

CHAPTER XXVII.

THE DISABILITY OF A GRANTOR ARISING FROM ADVERSE POSSESSION.

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§ 415. Disability of disseisee at common law—Statute 32 Henry VIII.—At common law a right of entry was not assignable, though it might be released to the person in actual seisin or possession of the freehold;¹ and, as by the earlier common law such importance was attached to the possession of land and to the real, actual transfer of this possession when a freehold was conveyed,² there could be no conveyance of land held in adverse possession; therefore in this sense it may be said that it was a rule of the common law that the conveyance of land in the adverse possession of another was void.³

After the statute of uses⁴ and when it was possible to transfer the legal title to land without this actual change

¹ Co. Litt. 214a; Digby Hist. L. Real Prop. 149n; 2 Poll. & Mait. Hist. Eng. L. 91.

² 2 Poll. & Mait. Hist. Eng. L. 42, 81, 84.

³ Bernstein v. Humes, 60 Ala. 528; 31 Am. R. 52; Bruckner's Lessee v. Lawrence, 1 Doug. (Mich.) 19, 38.

⁴ (1535) 27 Hen. VIII, c. 10.

of possession there was enacted a statute⁵ which prohibited the buying or selling of any pretended rights or titles to any lands, tenements or hereditaments, unless the seller or his ancestor, or those by whom he claimed, had been in possession of the same, or of the reversion or remainder thereof, or had taken the rents or profits thereof, for a year next before the sale; this statute also confirmed all previous statutes against champerty and maintenance, but permitted the purchase of a pretended title by one in the lawful possession of the rents and profits of lands. The object of the statute was to prevent the transfer of titles for the purpose of maintaining or assisting a suit and to leave to the land-claimant the conduct of his own suit unaided by the means of others who might expect to share in the property recovered.⁶

§ 416. Statutes in this country adopting the principles of this statute.—The statute of Henry VIII has been followed more or less closely in statutes in some of the United States; the chief reason given for its adoption being that, in accordance with a wise policy, it prevents the purchase of doubtful claims by strangers to them for the purpose of litigation.⁷

In several states, therefore, conveyances of lands which at the time of the conveyance are in the adverse possession of another are declared by statute to be void;⁸ and in some states the buying or selling of such pretended titles is declared to be a misdemeanor.⁹

⁵ The bill of bracer and buying of titles, usually called "The Pretended Title Act," 32 Hen. VIII, c. 9 (1540).

⁶ *Baker v. Whiting*, 3 Sumn. 475.

⁷ *Russell v. Doyle*, 84 Ky. 386, 389; 1 S. W. 604; *McMahan v. Bowe*, 114 Mass. 140; 19 Am. R. 321.

⁸ Connecticut Gen. Stat. 1902, § 4042; Kentucky Stat. 1903, § 210; New York Real Prop. L., § 225; N. Y. R. S. Birdseye's 3d ed. III, p. 3057; Tennessee Code 1896, §§ 3171, 3172, 3175.

⁹ New York Penal Co., § 130; N. Y. R. S. Birdseye's 3d ed. I, p. 407; North Dakota Co. 1899. § 7002; a similar provision in South Dakota Penal Code, § 7648, though found in the statutes of 1901, appears to

§ 417. Disseisee's conveyance not void for all purposes.—Nevertheless a conveyance made under such circumstances where these statutes exist (as also in those states where the same doctrine is recognized without legislation) are not generally regarded as absolutely void for all purposes.

As against the party in possession, holding the land mentioned in the conveyance adversely to the grantor, the conveyance passes no title and is thus often said to be void,¹⁰ or voidable¹¹ as to him, and it gives the grantee, generally, no right to maintain an action in his own name against the adverse claimant.

Yet such a conveyance is usually regarded as valid between the parties to it and as transferring to the grantee the right to maintain an action of ejectment against the adverse possessor in the name of his grantor.¹²

The grantee in such cases uses his grantor's title, which still remains in the grantor in spite of his deed, for the purpose of getting possession of the land; and, therefore, if the grantor, before the grantee brings an action against the adverse possessor, releases his legal title to the adverse possessor, the latter has then the legal title and possession under it, and neither the grantor nor the grantee in the former deed can recover the land.¹³

§ 418. The principle recognized in some states without legislation.—In a few other states the principle of the statute of Henry VIII has been recently recognized irrespective of express statutes adopting it.

have been repealed in 1899, see *Civ. Co.*, § 4492; *Campbell v. Equitable Loan &c. Co.*, 1903 (S. Dak.), 94 N. W. 401.

¹⁰ *Mead v. Fitzpatrick*, 1902, 74 Conn. 521; 51 Atl. 515; *Green v. Cumberland &c. Co.*, 1903 (Tenn.), 72 S. W. 459; *Farmers' Bank's Assignee v. Pryse*, 1903 (Ky.), 76 S. W. 358.

¹¹ *Fort Jefferson Improvement Co. v. Dupoyster*, 1899, 108 Ky. 792; 51 S. W. 810; 48 L. R. A. 537.

¹² *Farnum v. Peterson*, 111 Mass. 148; *Galbraith v. Paine*, 1903 (N. Dak.), 96 N. W. 258; *Key v. Snow*, 90 Tenn. 663; 18 S. W. 251. But see contra *Crowley v. Vaughan*, 11 Bush (Ky.), 517.

¹³ *Dever v. Hagerty*, 1902, 169 N. Y. 481; 62 N. E. 586.

In Alabama, for example, a conveyance of lands which at the time of the execution of the conveyance are in the adverse possession of a third person, while good as between the parties to it, is void for champerty as to the adverse possessor;¹⁴ and in Florida the same doctrine prevails.¹⁵

In Indiana, at an early period, the general rule that a conveyance of land in the adverse possession of another is void as against the adverse possessor, was adopted as part of the common law;¹⁶ but the grantee could maintain an action in the name of his grantor; for, as the deed was valid between the parties to it, the grantor could not deny the use of his name for this purpose, and if the land was recovered by the grantee in the name of the grantor, the recovery inured to the benefit of the grantee.¹⁷

As the present statute,¹⁸ while not directly authorizing the conveyance of lands held adversely to the grantor (as do statutes in half the states), provides that any person having the right to recover the possession of real estate, or to quiet the title thereto in the name of any other person, shall have a right to recover possession or quiet title in his own name, the older doctrine seems to be practically abolished.¹⁹

§ 419. To what transfers the rule does not apply.—The rule that conveyances of lands by one disseised are invalid as against the disseisor, does not apply to certain conveyances, even though the lands are adversely pos-

¹⁴ *Berry v. Tennessee &c. R. Co.*, 1902, 134 Ala. 618; 33 So. 8; *Pearson v. Adams*, 1901, 129 Ala. 157; 29 So. 977; *Chevalier v. Carter*, 1899, 124 Ala. 520; 26 So. 901.

¹⁵ *Reyes v. Middleton*, 1895, 36 Fla. 99; 17 So. 937; 29 L. R. A. 66.

¹⁶ *Patterson v. Nixon*, 79 Ind. 251, 255.

¹⁷ *Steeple v. Downing*, 60 Ind. 478, 484.

¹⁸ *Burns' R. S.* 1901, § 1086.

¹⁹ See *Peck v. Sims*, 120 Ind. 345; 22 N. E. 313; *Chapman v. Jones*, 1897, 149 Ind. 434; 47 N. E. 1065; *Winstandley v. Stipp*, 1892, 132 Ind. 548; 32 N. E. 302.

essed when the conveyances are executed. For instance, such a conveyance is not invalid if made in pursuance of a valid contract entered into while the land was not held adversely.²⁰ Nor is the doctrine that the conveyance of a disseisee is void, applicable to a patent or deed of land from the state, because the state cannot be disseised;²¹ nor does the rule apply to judicial sales.²² It has also been held that one in possession under a conveyance from a minor does not hold adversely within the meaning of these statutes so that his possession will render void a conveyance by the former infant to another after his majority in disaffirmance of his former voidable conveyance.²³ A release made to one in possession by the disseisee seems to have been always allowable.²⁴

§ 420. Character of possession rendering the transfer void.—While the possession of a third person which will render void a conveyance of the land must be adverse to the grantor, and such as, if continued long enough, will give the possessor title,²⁵ it need not generally be under color of title or claim of some specific title, unless the statute provides that the possession shall be by one “claiming under a title adverse to that of the grantor,” in which case it has been construed to require a claim under some specific title;²⁶ not every invasion, however, of a grantor’s rights as landowner, even though of a character which if continued would ultimately ripen into a per-

²⁰ *Harral v. Leverty*, 50 Conn. 46; 47 Am. R. 608; *Greer v. Winter-smith*, 85 Ky. 516; 4 S. W. 232; 7 Am. St. R. 613.

²¹ *Candee v. Hayward*, 37 N. Y. 653; *Cassedy v. Jackson*, 45 Miss. 397, 407.

²² *Ward v. Edge*, 1897, 100 Ky. 757; 39 S. W. 440; *Coleman v. Manhattan Beach Co.*, 94 N. Y. 229.

²³ *Moore v. Baker*, 1892, 92 Ky. 518; 18 S. W. 363.

²⁴ *Adams v. Buford*, 6 Dana 406, 413.

²⁵ *Merwin v. Morris*, 1899, 71 Conn. 555; 42 Atl. 855; *Murray v. Hoyle*, 1890, 92 Ala. 559; 9 So. 368.

²⁶ *Arents v. Long Island R. Co.*, 1898, 156 N. Y. 1; 50 N. E. 422; *Kreuger v. Schultz*, 1896, 6 N. Dak. 310; 70 N. W. 269.

petual easement, will amount to such adverse possession, or ouster of possession, as will render the grantor's conveyance invalid; so, for example, the possession and occupancy of a structure projecting over, but not touching, the grantor's land is not such ouster.²⁷

While the possession of the adverse holder must generally be actual as distinguished from construction,²⁸ it is enough to make his possession adverse within the policy of these statutes that he is in actual possession of a part of the land claiming the whole tract under an assurance of title in which the boundaries of the whole are specified and defined.²⁹

§ 421. The old rule generally abrogated in the United States.—In a few states the principle of the statute of Henry VIII has never been recognized by either the courts or legislatures. The reasons for the statute have been considered inapplicable to this country, and it has been deemed the better policy to render the transfer of land as free as possible and to disregard the question as to whether the grantor is in or out of possession.³⁰

And in accordance with the same policy statutes have been enacted in more than half the states, and in many where until recently the statute of Henry VIII had been recognized, abrogating entirely the old doctrine. These statutes either declare that no grant or conveyance of lands shall be void for the reason that the lands are in the adverse possession of another than the grantor when the conveyance is executed, or they provide that one may convey his interest in lands in the adverse possession of

²⁷ *Norwalk Heating &c. Co. v. Vernam*, 1903, 75 Conn. 662; 55 Atl. 168.

²⁸ *Dawley v. Brown*, 79 N. Y. 390.

²⁹ *Green v. Cumberland &c. Co.*, 1903 (Tenn.); 72 S. W. 459.

³⁰ *Hall's Lessee v. Ashby*, 9 Ohio 96; 34 Am. D. 424; *Borland's Lessee v. Marshall*, 2 Ohio St. 308, 314; *Stoever v. Whitman*, 6 Binn. (Pa.) 416, 420; *Overfield v. Christie*, 7 Serg. & Rawle (Pa.) 173; *Campbell v. Everts*, 47 Texas 102.

another with the same effect as if they were not so held.⁸¹

The abolition, however, of the rule making void conveyances of land in adverse possession will not render valid contracts and conveyances which are essentially champertous in their nature and thus void.⁸²

⁸¹ Ark. Dig. Stat. 1894, § 701; Cal. Civ. Co., § 1047; Colo. Mill's Co., § 431; Ga. Code 1895, § 3605; Idaho Civ. Co. 1901, § 2393; Ill. R. S., ch. 30, § 4; Iowa Ann. Co. 1897, § 2916; Kan. Gen. Stat. 1901, § 1208; Maine R. S. 1883, ch. 73, § 1; Mass. Rev. L. 1902, ch. 127, § 6; Mich. C. L. 1897, § 8961; Minn. Gen. Stat. 1894, § 4165; Miss. Co. 1892, § 2433; Mo. R. S. 1899, § 905; Montana Co. 1895, § 1443; Neb. Com. Stat. 1901, § 4123; Nev. Com. L. 1900, § 2673; Ore. Hill's L. 1892, § 3009; R. I. Gen. L. 1896, ch. 201, § 23; So. Dak. Civ. Co. 1901, § 4492 (though, see Penal Co., § 7648); Utah R. S. 1898, § 1980; Vermont Stat. 1894, § 2240; Wis. Stat. 1898, § 2205; Wyoming R. S. 1899, § 2735.

⁸² Johnson v. Hilton, 1895, 96 Ga. 577; 23 S. E. 841; Illinois Land &c. Co. v. Speyer, 1891, 138 Ill. 137; 27 N. E. 931; Burton v. Perry, 1893, 146 Ill. 71; 34 N. E. 60; Stewart v. Welch, 41 Ohio St. 483.