CHAPTER II.

THE CHIEF METHODS OF VOLUNTARY ALIENATION OF LAND INTER VIVOS.

§ 11. Formerly no writing necessary—The feoffment.—Owing to repeated allusions in modern statutes and opinions to earlier law a brief view of former methods of transferring interests in real property will be found to be not only interesting, but of practical importance.

From the Norman Conquest, 1066, onward for a period of over four hundred and sixty years no writing of any kind was necessary for the legal transfer of a freehold estate in possession in corporeal hereditaments.

Such transfer was accomplished generally by "the most valuable of assurances"—the feoffment. This consists simply and solely in livery of seisin, that is the delivery by the feoffor to the feoffee of possession of the land: "Some phrases in common use, which seem to imply a distinction between the feoffment and the livery are so far incorrect."[1]

[1] Challis, Real Prop., ch. 28. As to the conveyance of those interests in land that could not be transferred at common law by feoffment, i. e., incorporeal interests, see post § 242.

§ 12. **The bargain and sale—When deed necessary for.**—In 1535, just after the Statute of Uses[2] was enacted, the Statute of Enrolments required that "bargains and sales" intended to pass any estate of inheritance or freehold in any hereditaments should be "by writing, indented, sealed and enrolled" among certain records.[3]

Before this enactment "bargains and sales" were not required to be by deed, i. e., a writing under seal, and the statute was intended to prevent secret conveyances.[4]

§ 13. **The lease and release.**—The statute of enrolments did not apply to interests less than a freehold, and therefore a bargain and sale for a year, or a term of years, took effect in spite of the statute and without enrolment; the statute of uses did, however, apply to it, and immediately after the execution of the bargain and sale the lessee became in possession by virtue of this statute, and being thus in possession, he could take a release of the reversion.[5]

This conveyance by lease and release was for more than two centuries, 1620–1841, the common mode of conveying freehold lands in England, and is referred to occasionally in American decisions and statutes.[6] It was not necessary that the bargain and sale for a year should be by deed, though after the Statute of Frauds[7] it was necessary that it should be in writing.

§ 14. **The feoffment—When a deed became necessary for.**—But the common law conveyance by feoffment was still legal (and, indeed, was necessary in some cases, and

[2] 27 Hen. VIII, ch. 10.

[3] See the Act, Digby, Hist. L. Real Prop., 5th ed., p. 368.

[4] 2 Bl. Comm. 338.

[5] 2 Bl. Comm. 339. See post, §§ 20, 25.

[6] E. g. Ky. Stat., 1899, § 492: "Every deed of release shall be as effectual for the purposes therein expressed, without the execution of a lease, as if the same had been executed."

[7] (1677) 29 Car. II, ch. 3.

still is in England);[8] and for this method of conveyance still no written instrument of any kind was required until nearly one hundred and fifty years after "bargains and sales" were required by the Statute of Enrolments to be by deed. That is, until the Statute of Frauds, 1677, no writing was essential to a feoffment, and a deed was not required for a feoffment until 1845.[9]

So far as form of expression was concerned a feoffment was (before these statutes) an oral grant, and the words, "I enfeoff thee and thy heirs forever of black acre" were as effectual as the longest form of deed; but any form of statement, long or short, was wholly ineffectual without livery of seisin.

§ 15. **Deeds used though not necessary.**—Nevertheless, during the time when deeds were not necessary they appear to have been often used for the purpose of preserving some record of the transaction.

The charter, or deed of feoffment, when used for this purpose was properly enough expressed as testifying to a past act: "I have given and granted."[10]

Many deeds now in ordinary use contain language which is a relic of this custom, but they also contain words in the present tense—the combination expressing something that in most cases is not true. For example: "I, A B, etc., have given, granted, bargained, sold, remised, released, conveyed, aliened and confirmed, and by these presents do give, grant, bargain, sell, remise, etc."

Aside from the needless multiplication of operative words (which arose from overanxious care that the deed

[8] Digby, Hist. L. Real Prop., 5th ed., p. 412.

[9] 8 and 9 Vict., ch. 106; Williams' Real Prop., 17th ed., p. 185; Sheppard's Touchstone, Preston's ed., 203. Except in the case of a feoffment to a corporation aggregate and not being a gift in frank-almoigne; Challis Real Prop., p. 326.

[10] See Digby, Hist. L. R. Prop., 5th ed., 60, 61, 145; 2 Bl. Comm., Appendix, form 1.

might operate as one kind of conveyance, if not as another), the employment of both tenses is a worse than useless perpetuation of an old custom.

§ 16. **Livery of seisin in the United States—Conveyance generally by deed.**—It is sometimes stated that livery of seisin has not been used in the United States,[11] but as late as 1827 a conveyance by feoffment with livery of seisin was made in New York,[12] and it was not until 1830 that it was abolished in that state.

However, it appears that it is now either expressly abolished or impliedly declared to be unnecessary in every state.

The statute of Michigan on the subject is substantially like those of many of the states:

"Conveyances of lands * * * may be made by deed * * * without any other act or ceremony whatever." [13]

In Illinois it is provided: "Livery of seisin shall in no case be necessary," etc.,[14] while in New York the statute declares that, "Conveyance by feoffment with livery of seisin has been abolished." [15]

In some states it is excluded by the terms of the statute; for example, "Conveyances of land * * * shall be by deed in writing," [16] or, "An estate in real property * * * can be transferred only by operation of law or by an instrument in writing," [17] while some statutes simply specify how deeds shall be executed without reference or allusion to livery of seisin.[18]

[11] E. g., 4 Kent Comm. 489.
[12] McGregor v. Comstock, 17 N. Y. 162, 171.
[13] C. L. Mich. 1897, § 8956. So, also, e. g., Kan. G. S. 1901, § 1205; Minn. G. S. 1894, § 4160; Mo. R. S. 1899, § 900; Wis. St. 1898, § 2203.
[14] R. S. ch. 30, § 1.
[15] L. 1896, ch. 547, § 206; 3 Birdseye, p. 3050, § 206.
[16] Ind. Burns' R. S. 1901, § 3335.
[17] Cal. Civ. Co., § 1091.
[18] E. g., Ohio R. S., § 4106.

§ 17. How title may still pass inter vivos without writing. From a consideration of such statutes as those just referred to and the Statute of Frauds it might naturally be inferred, at first thought, that there could be now no voluntary transfer of lands inter vivos, so as to convey absolute title in fee simple, without at least some writing; but such is not the case, for there may be a complete and voluntary transfer in fee simple without any writing whatever; as where one enters upon real estate by virtue of a parol gift, his legal title will become absolute if he continues in possession, claiming as owner, for the period prescribed by the statute of limitations.[19] It will be noticed that in such cases as those just cited the transfer of title to the donee is not dependent on any consideration paid by him, nor on any improvements made by him on the property. By simply taking possession under the gift his title may ultimately become perfect, although the voluntary transfer by the donor does not comply with the formalities required by the statutes, but may be repudiated by him at any time before his legal rights are barred by the statute of limitations.

Such cases differ, therefore, from those in which parol gifts have been made of real estate, and the respective donees have taken possession and made valuable improvements on the property, relying on the gift.

In these latter cases, while the legal title may not have yet passed to the donee, nevertheless a court of equity will, as it has often been held, protect his equitable title.[20]

And where, instead of a gift merely, there has been an oral contract for the sale of real estate which has been partly performed by one party, a court of equity will gen-

[19] Schafer v. Hauser, 1897, 111 Mich. 622; 70 N. W. 136; 3 D. L. N. 801; 35 L. R. A. 835; Wilson v. Campbell, 119 Ind. 286; 21 N. E. 893; Wheeler v. Laird, 147 Mass. 421; 18 N. E. 212.

[20] Neale v. Neales, 9 Wall. 1, 9; Schwindt v. Schwindt, 1900, 61 Kan. 377; 59 Pac. 647; Hubbard v. Hubbard, 1897, 140 Mo. 300; 41 S. W. 749; Young v. Overbaugh, 1895, 145 N. Y. 158; 39 N. E. 712. See Ellis v. Dasher, 1897, 101 Ga. 5, 7; 29 S. E. 268.

erally decree a specific performance of the contract in favor of that party in spite of the statute of frauds. In such cases the courts proceed on the general principle that one who has made an oral promise, by reason of which he has obtained some benefit from another, will not be permitted to justify his refusal to perform that promise on the ground that certain statutory requirements have not been complied with.[21]

The cases cited in this section have one feature in common, that is: the title to the real property involved in each case has passed without the execution of any written instrument by the former owner of the property.

§ 18. **Fines and recoveries.**—The feoffment was anciently the only direct way of conveying a freehold interest in lands in possession from one person to another.

But as early as the reign of Henry II, 1154–1189, forms of litigation were used for the purpose of effecting a conveyance of land.

The law of fines was formerly most intricate, but as this method of dealing with land is wholly abolished a knowledge of its details seems unnecessary, though every lawyer should understand the general nature of a fine.

Briefly, it was an amicable compromise—a final concord—of an action, by leave of court, whereby the lands in question in the action, were acknowledged to be the right of one of the parties. Sometimes the concord put an end to genuine litigation, but generally the action was begun merely in order that the pretended compromise might be made. The plaintiff, the intending purchaser, was at first called the demandant, and the defendant (the vendor) the deforceant, but afterward they became known, the latter as conusor, and the former as conusee —these terms referring to the recognition of the right of the one party by the other.

[21] Riggles v. Erney, 1894, 154 U. S. 244; Pike v. Pike, 1899, 121 Mich. 170; 80 N. W. 5; 6 D. L. N. 405; 80 Am. St. R. 488; Martin v. Martin, 1897, 170 Ill. 639; 48 N. E. 924. See Pomeroy Eq. Jur., § 1409.

The fine was so called because it put an end, not only to the matter in dispute, but also to all claims to the land by other persons than the parties who did not within a given time assert their claims, unless they could excuse themselves by showing infancy or some other disability.

Thus the advantages of a fine were: (1) that there was indisputable evidence of the transaction (the concord being enrolled among the court records); (2) the title conferred by the fine was a bar to the claims of all persons (not under disability), whether or not they were parties to the action, who did not within due time put in their claims.[22]

In considering a recent statute adopting the so-called "Torrens System," Holmes, C. J., in meeting an objection to the constitutionality of the statute, refers to the effect of a fine in barring claims to land:[23] and in modern decisions, where conveyances by married women are considered, references are necessarily made to the law of fines.[24] Such instances afford illustrations of the truth that "the study of what is obsolete in practice is not necessarily a waste of time." [25]

A "common recovery" was a collusive action of recovery, not compromised, but prosecuted to judgment by the demandant or recoveror against the tenant or recoveree. It was the mode of barring estates tail, and the result of the proceeding was that the lands passed from the tenant in tail to the claimant in fee simple, free from the claims of reversioner, remainderman or issue in tail,[26] and it was used in this country at one time for the same purpose.[27]

[22] 2 Bl. Comm. 348; Pollock & Maitland, Hist. Eng. Law, II, 94–105; Shep. Touch., ch. 2.

[23] Tyler v. Court of Registration, 1900, 175 Mass. 71, 74; 55 N. E. 812; 51 L. R. A. 433.

[24] Hitz v. Jenks, 1887, 123 U. S. 297, 301; Martin v. Dwelly, 6 Wend. 9; 21 Am. Dec. 245; Clark v. Clark, 16 Ore. 224, 226; 18 Pac. 1.

[25] Williams Real Prop., 17th ed., 174.

[26] 2 Bl. Comm. 357.

[27] See post, § 142.