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ON THE DOCTRINE OF USES AS AN ELEMENT OF OUR LAW OF CONVEYANCES.

SECOND ARTICLE.

The early colonists of this country brought hither with them the various modes of conveying real estate, at that time in use in England. This is apparent from the language of numerous ancient statutes; some of which distinctly recognized feoffment at common law as a valid conveyance, while others have mentioned bargain and sale as a method resorted to for transferring property.

Notwithstanding that legislation in the States has prescribed and limited the operation of deeds, these statutory regulations have not been held to supercede or abolish the modes of conveyance at common law, nor by way of use; and there is, at this day, an almost universal recognition of the English doctrine of uses, as an important element of the American law of conveyance. It is requisite to a satisfactory consideration of the subject before us, that we should ascertain precisely the nature of the English doctrine, before proceeding to inquire into the manner and extent of its application to real estate in this country; and no better exposition of its principles can be given than will be found in its own history, from the period of its original advancement, down to the passage of the cele-

brated statute in the reign of Henry VIII, which by executing uses into possession, may be said to have

> "Turn'd them to shape, and giv'n to airy nothing
> A local habitation and a name."

The English doctrine of uses had its source in the jurisprudence of imperial Rome. By the civil law, certain classes of persons were held incapable of being constituted heirs, or even of taking legacies under testament; and, in order to evade these restrictions, it became usual for testators to nominate some person to be their heir who was capable of taking the inheritance; and to annex a request to the devise, that the person thus constituted heir should give the property to some other person who was incapable of taking directly under the will. This was called a fidei commissum; and legal sanction was given to the execution of the trust reposed in the devisee. The early English clergy, who being chiefly foreigners, were familiar with the learning of the civil law, readily perceived that this doctrine, if once established in England, would greatly facilitate their endeavors to elude the statutory inhibitions of mortmain, by creating an usufructuary possession of land, distinct from the land itself. The scheme was favored by the ecclesiastical chancellors; and accordingly, about the close of the reign of Edward III, they procured its introduction into the English law, under the title of Uses, by which grants and devises of lands were obtained to the use of religious houses, although not directly to the houses themselves. The laity were not tardy in resorting to this contrivance, as regarded both lands and chattels, to enable them to defeat creditors of their executions, and for other fraudulent purposes.

An use may be defined to be a trust or confidence reposed in the legal tenant, that he should suffer another person, who was called the cestui que use, to receive the profits, and that he would protect and dispose of the land according to that person's directions. As the person entrusted with the land generally obtained a feoffment of it, he was called the feoffee to uses; and, although the common law considered him as having the entire ownership of the land, and that the use was repugnant to the limitation made to the feoffee,

yet, chancery held that though the feoffee had the legal estate, the cestui que use had the equitable estate; and the chancellor of Richard II devised the writ of subpœna, returnable into chancery, for the purpose of compelling the feoffee to appear and disclose the trust, and then perform it.

This new method of conveyance was totally discountenanced by the courts of common law; for, as the feudal tenures were created with the utmost publicity, they held that no possession could pass from one to another without solemn livery, though the consideration were never so valuable. The incorporeal nature of uses admitting of secret and informal transfers of property unaccompanied by any act of notoriety, their introduction necessarily subverted, in many instances, the institution and policy of the common law, whose striking feature was simplicity in regard as well to the estates which might be created, as to the means by which they might be raised. By way of use, estates passed by bare words only, without livery of seisin, or any permanent record of the transaction, so that, a third person who had right, knew not against whom to bring his action. As the use was only the equitable right to the enjoyment of the land, it was not affected by the rule of law against a testamentary disposition of estates; for it was thought reasonable, in equity, that the cestui que use might dispose of the profits by will, although the legal estate still remained in the feoffee to uses. Consequently the lords lost their wardships, reliefs, marriages, and escheats; the king, also, lost the estates of aliens and criminals; purchasers were insecure; many were defrauded of their rights by perjury in averment of secret uses, and the use was not subject to the payment of debts; but, in spite of the opposition which they encountered from the common law courts, uses were so admirably adapted to the various exigencies of an increasing commerce, which demanded frequent and secret transfers of property, that, under the guardianship of the courts of chancery, which gradually extended the substantial property of the cestui que use, they became very generally prevalent; and being proof against forfeiture, almost all the lands of the nobility were conveyed to uses during the civil wars of the Roses.

The power conferred by the legislature upon the cestui que use, enabling him to alien lands, without divesting the feoffee to uses of his legal estate, effected also a wide opening to frauds, which finally became intolerable. Several enactments were made for the protection of purchasers and creditors; but the assimilation of uses to the common law remained incomplete, and every attempt to impress them with feudal qualities, while in a separate state, proved ineffectual.

At length, in the midst of these inconveniences and perplexities, the idea was conceived of joining the possession to the use; and, accordingly, the statute 27 Henry VIII was passed, by which it was enacted that, "where any person or persons shall stand seised of any lands or other hereditaments, to the use, confidence, or trust of any other person or persons, the persons that have any such use, confidence, or trust, (that is, the persons beneficially entitled,) shall be deemed in lawful seisin and possession of the same lands and hereditaments, for such estate as they have in the use, trust, or confidence.

This statute was the means of achieving a complete revolution in the system of conveyancing, and forms an era from which may be dated a change in the very constitution of the law of real property. By effecting a transubstantiation of the use, or, in the pithy language of the law, by executing it into possession, it has invested land with equitable properties, and rendered it susceptible of new modifications. It was not designed by the statute to drown the use in the possession; but the possession was imbued with the quality, form, and condition of the use. Uses had none of the lineaments of the feudal system which had been so deeply impressed upon estates at common law; and although the estate in the use, when it became an interest in the land, under the statute, became also liable to all those rules to which common law estates were liable, yet, the qualities which had formerly attended uses in equity, were not separated from them when they were changed, as Sir Wm. Blackstone says, by a sort of parliamentary magic, into an estate in the land itself. The statute transferred the use, with its accompanying conditions and limitations into the land. Shifting, springing, and con-

tingent uses were admitted with nearly the same latitude as before; and to the method which they presented of creating a future interest in land, executory devises owed their origin. The conveyances before in use, still remained, the act having its full operation upon them, and were divided, as before, into two sorts, viz. those operating by transmutation of possession, which were feoffments, lease and release, fines and recoveries; and those not having that operation, as bargains and sales, and covenants to stand seised. The former sort of conveyances actually transferred the estate at common law, and, if uses were declared upon them, the statute was at once attracted. Previous to its enactment a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey an estate in fee simple in the lands. But the statute of uses made it requisite to a feoffment, either that there should be a consideration for the gift, or that it should be expressed to be made not simply unto, but unto and *to the use* of the feoffee; otherwise it should be considered to be made to the use of the party conveying. And in regard to this provision, Lord Hardwicke (in 1 Atkyns' Rep. 591,) is reported to have said, that the statute had no other effect than to add three words to a conveyance.

Bargains and sales, and covenants to stand seised, operated, in the first instance, in equity; although immediately after their execution the legal estate was vested in the bargainee or covenantee by force of the statute of uses. It was requisite to the validity of a conveyance by covenant to stand seised, that there should be a consideration of blood or marriage. Equity, in that case, considered the covenantor to be a trustee for the person in whose favor he had agreed to settle his estate. In the case of a bargain and sale, a valuable consideration was necessary, but it needed not to be pecuniary; a peppercorn, &c., being sufficient to support it. Upon a sale, it was usual for the owner to agree, in the first instance, to sell his estate to the purchaser. This, which was in the nature of a real contract, was termed a bargain and sale. Nothing passed by it at common law; but equity, although there was no conveyance, converted the seller himself into a trustee, and considered him to

stand seised to the use of the purchaser in fee. In order to remedy the inconveniences resulting from secret transfers of property by this mode of conveyance, it was ordained, soon after the passage of the statute of uses, that conveyances by bargain and sale should be by indenture enrolled. But, as chattel interests were not held to be included within this ordinance, it was discovered that a secret bargain and sale to one for years, gave him the use under the general rule of equity, and the legal estate by force of the statute of uses; and it was considered that the legal estate so vested in him, rendered him capable of accepting a release, without the necessity of previous actual entry. Thus a lease and release, which become in effect a new mode of conveyance, operates, at this day, partly under the statute, and partly at common law. The lease for a year, is a bargain and sale under the statute; and, by force of the statute, the lessee immediately takes a vested estate divided from the reversion, and is capable of accepting a release operating by way of enlargement of the reversion. The release takes effect as formerly, at common law. This contrivance was found to dispense with the ceremonies of livery, and of public enrolment; one or other of which forms of notoriety the statute of uses evidently intended should be observed in the transfer of every freehold; and a secret mode of conveyance was established which in fine became the universal assurance of the realm. A simple bargain and sale, as well as covenants to stand seised, not being adapted to settlements, nor to the case of persons not in esse, on account of the considerations requisite to support them, have consequently long since fallen into disuse in England. Chancellor Kent says, that property is there universally conveyed by lease and release, operating in part under the statute of uses; that being a mode well fitted to the secrecy which best accords with the feelings connected with family settlements.

There were some collateral consequences resulting from the statute of uses, which have become indelibly impressed upon the English, and, generally speaking, upon the American law of real property. Among these was the act rendering lands devisable, passed a few years after the 27 Henry VIII. Another was, that

through the medium of a feoffee, or releasee, a man might convey to his wife, although at common law she was incapable of accepting a gift immediately from him. In consequence of uses, before the statute, not being subject to dower, it became usual for the wife's friends, on her marriage, to require the husband to take a conveyance to himself and his wife of some specific lands, as a provision for her after his death; and this was the origin of jointure. But by the statute, a jointure, which was a nullity at law, was made a legal satisfaction of dower. Besides some indirect productions, however, the only end of the statute has been to give efficacy to a species of secret conveyances; while uses has been revived, or rather, have crept into a new existence, under the name of Trusts, subject to the exclusive cognizance of courts of equity. Soon after the statute, it was held that it only executed the first use, and that a use upon a use was void. Thus, equity once more had a pretext for interference, on the ground that the second use, though void at law, was good in equity. And of this, Lord Mansfield, (in 2 Doug. Rep., 774,) remarked: "that, it was not the liberality of the courts of equity, but it was the absurd narrowness of the courts of law, resting on literal distinctions, which in a manner repealed the statute of uses, and drove cestuis que trust into equity." By means of this construction, the ancient use was virtually preserved to be the seed from which was to germinate the noble and enlightened system of modern trusts.

The Statute of 27 Henry VIII. was, then, a law of restitution, to restore the ancient common law, which had been, in a manner, subverted by the two-fold system of uses, by joining the dual interests, possession and use, invented by the monks to evade the operation of the statute of mortmain. As has been already observed, this, or a similar statute is very generally prevalent in the United States. To it a new species of conveyancing owes its origin, which dispenses with livery of seisin, and almost entirely supercedes, in practice, the employment of common law deeds. From its operation arise the words: "to the use of the bargainee," found in deeds of bargain and sale, which are almost universally

employed in this country for the purpose of conveying landed property.

In 6 Mass. Rep. 31, Parsons, C. J., said: "The statute of uses being in force in England when our ancestors came here, they brought it with them as an existing modification of the common law; and it has always been considered as a part of our law." And the statute is recognized as existing in Massachusetts, in 3 Mass. Rep. 573; 7 id. 154; 8 id. 442, and in a multiplicity of other cases. In 1 New Hampshire Rep. 237, Justice Bell said: "The law respecting uses and trusts, as modified by the statute 27 Henry VIII., was received, and has been in practice as the law of this State, from the first organization of its government." And the adoption of the statute is also fully recognized in 1 N. H. Rep. 64; 3 id. 265. It was a part of the colonial law of Virginia, until the general repeal of the British Statutes in 1792. Afterwards, in 1819, a substitute was adopted by the Statute of Conveyances, which provided that the seisin should be executed to the use only in cases of deeds of bargain and sale, of lease and release, and of covenants to stand seised to the use. The statute only executes the use in those specified cases, and does not, like the English Statute, include every case where any person shall stand seised to the use of any other person. But the theory of uses still exists.

Similar enactments to that of Virginia are found in the Statutes of North Carolina, revised in 1836; of Kentucky, revised in 1834; of Mississippi, and of Florida.

In South Carolina, the statute is expressly adopted in terms. In Indiana, Illinois, and Missouri, it is reënacted in substance. In Delaware, it is briefly enacted that "lands, tenements, and hereditaments may be aliened, and possession thereof transferred by deed, without livery of seisin; and the legal estate shall accompany the use, and pass with it." (Del. Revised Statutes, 1829.) In Maryland, the courts from their very first establishment have adjudged the people entitled to the benefit of all the statutes of England, passed antecedent to its settlement as a province. And amongst other English statutes adopted by them, is that of 27 Henry VIII., concerning Uses and Wills. (2 Har. & McH. R. 336.) In New

York, the English doctrine of uses was recognized prior to the introduction, by the Revised Statutes, in 1830, of the mode of conveyance by grant, which may now be considered a substitute for the conveyance to uses. (10 Johns. Rep. 456 and 505; 11 id. 351; 16 id. 304 and 515.) The revisers considered that by making a grant without the actual livery of seisin effectual to pass every estate and interest in land, the utility of conveyances deriving their effect from the statute of uses would be superceded; and that the new modifications of property which uses have sanctioned, would be preserved by repealing the rules of the common law, by which they were prohibited, and permitting every estate to be created by grant which can be created by devise. It was, accordingly, declared that uses and trusts, except as authorized and modified in the article relating to them, were abolished; and every estate held as an use executed under any former statute, was confirmed as a legal estate. (4 Kent's Com. 300).

Besides the States already mentioned as having recognized the doctrine of the statute of uses, it has been adopted, either expressly or by a recognition of its beneficial principles, in Alabama, Connecticut, Georgia, New Jersey, and Tennessee; and in Rhode Island the statute has operation, but it is necessary that the deed be acknowledged before it can take effect.

In Ohio, it seems never to have been in force, as a rule of property; and it has been said that uses stand as they were before the 27 Henry VIII. (7 Ohio Rep. 275).

The English learning in regard to conveyances on which a use may, or may not be raised, has been for the most part abolished in Pennsylvania, since the passage of the Act of Assembly 28th May, 1715, if not from a prior period. By that act, all deeds and conveyances, whatever be their forms, when they are duly recorded have the same force and effect for giving seisin and possession, as deeds of feoffment with livery of seisin, or deeds enrolled in any of the courts of Westminster. By a feoffment with livery, a use may be raised to any one in whose favor it is declared by the deed, without a consideration expressed: and, therefore, the same thing may

be done in that state, by a bargain and sale, or any other form of conveyance, duly recorded.

It is in consequence of these and similar principles established by our law in early times, that the complex and burthensome machinery of feoffment with livery of seisin, lease and release, and fines and recoveries, employed in England for the raising of uses, has never been in common use here; and the simple forms of our deeds, containing words of bargain and sale, alienation, feoffment, release, etc., have been made to answer all the purposes to which the former were applied in England. It has been declared that our deeds are a combination, partly of feoffment, partly of bargain and sale; the livery of seisin necessary to deeds of feoffment being superceded by the act of recording, and the whole taking effect by the force of the statute of uses; and, although it is true that our deed does pass the estate to the grantee, without livery of seisin, it is by virtue of the statute, growing out of the recording, that it is effective. Frequent recurrence to the statute of uses is, therefore, indispensably necessary in giving effect to deeds in this country. 3 Pick. 521; 4 Dane's Abr. 157, 258; 3 Mass. 573; 5 id. 353; 6 id. 32; 14 id. 491; 12 Metc. 162.

The only conveyance known to American law, operating directly and solely under the statute of uses, is a covenant to stand seised to uses. And although it would seem that a mere covenant to convey cannot, in this country, operate to transfer the estate, yet cases frequently occur in which the grantors intended to convey according the rules of the comman law, but owing to some defect in the manner of conveying, the deed can take effect only by the application of the statute of uses; and so liberal are the courts, in such instances, in giving effect to the intention of the parties, that a deed which is defective as a feoffment, for want of proof of seisin, may operate as a covenant to stand seised to uses, and as such, pass the title to the grantee; the use being executed into possession by the force of the statute. 4 Munf. 473.

A lease and release, although frequently recognized by statutes, is almost entirely unknown here in practice. Fines, as a method of conveyance, do not appear ever to have been adopted in this

country; and common recoveries have been but seldom used. 4 Mason, 55.

The mode of conveyance most prevalent in the United States, is a bargain and sale. The great liberality manifested by courts of law in reference to its form, has contributed to bring it into general favor. If the instrument express a valuable consideration in law as the foundation of the bargain, no particular form of words is necessary; any terms that would raise a use will be sufficient. 4 Kent's Comm. 496.

It is still essentially the same conveyance that has already been described as formerly in use in England. The bargain and sale first vests the use, and then the statute vests the possession. It operates by delivery merely, and not by livery of seisin; consequently, it is greatly preferable to the ancient charter of feoffment, which it has universally superceded. As we have seen, it is required to be enrolled in England; and although good as between the parties without this formality in the United States, in order to protect against subsequent purchasers and creditors, it must universally be recorded.

To the execution of a use, under the statute, it is necessary that there should be a person seised to the use of some other person. It is therefore requisite to the validity of a bargain and sale, as such, that the person making it should have a capacity to raise a use. This point only arises, in practice, in regard to a corporation. The word person, in the statute, has been held inapplicable to corporations, in England; and there, in order to enable them to convey by deed of bargain and sale, a distinction has been taken between standing seised to a use, and giving a use; it being held that a corporation may convey, by way of use, though it cannot take, or stand permanently seised to the use of others. But, in the United States, corporations are subject to the process of chancery, and the word, "person" in statutes is held to apply as well to bodies corporate as to individuals; and therefore a corporation may be seised to any use or trust, not foreign to the purposes of its creation. 11 Wheaton, 362; 2 Howard S. C. R. 497; 2 Kent's Com. 279.

Another circumstance necessary to the execution of a use under the statute, is, that there must be a cestui que use in esse. If, therefore, a use be limited to a person not in esse, or to a person uncertain, the statute can have no operation. All persons capable of taking lands by any common law conveyance, may also be cestuis que use; and by the words of the statute, corporations may be cestuis que use.

It is likewise requisite that there should be a use in esse, in possession, remainder, or reversion; and this use may either be created by an express declaration, or may result to the original owner of the estate, or arise from an implication of law.

It has been a question, whether a bargain and sale to take effect in futuro, is valid. And although there seems to be a lack of unanimity in the adjudications on this point, most, if not all of the elementary writers lay it down, that a freehold in future may be created by a bargain and sale operating under the statute of uses. The rule of law, that an estate of freehold cannot be made to commence in futuro, is only applicable to common law assurances, which operate by transmutation of possession; and does not reach conveyances under the statute. It has always been held that a covenant to stand seised might take effect at a future day; its object being to provide family settlements; and it has been declared that the only substantial difference between a covenant to stand seised to uses, and a bargain and sale, is in the nature of the consideration which they require. In the case of a bargain and sale, a consideration expressed in the deed is sufficient to give it validity; and it seems that such a deed would be as capable of taking effect in futuro, as would be a covenant to stand seised. Chancellor Kent says, that springing uses may be raised by any form of conveyance. In conveyances which operate by way of transmutation of possesion, as feoffment, etc., the estate must be conveyed, and the use raised out of the seisin created in the grantee by the conveyance. In the case of covenants to stand seised, and bargains and sales, which operate not by transmutation of the estate of the grantor, the use is severed out of the grantor's seisin, and executed by the statute. Covenants to stand seised, as has been before

observed, are seldom resorted to in the country, except for the purpose of giving effect to defective deeds, according to the legal maxim,—ut res magis valeat quam pereat. Deeds of bargain and said are almost universally employed throughout the United States, and by their general aptitude are made to answer every purpose.

Ulterior uses, declared on deeds of bargain and sale, covenants to stand seised, or conveyances by appointment under a power, are uses on uses, and considered trusts. No use can be declared on a bargain and sale, or covenant to stand seised, but to the bargainee or covenantee; because, these conveyances only pass a use, and the legal estate is transferred by the statute. Now, it has been shown that the statute only executes the first use, and not the second; so that the second is void in law, but is supported in equity under the name of trust. (2 Prest. Conv. 482.) Also, in all cases of uses not executed by the force of any statute, they will remain as equitable estates, of the same nature as trusts, and not cognizable in courts of law.

It was held, in some early cases, that trust estates were to be regarded as identical with uses prior to the 27 Henry VIII.; but a different doctrine is now settled. In its general outlines and essential properties, the doctrine of trusts resembles uses; and many of the qualities of the ancient use were annexed by the Chancellors to equitable estates. But there is a distinction between them, occasioned not so much by any alteration in their nature, as by the change which has taken place in the system of law by which they are regulated. An eminent judge has said that uses and trusts might essentially be looked upon as being two names for the same thing: that they are opposed, not from any metaphysical difference in the essence of the things themselves; but their opposition consists in the difference in the practice of the Court of Chancery.

As the statute of uses preceded the statute of wills, in England, the former has been said not to extend the devises to uses. Whatever diversity of opinion may have existed upon this question, the better judgment now seems to be prevalent, that such uses may be executed by the statute. But, in Virginia, it has been held that