained; a valuable consideration was proved.

In sustaining a deed creating a future freehold without a particular estate to support it, the court said: "Our statute has abolished livery of seisin, and deeds of feoffment have gone out of use, and lands are conveyed by deed of bargain and sale, and under the statute of uses, the use is executed and the title passes to the grantee on the delivery of the deed. * * * Our modern tenures have happily been freed from the ancient restraints, and the necessities of society relieved from useless forms and unmeaning ceremonies, until what was a most intricate and highly technical system has become comparatively simple." Shackleton v. Sebree (1877), 86 Ill. 616.

Future Estate by Bargain and Sale Good as Covenant to Stand, &c.—An action to recover \$400 as paid without consideration by son to father for deed to have and to hold after the death of the grantor" cannot be maintained during grantor's life; because covenant to convey is consideration and not broken till death, at least. Also the conveyance was good as covenant to stand seised, to future use, though blood not mentioned, for it may be proved. Wallis v. Wallis (1808), 4 Mass. 135, 3 Am. Dec. 210.

The above decision got the Massachusetts court into a great dilemma. As a result of it the court first held a deed void as a conveyance of a future estate, where the consideration was only pecuniary. Welsh v. Foster (1815), 12 Mass. 93. Clearly it was good as a bargain and sale; but the court stuck to the error for a great many years, through a long course of decisions. Finally the result was escaped by holding, what is both false and unnecessary, that such a conveyance can operate as a covenant to stand seised, based on a pecuniary consideration. Trafton v. Hawes (1869), 102 Mass. 533, 3 Am. Rep. 494.

²¹ **Freehold in Futuro Void When Not by Way of Use.**

Welch v. Foster (1810), 12 Mass. 91;
 Jackson v. Sebring (1819), 16 Johns. (N. Y.) 47, 8 Am. Dec. 357.

In a number of states the statutes expressly declare that future freeholds may be created without a prior estate to support them; and there, certainly, no resort to the statute of uses is necessary to make any such conveyance good.²² Beyond this, a number of American courts have sustained such conveyances without any regard to the statute of uses or any local statute changing the common law in this respect.²³

A good illustration of these cases is furnished by *Ferguson v. Mason*,²⁴ in which land was conveyed by deed in consideration of

²² Statutes Permit Freeholds to Commence in Futuro.

- Georgia*: Code (1896) § 3082; *White v. Hopkins* (1887), 80 Ga. 154, 4 S. E. 863.
Indiana: Horner's An. St. (1901) § 2959. *Wilson v. Carrico* (1895), 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; *Haines v. Weirick* (1900), 155 Ind. 548, 58 N. E. 712.
Iowa: Code (1897) § 2917.
Kentucky: Statutes (1903), 2341; *Hunt v. Hunt* (1904), — Ky. —, 82 S. W. 928, 68 L. R. A. 180, 26 Ky. L. R. 973.
Missouri: Rev. St. (1899) § 4596; *Dozier v. Toalson* (1903), 180 Mo. 546, 79 S. W. 420, 103 Am. St. Rep. 586.
Nebraska: Comp. St. 1901 § 4146.
Tennessee: *Ellis v. Pierson* (1900), 104 Tenn. 591, 58 S. W. 318.
Texas: Sayles Civ. Stat. (1897) § 632; *McLain v. Garrison* (1905), — Tex. Civ. App. —, 88 S. W. 484; *Chrisman v. Wyatt* (1894), 7 Tex. Civ. App. 40, 26 S. W. 759; *Jenkins v. Adcock* (1893), 5 Tex. Civ. App. 466, 27 S. W. 21.
Virginia: Code (1904) § 2418.
West Virginia: Code (1899) c. 71, § 5.

²³ Feudal Doctrines as to Future Estates Are Obsolete.

- Arkansas*: *Bunch v. Nicks* (1887), 50 Ark. 367, 374, 7 S. W. 563; *Lewis v. Tisdale* (1905, Ark.) 88 S. W. 579.
California: *Chandler v. Chandler* (1880), 55 Cal. 267, in which the court holds it unnecessary to decide whether the statute of uses is a part of their common law, and viewing the deed as creating a trust, directed a formal conveyance to make the title surely clear.
Connecticut: *Graves v. Atwood* (1885), 52 Conn. 512, 52 Am. Rep. 610, reservation of life interest; *Bryan v. Bradley* (1844), 16 Conn. 474; *Bissell v. Grant* (1868), 35 Conn. 288, 297; *Fish v. Sawyer* (1836), 11 Conn. 545, 550.
Illinois: *Latimer v. Latimer* (1898), 174 Ill. 418, 51 N. E. 548; *Harshbarger v. Carroll* (1896), 163 Ill. 636, 45 N. E. 565.
Maine: *Wyman v. Brown* (1863), 50 Me. 139, 150 *et seq.*; followed in *Abbott v. Holway* (1881), 72 Me. 298.
Michigan: *Martin v. Cook* (1894), 102 Mich. 267, 60 N. W. 679.
Minnesota: *Sabledowsky v. Arbuckle* (1892), 50 Minn. 475, 52 N. W. 920.
Mississippi: Code (1892) § 2433 provides that "any interest in or claim to land may be conveyed, to vest immediately or in the future, by writing signed and delivered." This might be argued to authorize creating freeholds to begin in future. At all events, it is settled that it may be done. *McDaniels v. Johns* (1871), 45 Miss. 632; *Wall v. Wall* (1855), 30 Miss. 93, 64 Am. Dec. 147.
New York: In this state the statute provisions are the same as in Wisconsin. See 1 R. S. p. 723 § 11; 2 Birdseye's R. S. (1901) p. 3018 § 27. Freeholds created to begin in future are there sustained without question. *Heath v. Hewitt* (1891), 127 N. Y. 166, 27 N. E. 959, 24 Am. St. Rep. 438, 13 L. R. A. 46.
Tennessee: *Cains v. Jones* (1833), 13 Tenn. (5 Yerg.) 249, to grantor's betrothed. Now the statutes expressly sanction such conveyances. See statute above cited.
Vermont: *Gorham v. Daniels* (1851), 23 Vt. 600.
Wisconsin: *Ferguson v. Mason* (1884), 60 Wis. 377, 19 N. W. 420.
²⁴ *Ferguson v. Mason* (1884), 60 Wis. 377, 19 N. W. 420.

one dollar and love and affection, reserving to the grantor and his wife the use and control as long as either may live. It was objected that it was a conveyance of a freehold to commence in future and so void. The court, speaking by LYON, J., held the deed valid, saying: "In very many of the older cases the courts, out of tender regard to the subtle and technical distinctions and niceties of the common law rules respecting the tenure and alienation of real estate, seem to have held that if such a conveyance be regarded as a feoffment, or bargain and sale, it could not be upheld. * * * So those courts upheld such conveyances on the ground that a covenant might be implied from their terms on the part of the grantor to stand seised of the lands to his own use during life, and, after his decease, to the use of his grantee and his heirs. * * * Thus these courts were strictly loyal to the old common law rules which grew out of tenures that never obtained in this country to any great extent, and at the same time gave judgments which are clearly reasonable and just. * * * Such conveyances cannot, however, be upheld in this state on any implied covenant, or on the doctrine that the grantor stands seised to the use of the grantee, for our statutes long since abolished implied covenants and such uses. Rev. St. 1858, c. 84 § 1; Id. c. 86, § 5. But we think they may be upheld on other grounds. The statute recognizes and defines future estates in expectancy as follows: 'A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.' Rev. St. 1858, c. 83, § 10. At common law the intervention of a precedent estate, created at the same time, was essential to the validity of a conveyance of an estate of freehold, to commence at a future time, which is an estate in remainder. * * * But this refined doctrine of the necessity to create a particular estate to support a freehold estate to commence at a future time, has been overturned by the statute above quoted. Similar statutes prevail in a large number of the states of the Union. * * * Conveyances of land containing exceptions or reservations similar to that in the conveyance under consideration in the present case, are very common and always have been in general use in this country, as the reports of judicial decisions abundantly show. Because of this fact, some courts, in the absence of statutory provisions on the subject, have held such conveyances valid, without much regard to any other ground upon which their judgments might have been placed. * * * What policy or rule of law is contravened, if, instead of making his conveyance to take effect immediately, he stipulates that it shall take effect at the end of a month or a year,

or on the happening of some future event? We should be strongly inclined to uphold that right as a necessary incident of allodial tenures, were there no statute expressly conferring it."²⁴

The old rule of the court of chancery, still part of the law of trusts, that the court would not interfere to compel performance of a purely voluntary promise, confined enforceable uses before the statute to those founded on a consideration; and therefore a consideration was essential to raise a use under the statute, and a conveyance would not operate under the statute of uses unless there was a consideration recited or proved. On this ground American courts have denied deeds effect as conveyances by way of use.²⁵ But the greater number of our courts, by far, give no regard to such objections, holding that our conveyances operate by virtue of the state statutes, without any respect to the old requirements.²⁶

²⁵ Consideration Must be Recited or Proved.

Catlin Coal Co. v. Lloyd (1899), 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216, holding erasure of recital of consideration fatal to deed of bargain and sale;

Wood v. Chapin (1856), 13 N. Y. 509, 67 Am. Dec. 62, holding deed by bargain and sale void for want of consideration proved or recited, citing *Jackson v. Sebring* (1819), 16 Johns. (N. Y.) 47, 8 Am. Dec. 357, to same point;

Wood v. Beach (1834), 7 Vt. 522, holding proof of consideration properly admitted because none was expressed and the deed would not be good without it.

²⁶ Conveyance by Deed Valid Without Consideration in Fact or Recited.

California: *Driscall v. Driscall* (1904), 143 Cal. 528, 77 Pac. 471.

Connecticut: *Rogers v. Hillhouse* (1820), 3 Conn. 398, that a quitclaim without consideration is good at common law;

Georgia: *Martin v. White* (1902), 115 Ga. 866, 42 S. E. 279, holding a voluntary deed void as to a subsequent purchaser for value without notice except the record.

Indiana: *Randall v. Ghent* (1862), 19 Ind. 271, holding no consideration necessary, recited or proved.

Iowa: *Pierson v. Armstrong* (1855), 1 Iowa 282, 63 Am. Dec. 440.

Kansas: *Ruth v. Ford* (1872), 9 Kan. 17, holding no consideration need be recited.

Kentucky: *Neurenberger v. Lehenbauer* (1902, Ky.), 66 S. W. 15, 23 Ky. L. R. 1753.

Maine: *Wentworth v. Shibles* (1896), 89 Me. 167, 36 Atl. 108; *Green v. Thomas* (1834), 11 Me. 318.

Maryland: *Goodwin v. White* (1882), 59 Md. 503.

Michigan: *Shafter v. Huntington* (1884), 53 Mich. 310, 315, 19 N. W. 11.

Mississippi: *McDaniels v. Johns* (1871), 45 Miss. 632.

Missouri: *Perry v. Price* (1825), 1 Mo. 553.

North Carolina: *Ivey v. Granberry* (1872), 66 N. Car. 223, sustaining a deed though without consideration, saying, "Surely one may give by deed while he lives as well as by devise after his death; in either case no one can be heard to complain except creditors or purchasers for value;" approved and followed in *Mosely v. Mosely* (1882), 87 N. Car. 69; and *Howard v. Turner* (1899), 125 N. Car. 107, 34 S. E. 229.

New York: *Cruger v. Douglas* (1844), 4 Edw. Ch. 433, 507, 5 Barb. 225.

Ohio: *Thompson v. Thompson* (1867), 17 Ohio St. 650, in which *WELCH, J.*, considers it strange that the law should require a man making a gift of land to lie about it, by admitting value received, in order that the gift should be valid.

Pennsylvania: *Sprague v. Woods* (1842), 4 W. & S. 192; *Lancaster v. Dolan* (1829), 1 Rawle 231, 18 Am. Dec. 625.

South Carolina: *Brown v. Brown* (1895), 44 S. Car. 378, 22 S. E. 412.

South Dakota: *Bernardy v. Colonial & U. S. M. Co.* (1904), 17 S. Dak. 637, 98 N. W. 166.

Tennessee: *Taul v. Campbell* (1835), 7 Yerg. (15 Tenn.) 319, 339; *Jackson v. Dillon* (1814), 2 Overt. (2 Tenn.) 261; *Henderson v. Gaines* (1860), 41 Tenn. (1 Cold.) 223.

Texas: *Baker v. Westcott* (1889), 73 Tex. 129, 11 S. W. 157.

In several of the states the statute of uses is in substance re-enacted, or conveyances operating under that statute expressly authorized or regulated.²⁷ A statute is found in a number of states providing that, "A deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale."²⁸

²⁷ American Statutes of Uses.

See the decisions hereinbefore cited concerning conveyances operating under the statute of uses.

Florida: Bargain and sale, lease and release, and covenant to stand seised or conveyance operating by way of covenant, etc., declared equivalent to feoffment with livery. Rev. St. (1892), § 1954.

Illinois: Rev. Stat. (1903), c. 30, § 3, substantially re-enacting the provisions of the statute of uses.

In holding a conveyance in trust executed to vest the legal title in the real beneficiary the court said: "The trustee had no trusts to perform. * * * Our statute is a substantial re-enactment of the 27th Hen. 8, * * * usually termed the statute of uses. * * * Livery of seisin is abolished by the first section of the conveying act, and the title is thereby absolutely vested in the donee, grantee, bargainee, etc., independently of the statute of uses. Hence, under this statute, a deed in the form of a bargain and sale must be regarded as having the force and effect of a feoffment." *Witham v. Brooner* (1872), 63 Ill. 344.

Kentucky: Statutes (1903), § 491, declaring title and possession to vest in grantee by deed of bargain and sale, covenant to stand seised and lease and release.

Maryland: *Brown v. Renshaw* (1881), 57 Md. 67, treating a deed as a bargain and sale in which the use named being a use on a use was a trust only enforceable in chancery.

Michigan: All English statutes were repealed in this state, and we have the trust as at common law before the statute of uses; modified by our own statutes. *Ready v. Kearsley* (1866), 14 Mich. 215, 224; *Trask v. Green* (1861), 9 Mich. 358, 365.

Missouri: Rev. St. (1899), § 4589, substantially re-enacting the provisions of the statute of uses.

North Carolina: The statute of uses is recognized as in force in this state. *Smith v. Brisson* (1884), 90 N. Car. 284, sustaining conveyance of a fee on a fee.

Ohio: It is said that the statute of uses never was in force in this state. *Thompson v. Thompson* (1867), 17 Ohio St. 650.

Oregon: "In this state the statute of uses has not been adopted in terms; but conceding the fact, without deciding it, that it does constitute a part of our common law, etc." *Lambert v. Smith* (1881), 9 Ore. 185, 191.

Vermont: The statute of uses was never in force here. *Gorham v. Daniels* (1851), 23 Vt. 600.

Virginia: Code (1904), § 2426, giving conveyances by virtue of statute of uses effect of feoffment at common law with livery.

West Virginia: Code (1899), c. 71, § 14, giving bargain and sale, lease and release, and covenant to stand seised the effect of feoffment with livery.

Wisconsin: Deeds cannot operate by way of use in this state, uses having been abolished except as provided in the statute. *Ferguson v. Mason* (1884), 60 Wis. 377, 19 N. W. 420.

²⁸ Quitclaim and Release Operate as Bargain and Sale.

Indiana: Horner's An. St. (1901), § 2924.

Massachusetts: Rev. Laws (1902), c. 127, § 1.

Michigan: Comp. Laws (1897), § 8957; *Frost v. Missionary Soc.* (1885), 56 Mich. 62, 88, 22 N. W. 189.

Minnesota: Statutes (1894), § 4163.

Wisconsin: Statutes (1898), § 2207.

Wyoming: Rev. St. (1899), § 2733.

And yet it is held even in these states that the fact that the deed is in form a quitclaim is notice to the purchaser of latent defects in the title.²⁰

Questions concerning the necessity of a seal and words of limitation as required at common law to pass a fee by deed, are still met occasionally in modern cases, and seals and the word heirs seem to be still essential in a few states, though generally rendered unnecessary by local statutes. The rule that title to land in adverse possession cannot be conveyed by deed, which arose by virtue of the common law against maintenance and assignment of causes of action, and by virtue of the statute of 32 Hen. 8, c. 9, known as the pretended title act, is still the law in several states, though abolished in many. The common law as to capacity of parties in large part remains. Other common law essentials to a valid transfer of lands by deed may still possibly exist. But in the main our conveyances by deed are purely matters of local statute and usage.

The following conclusions may be drawn from the foregoing discussion:

1. That the statute of uses, the doctrines concerning uses, and conveyances operating by virtue of the statute of uses, have little or nothing to do with the validity of the ordinary conveyance in the great majority of the states. It must be remembered that we are not discussing the importance of the old law to enable one to understand, or as still governing, trusts, whether created by deed or otherwise.

2. That generally a conveyance satisfying the local statutes is sufficient, and one not satisfying such statutes is insufficient, regardless of the old common law.

3. That in about a fifth of the states one or more of these old conveyances at common law and under the statute of uses, are still retained in modified form and effect by the local statutes.

4. They may still have effect in a few states regardless of or notwithstanding the state statutes.

JOHN R. ROOD.

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²⁰ *Peters v. Cartier* (1890), 80 Mich. 124, 129, 45 N. W. 83, 20 Am. St. Rep. 508.