CHAPTER VIII.

THE OPERATIVE WORDS.

§ 68. Special operative words for special conveyances.—In that part of the premises known as the granting clause occur the "operative words." In former times the particular words used were of special importance, each one of the several kinds of conveyances having its appropriate operative word or words which made it effective as the special kind of conveyance it purported to be.

The name of the particular conveyance (see above, § 20) is generally suggestive of the appropriate operative words formerly always used in it. While these technical words have lost much of their former force and special significance, they seem still appropriate if it be intended that a particular conveyance shall have the characteristic properties it possessed at the common law as distinguishing it from others.

For example, the "exchange" at common law was the appropriate conveyance in special circumstances, and the technical exchange was attended with results peculiar in many respects to itself—there was a warranty with a condition of re-entry, so that if the title to either piece of land exchanged proved bad, and the party or his assigns were evicted, he or his assigns could recover the

other piece of land which had been given in exchange. But to produce this result it was necessary that the word "exchange" should be used, and a modern conveyance cannot operate as a technical exchange at common law without the use of the same word.[1]

§ 69. **Superfluous use of operative words—Rule of construction.**—It was formerly the practice always to use a great many words without regard to their true meaning, and it is still the common practice to insert in deeds nearly all the operative terms ever needed in transferring real estate.

When deeds were construed technically this was done in order that the deed might operate in one way if it could not operate in another, but in modern conveyances most of these words are surplusage.

The general rule of construction is that if from an examination of the whole instrument an intent to convey may be gathered, the absence of the usual or proper operative words will not render the instrument void as a conveyance.

Careful attention, of course, must be given to words from which covenants may be implied, under such statutes as are referred to above (at § 30), and the particular effect in this respect produced by particular words must not be lost sight of. But as conveyances of the property merely, the courts will construe deeds as operative in one form or another if possible.

Illustrations: The words "bargain and sell" are not needed to make a deed a bargain and sale, operating as such, but the words "remise, release and quit claim" will accomplish the same result, the deed expressing that it is made for a valuable consideration.[2]

So where the statute provides a form of deed intended

[1] Windsor v. Collinson, 32 Ore. 297; 52 Pac. 26; Gamble v. McClure, 69Pa. St. 282.

[2] Havens v. Seashore Co., 1890, 47 N. J. Eq. 365, 372; 20 Atl. 497.

to transfer the grantor's whole interest, in which form the single operative word is "grant," the word "convey" used in a deed has been held equivalent to this word "grant."[3]

And if a deed containing the words: "bargain, sell and convey" cannot operate as a deed of bargain and sale, for want of consideration,[4] it sometimes may as a grant at common law, the word "convey" being as effective as "grant" for this purpose.[5]

Even where there were no distinctively operative words, but the deed stated that the grantee was "to have" a designated proportion of the estate, absolutely and in full property, and it was contended that the deed was void as containing no operative words, the court sustained it, saying: "The words were plainly intended to operate in præsenti, and though the most apt words are not used, the intention appearing from the deed as a whole should not be defeated."[6]

§ 70. **Effect of assignments indorsed on deeds.**—The question has arisen whether indorsements on deeds "assigning" the grantee's interest in the deed are valid transfers of the legal title to the land.

Where the grantee named in the deed indorsed on it an assignment under his hand and seal of all his right, title and interest "in and to the within deed" to his son, for value, such assignment, when delivered, was held to con-

[3] Chapman v. Charter, 1899, 46 W. Va. 769, 779; 34 S. E. 768. The statutory word here was not intended to import covenants into the deed, but simply to transfer the grantor's entire interest. So such a decision is not inconsistent with the general rule that, when certain statutory words have a special and peculiar effect they alone should be used to produce that effect; as in the case of the statutory words in the short statutory forms which have the dual capacity of transferring title and importing covenants. See post, § 212.

[4] See ante, § 56.

[5] Lambert v. Smith, 9 Ore. 185.

[6] Anglade v. St. Avit, 67 Mo. 434.

vey the title, the surrounding circumstances indicating an intention to transfer the real property described in the deed.[7]

And the words "I assign the within to A B for value received" indorsed on a deed, signed by the grantee named in the deed, and regularly acknowledged, have been held sufficient to convey title to the land described in the conveyance on which they were indorsed.[8]

It has, however, been held in similar cases that such an indorsement conveys no legal title to the land, one reason being, in most cases, that there are not words effectual to transfer the legal title; in such cases the assignment is regarded as at best entitling the assignee to relief in equity as upon an executory contract.[9]

§ 71. Operative words of some kind essential.—Many of the foregoing cases illustrate the general rule, that courts will sustain deeds in this particular, as in others, if possible, and make them effectual according to the intent of the parties.

Nevertheless, it often happens that title is not transferred by an instrument probably intended to transfer it, because there are no words in it sufficient to give it effect as a conveyance.

Even if the instrument purports in form to be a deed of indenture, duly signed, sealed and acknowledged, but the only operative words in it are "warrant and defend unto C D, her heirs and assigns, forever, the receipt whereof is hereby acknowledged," it would not operate as a conveyance of the real estate described in it.[10]

[7] Lemon v. Graham, 1890, 131 Pa. St. 447; 19 Atl. 48.

[8] Harlowe v. Hudgins, 1892, 84 Texas 107; 19 S. W. 364.

[9] Bentley v. De Forest, 2 Ohio 221; Dupont v. Wertheman, 10 Cal. 354; Porter v. Read, 19 Maine 363.

[10] Hummelman v. Mount, 87 Ind. 178. In this case Judge Elliott says: "It is no doubt true that an instrument purporting to be a deed will be effectual if it contains in any part of it apt words of conveyance. In all well drawn deeds these words appear in their appropriate place. But here there are none in any part of this instrument."

And "waive and renounce" are not words of conveyance sufficient to convey title.[11]

In some states statutes provide that any instrument in writing signed by the grantor is effectual to transfer the legal title if such was the intention of the grantor to be collected from the whole instrument.

Such a statute, however, is not intended to dispense with operative words: it simply imposes upon the courts the duty of construing liberally the words of transfer; hence, even under such statutes, some words of conveyance are necessary.[12]

§ 72. Words generally considered as sufficient.—In spite of the long established practice of inserting in conveyances all the words which have been appropriate to the different forms of deeds, it appears that even as early as Lord Coke's time the word "grant" was sufficient to amount to a grant, a feoffment, a gift, a lease, a release, confirmation or surrender.[13] And the words "give, grant, bargain and sell" seem to be, according to the authorities, sufficient for all purposes as operative words transferring the title.

While it is evident that many carelessly drawn conveyances will be sustained by the courts, the only prudent and proper practice is to use those terms which, after long usage, have been determined by the courts with substantial unanimity to be effectual as words of transfer.

And while the difference between different conveyances

[11] Davis v. McGrew, 82 Cal. 135; 23 Pac. 41.

[12] Bell v. McDuffie, 71 Ga. 264; Webb v. Mullins, 78 Ala. 111. In the last case the instrument was substantially as follows: "Know all men by these presents: That I, A B, for and in consideration of love and affection which I have toward my son, J B, the following described real estate . . . . To have and to hold to the said J B, his heirs and assigns, forever. In testimony whereof, etc." It was held that this instrument contained no words which could be construed to transfer the legal title, even with the assistance of such a statute.

[13] Co. Litt. 301 b.

in this respect is not as marked as formerly, there are still other cases than those already mentioned where particular operative words are more appropriate for the conveyance than are others. This propriety may arise from statute or usage. For example: "Mortgage" is now by statute in many states made the appropriate word to use in a mortgage. In the creation of a term of years the appropriate words are "grant, demise and to farm let," the characteristic word being "demise" (but here, as in conveyances of larger interests, no particular form of words is absolutely necessary, and the words "lease" and "let" are often used alone), and the words "remise, release and forever quit claim" are used in the common form of a quit claim deed.