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CURRENT LEGISLATION

VALIDITY OF CONVEYANCE BY ONE OUT OF POSSESSION OF REAL PROPERTY HELD BY ADVERSE CLAIMANT.—At common law an attempted conveyance of real property by one out of possession was ineffective.¹ This rule is understood when one realizes the peculiar features of feoffment, which in the earlier stages of English history was the method of transfer of lands. While the intent to convey land by feoffment could be expressed either orally or in writing, this had to be followed by livery of seisin, or the feoffment was void, and livery of seisin could not be made unless the feoffor had actual possession of the land.² Hence, if the rightful owner of real property was out of possession and a disseisor in possession, the disposed grantor being unable to make delivery of possession of land, had nothing to convey and a purported conveyance was ineffective and void.

However, the disseisee did have certain rights whereby he could redeem his land, but these rights were considered personal, or choses in action and were not assignable at common law.³

New York, like the other English colonies, adopted the laws of the mother country, and despite the severance of ties with England, the state retained the English view of the sanctity of property. The legislature fully adopted the common law concept of the transfer of property⁴ in 1828,⁵ when the grant of real property by one not in possession and which property was in the actual possession of one claiming adversely to the grantor was declared to be void.

Even while this limitation on the transfer of real property was being given statutory effect by the legislature of this State, the very basis for the law had long been removed. The traditional livery of seisin was merely an historical ceremony long obsolete, and possession was not requisite for the transfer of lands.⁶

Subsequently, further limitation was put on the alienation of real property held by one claiming adversely and it was made a misdemeanor to buy, sell or covenant or convey any right, title or interest

¹ *People v. Ladew*, 237 N. Y. 413, 143 N. E. 238 (1924); *Little v. Jackson*, 6 Wend. 213 (N. Y. 1830).

² POLLACK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed.) 84.

³ 1 GREENLEAF, *CRUISE ON REAL PROPERTY*, tit. 13, c. 1, § 15 (this rule was a result of the fear of unnecessary litigation, and from the year 1275 to the year 1540 there were enacted a series of English statutes punishing maintenance and champerty).

⁴ *Vrooman v. Shepard*, 14 Barb. 441 (N. Y. 1852) (the common law declared void, as to the party in possession, a conveyance made when the land was held adversely to the parties to it, and also most contracts in relation thereto); *Truax v. Thorn*, 2 Barb. 156 (N. Y. 1848).

⁵ 1 R. S. 1828.

⁶ N. Y. REAL PROP. LAW § 242; *Russell v. Societe Anonyme Deo Etablissements Aeraxon*, 242 App. Div. 801, 274 N. Y. Supp. 794 (2d Dep't 1934), *aff'd*, 268 N. Y. 173, 197 N. E. 135 (1935).

in lands or tenements unless the grantor or those under whom he claimed had been in possession of the lands or the remainder or reversion thereof, or had taken the rents and profits for one year.⁷

From the Revised Statutes of 1828 was evolved Section 260 of the Real Property Law.⁸ Under this law a deed was held void where at the time of its delivery another than the grantee was in actual possession of the land claiming under a title adverse to that of the grantor; and this, though the grantor's title was good.⁹ To evoke the statute the adverse possession had to be actual and not constructive¹⁰ and such possession even for a single day, if known or unknown, avoided the attempted conveyance.¹¹ This was true of course only where the person in such possession claimed under some specific title,¹² and such title claim had to be made under some written instrument purporting to transfer the lands in question to the claimant, or some judgment of a court.¹³

As between the grantor and grantee the deed was operative and passed title. The same was true of persons standing in legal privity with them. It was only considered void as against parties holding and claiming title adversely.¹⁴ Hence, a defense under this section was available only to one in adverse possession of the lands and not to the grantor-disseisee or a stranger not claiming under the disseisor.¹⁵

⁷ N. Y. PENAL LAW §§ 2031-2033.

⁸ N. Y. REAL PROP. LAW § 260. "Effect of grant or mortgage of real property adversely possessed. A grant of real property is absolutely void, if at the time of the delivery thereof, such property is in actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, * * *. The provisions of this section do not apply to a grant of such property made to the people of the state of New York, nor to a person where the title granted to such person shall thereafter, by grant or mesne conveyance, become vested in said people."

⁹ *Collins v. Buffalo, L. & R. Ry., et al.*, 145 App. Div. 148, 129 N. Y. Supp. 139 (4th Dep't 1911).

¹⁰ *Ostrander, et ux. v. Bell, et al.*, 199 App. Div. 304, 192 N. Y. Supp. 262 (3d Dep't 1921).

¹¹ *Blissing v. Smith*, 85 Hun 564, 33 N. Y. Supp. 123 (5th Dep't 1895); *Smith v. Faulkner*, 48 Hun 186, 15 N. Y. St. Rep. 637 (1888); *Crary v. Goodman*, 22 N. Y. 130 (1860).

¹² *Dowley v. Brown*, 79 N. Y. 390 (1880) (this specific title of adverse possessor had to be disclosed so court could determine if it actually was adverse to that of grantor in contested transfer).

¹³ *Green v. Horn*, 207 N. Y. 489, 101 N. E. 430 (1913).

¹⁴ *Hennig v. Smith*, 151 N. Y. Supp. 444 (Erie County 1915); *Sheridan v. Caldwell*, 145 App. Div. 603, 130 N. Y. Supp. 638 (2d Dep't 1911); *Ward v. Reynolds*, 25 Hun 385 (N. Y. 1881); *Hamilton v. Wright*, 37 N. Y. 502 (1868). *Contra*: *People v. Ladew*, 237 N. Y. 413, 143 N. E. 238 (1924) (wherein it was held that a grantee of the disseisee gets no title, no right of entry but a mere right to claim by estoppel the benefit of the recovery of possession of his grantor).

¹⁵ *Sheridan v. Caldwell*, 145 App. Div. 609, 130 N. Y. Supp. 638 (2d Dep't 1911); *Hamilton v. Wright*, 37 N. Y. 502 (1868).

Under one of the exceptions of this statute, a mortgage on lands adversely held was not void. However, no action could be maintained by one out of possession; the mortgagee being required either to sue on the bond, or, if he desired to enforce his rights on the land, to wait until the mortgagor recovered possession.¹⁶ Prior to such recovery there was no estate in or lien against such property in favor of the mortgagee.

The courts construed Section 260 of the Real Property Law to apply only to voluntary conveyances.¹⁷ The legislature further limited the application of the statute by specifically designating conveyances to the State of land adversely held as valid.¹⁸ This was another step on the road to abandoning a useless and cumbersome law.

The legislature created an apparent anomaly on the statute books in 1862 when it provided that a grantee of lands adversely held might maintain an action in the name of his grantor to recover the property.¹⁹ However, the problem was resolved by judicial interpretation and it was decided that this section only provided a remedy; it did not make the deed valid or change the substantive statute in that regard.²⁰ Nevertheless, the effect of Section 260 of the Real Property Law was nullified by Section 994 of the Civil Practice Act to the extent that a grant of land in adverse possession transferred to the grantee the grantor's right to recover possession,²¹ and though the deed was void the grantee got a substantial right thereby.²² Thus it can be seen that the legislature attempted to accomplish by a circuitous method what it finally did directly. The only plausible reason for this steadfast refusal to eliminate entirely from the statute books laws which substantively prohibited and remedially permitted the same thing, was the blind adherence to an obsolete and archaic rule which is inconsistent with the law of property today.²³

The final step to eliminate this law which made such convey-

¹⁶ *Hopkins, et al. v. Baker*, 140 App. Div. 460, 125 N. Y. Supp. 417 (1st Dep't 1910); *De Garmo v. Phelps*, 176 N. Y. 455, 68 N. E. 873 (1903).

¹⁷ *Truax v. Thorn*, 2 Barb. 156 (N. Y. 1848); *Stoddard v. Whiting*, 46 N. Y. 627 (1871) (it was held that this section does not apply to a conveyance of an equitable right of redemption).

¹⁸ N. Y. Laws 1909, c. 481.

¹⁹ N. Y. CODE OF CIV. PROC. § 111, later N. Y. CIV. PRAC. ACT § 994. "Action by grantee of lands held adversely. Such an action may be maintained by a grantee, his heir or devisee, in the name of the grantor or his heir where the conveyance under which he claims is void because the property conveyed was held adversely to the grantor. * * *"

²⁰ *Hamilton v. Wright*, 37 N. Y. 502 (1868).

²¹ *Chamberlain v. Taylor*, 105 N. Y. 185, 11 N. E. 625 (1887).

²² *Towle v. Smith*, 25 N. Y. Super. Ct. Rep. (2 Rob.) 489 (1864) (Code of Civ. Proc. § 111 was held to repeal by implication the penal provisions making conveyance of land by one out of possession a misdemeanor); LEGIS. DOC. NO. 65(G) (1941) p. 23. "There are no reported decisions in prosecution under sections 2031 or 2032 of the Penal Code since 1830."

²³ Only seven other states make such conveyances invalid: Connecticut, Florida, South Carolina, Tennessee, Kentucky, North Dakota and Oklahoma. The latter three are the only other states which make such acts a penal offense.

ances invalid was taken by the legislature and Section 260 of the Real Property Law was amended and now provides:

"No grant, conveyance or mortgage of real property or interest therein shall be void for the reason that at the time of the delivery thereof such real property is in the actual possession of a person claiming under a title adverse to that of the grantor." Also, Section 994 of the Civil Practice Act was amended to read:

"Action by grantee of lands held adversely. Such an action shall be maintained by a grantee, his executors, administrators or assigns in his or their own names, although at the time of the conveyance, such real property was in the actual possession of a person claiming under a title adverse to that of the grantor." Consistent with these changes, Sections 2031, 2032 and 2033 of the Penal Law were repealed.²⁴

These amendments expressly validate a conveyance by one out of possession of land held adversely and conform the practice to the general rule that the real party in interest must sue in his own name.²⁵ Although there has been no judicial decision in point since the passage of the amended statute, it will probably be treated as prospective in nature.²⁶

This statutory change is a recognition by the legislature that laws based on antiquated theories and contrary to the modern concepts of property, must of necessity be removed from the statute books of this State. It is another step in the direction of treating real property like a commodity and removing the air of sanctity that has too long surrounded it.²⁷ It makes for the freer and less complicated transfer of real property, and in the words of the Law Revision Commission in its report to the legislature on the value of this bill: "the clearing of titles will be facilitated by such amendments."²⁸

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²⁴ N. Y. Laws 1941, c. 317. It was further provided therein: "When a conveyance under which the grantee claims was made prior to the effective date of this act and was void because the real property conveyed was held adversely to the grantor, an action to recover real property, or the possession thereof may be maintained by a grantee, his distributee or devisee in the name of the grantor or his distributee. * * *"

²⁵ LEGIS. DOC. No. 65(G) (1941) p. 7.

²⁶ *Partello v. People*, — Misc. —, 14 N. Y. S. (2d) 264 (1939) (the court by way of dicta stated this to be true).

²⁷ *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 625 (N. Y. 1824) ("The apprehension, that justice would be trodden down, if property in action should be transferred, is no longer entertained; and the ancient rule now serves only to give form to some legal proceeding. Experience has fully shown, not only that no evil results from the assignment of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action as well as property in possession").

²⁸ LEGIS. DOC. No. 65(G) (1941) p. 6.