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Amendment to Surrogate's Court Act Relative to Conveyance of Real Property by Executor or Administrator to Holder of Contract of Sale Made by a Decedent

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exclude all suits between husband and wife based on matrimonial difficulties from the operative scope of Section 266. The court, in refusing to accept this view, said, "If it was the intention of the legislature to restrict counterclaims in actions between husband and wife to those mentioned in Section 1168, language expressing such an intention could readily have been employed and this is as much so with respect to new Section 266." [18] This is particularly so as remedial statutes should receive liberal construction.[19]

As a result of the limitation thus placed on Section 266 by Section 1168, certain counterclaims were denied which would have been otherwise valid under Section 266, resulting in a necessity for bringing separate suits. It is for this reason that, effective September 1, 1948, Section 1168 will be removed from the Civil Practice Act, and thereafter all matrimonial counterclaims will be brought directly under Section 266 as limited by Section 262.

ANNE G. KAFKA.

AMENDMENT TO SURROGATE'S COURT ACT RELATIVE TO CONVEYANCE OF REAL PROPERTY BY EXECUTOR OR ADMINISTRATOR TO HOLDER OF CONTRACT OF SALE MADE BY A DECEDENT.—Section 227 of the Surrogate's Court Act has been recently amended in order to facilitate the conveyance of real property of a decedent by his executor or administrator, pursuant to contracts of sale made by the decedent, without requiring court approval for such transfer, although the executor or administrator may seek such approval at his own option.[1] The section as amended now reads: [2]

> CONVEYANCE OF REAL PROPERTY BY EXECUTOR OR ADMINISTRATOR TO HOLDER OF CONTRACT OF SALE MADE BY A DECEDENT. Where a decedent dies seized of *real property* after he has made a contract for the conveyance thereof *remaining unexecuted at his death,* his executor, administrator, *or the successor of either,* may make a deed reciting said contract and conveying *such real property. The vendor's legal representative* or the vendee, *his legal representative, distributees, devisees* or assigns, may file a petition praying for the confirmation of *such conveyance,* or *in the case of a vendee, his legal representative, distributees, devisees or assigns,* for a decree that the same be made and delivered, or the *vendor's legal representative* may pray for the like

[18] *Id.* at 782, 36 N. Y. S. 2d at 489.

[19] *In re* Greenberg's Estate, 261 N. Y. 474, 185 N. E. 704 (1933); Ginsberg Realty Co. v. Greenstein, 157 Misc. 148, 283 N. Y. Supp. 100 (Munic. Ct. 1935), *aff'd,* 158 Misc. 473, 286 N. Y. Supp. 33 (Sup. Ct. 1936).

[1] Laws of N. Y. 1948, c. 617.

[2] New matter is in italics. The section became effective September 1, 1948.

relief in a petition for the judicial settlement of his account, *but no proceeding pursuant to this section shall be requisite in any case for the sole purpose of perfecting title to real property, and any such conveyance heretofore made by a legal representative of a decedent is ratified and confirmed. In a proceeding pursuant to this section, the court shall have the jurisdiction to adjudicate the amount remaining payable under the terms of any such land contract and all the respective rights of the parties.* In any case, a citation shall issue to all persons interested, and the court shall make such decree *or order* as justice requires.

The new amendment is actually a rather belated correction of an error in the wording of the section as amended in 1914,[3] when the revisers attempted to secure the present result, but failed to do so by reason of the wording of the statute.[4] At that time the revisers sought to enable the representative to execute a deed on his own responsibility in fulfillment of a valid contract to sell real property made by the decedent. It was desired to eliminate (1) the required action before the surrogate to obtain judicial approval before such deed could be granted, and (2) any necessity for heirs or devisees to join in a conveyance of the deed, when they held only naked legal title. The necessity for heirs or devisees to join in a conveyance was removed by the 1914 revision, but the attempt to enable the legal representative to execute a conveyance was defeated mainly by the wording of the last sentence of the original Section 227, "A deed delivered pursuant to this section, *upon its confirmation by such decree* shall be effectual to convey all the right, title and interest to the said lands which the decedent has at his death." (Italics ours.)

A construction of the statute of 1914 was necessary in the case of *Waxson Realty Corporation v. Rothschild.*[5] The action was brought by the assignee of the vendee of a contract of sale with a decedent, to recover the amount paid on the purchase price on the theory that the title was unmarketable. The defendant administrator interposed a general denial and a counterclaim for specific performance. After making the contract of sale, the vendor had died before delivering a deed, and left a will devising the property to a sister for life, and then creating a trust which invalidly suspended the power of alienation. The plaintiff rejected the title on the grounds that the administrator in a proceeding before the surrogate under Section 227, had not cited the necessary heirs. The legal representative of the decedent contended that he in fact had authority by reason of Section 227 to convey a deed without the proceeding before the surrogate, and without the citations issuing. The decision of the court on this point was to the contrary, on the basis of the portion

[3] Laws of N. Y. 1914, c. 443.

[4] N. Y. SEN. DOC. VOL. 11, No. 23, p. 224 (1914).

[5] 229 App. Div. 302, 241 N. Y. Supp. 589 (2d Dep't 1930), *rev'd on other grounds,* 255 N. Y. 332, 174 N. E. 700 (1931).

of the statute above cited, and a proper proceeding was held to be requisite for an effective conveyance.

In the *Waxson* case the court, by way of dictum, also questioned the constitutionality of the sought for construction. It was said there, "But in my opinion, there is considerable doubt as to whether the construction contended for by the appellant would not render this statute unconstitutional. An executor or administrator, as such, has no title in the real property. While he is entitled to the proceeds arising from a contract to sell real property made by the decedent in his lifetime, the legal title remains in the heirs at law or devisees. I am unable to see how this title, even though a mere naked legal title, may be divested by a statute giving the executor or administrator power to convey the property without the consent of the heirs or devisees. They have a right to be heard upon the validity of the contract and its due performance by the vendee, and such right may not be cut off by a statute giving the representative power to convey the lands under the contract without notice to them, without their consent, and without any proceeding to which they are parties and in which they may be heard."[6] It is difficult to see the reasoning of the court in making this statement. It has long been well settled that on completion of the contract of sale the vendee acquires equitable ownership, the vendor retaining legal ownership and title as security for the payment of the full purchase price,[7] and that on the death of the vendor, the contract and the money received under it pass as personalty.[8] Therefore, in the case of a valid executory contract, the only thing that remains to be done is the physical passing of title by the giving of a deed where the vendee has performed or is willing and able to perform. If the heirs do not believe that a valid contract subsisted, and that the property should not be conveyed, they still have recourse to legal and equitable remedies. The knowledge of the personal representative, who will deliver the deed, may be deemed as sufficient notice to the heirs of the existence of the contract. There would appear to be no denial of due process involved in this procedure. And on the other hand, much litigation can be avoided.

The current revision therefore clarifies the wording of the statute so as to give effect to the original intent of the legislature. This was done by eliminating the last sentence in its entirety, and including as an affirmative statement an additional phrase, "but no proceeding

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[6] Waxson Realty Corporation v. Rothschild, 229 App. Div. 302, 306, 241 N. Y. Supp. 589, 594 (2d Dep't 1930), *rev'd on other grounds,* 255 N. Y. 332, 174 N. E. 700 (1931).

[7] Williams *et al.* v. Haddock, 145 N. Y. 144, 39 N. E. 825 (1895); Crippen v. Spies, 225 App. Div. 411, 7 N. Y. S. 2d 704 (3d Dep't 1938).

[8] Stewart v. Griffith, 217 U. S. 323, 54 L. ed. 782 (1910); Williams *et al.* v. Haddock, 145 N. Y. 144, 39 N. E. 825 (1895); Coles v. Feeney, 52 N. J. Eq. 493, 29 Atl. 172 (1894); Bender v. Luckenbach, 162 Pa. 18, 29 Atl. 296 (1894).

pursuant to this section shall be requisite in any case for the sole purpose of perfecting title to real property and any conveyance heretofore made by a legal representative is ratified and confirmed."

Let us examine the situation in other jurisdictions. New Jersey has also recognized the problem by a statutory provision which gives the legal representative even broader power to fulfill the decedent's contracts for the sale of land without any order of court, and omits from its provision any optional characteristic as found in the New York law.[9] In Michigan an executor has been authorized to execute a deed without an order of the probate court, if the amount due on the land contract was paid in full.[10] Many states, however, hold to the requirement of a proceeding in the probate court to effect a conveyance in compliance with the contract of the decedent, the situation being regarded as one within the equitable jurisdiction of the probate court wherein it may decree a conveyance by the executor or administrator when the deceased, if living, could be compelled to convey.[11]

Most of the cases arising from the situation under discussion have been actions for specific performance brought by the purchaser to compel the executor or administrator to fulfill the decedent's contract.[12] However, even if the application to the probate court is by

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[9] N. J. REV. STAT., tit. 3, c. 23-6 (1937). "Contracts of Decedent for Purchase or Sale of Real Estate, Performance by Executor or Administrator. Any executor of any last will and testament, or any administrator to whom letters testamentary or of administration have heretofore or may hereafter be granted, may carry into effect the terms and conditions of any agreement for the purchase or sale of any real estate entered into by the decedent and any subsequent agreement entered into by such fiduciary in relation thereto. shall be binding and effectual on all parties as if made by the decedent and such fiduciary may take title to real estate in said agreement named, at such times and upon such terms and conditions as he shall deem for the best interest of the estate, although by the provisions of said last will and testament there is given no power to the executor to receive and take title to real estate, or, although said decedent died intestate; and said real estate shall be assets of the estate in the hands of said executor or administrator as the case may be, and may be sold and conveyed by him without any order of court, and he shall receive, be accountable for and pay over, the proceeds of such sale or sales as other estate moneys in his hands; and where any executor or administrator shall die or ,be removed from office by any court of competent jurisdiction, then and in every such case any sale or conveyance of such real estate made by the surviving or acting executor or administrator, or made by an administrator with the will annexed, or an administrator of intestate's estates, appointed by any court of competent jurisdiction in the place and stead of such deceased or removed executor or administrator, shall be construed to have vested and to vest in the purchaser or grantee the title to such real estate in the same manner and as fully to all intents and purposes as if all had been living or acting and had joined in such conveyance."

[10] Greenberg v. Mosley's Estate, 284 Mich. 683, 279 N. W. 904 (1938).

[11] CAL. PROB. CODE ANN. § 850 (1944); MASS. ANN. LAWS, c. 204, § 1 (1932); ILL. REV. STAT., c. 3, § 406 (1945).

[12] Wheeler v. Crosby, 20 Hun 140 (N. Y. 1880); *In re* Bailey's Estate, 42 Cal. App. 509, 109 P. 2d 356 (1941); Fidelity & Deposit Co. v. Meldrum, 46 Ariz. 295, 50 P. 2d 570 (1935); Wilson v. Fackrell, 54 Idaho 515, 34 P. 2d 409 (1934).

the executor or administrator seeking a direction to complete the contract, the result of such a decree would be in practical effect specific performance. It does, therefore, seem superfluous to require the legal representative to go to the extent of securing a decree in equity to accomplish the performance of a valid contract for the sale of land made by the decedent, when all that is sought is a conveyance of legal title to the equitable owner.

The enactment of this legislation was therefore advantageous, as it enables purchasers entitled to deeds under contracts with decedents to receive them without delay and difficulty attendant upon compliance with the law as it existed previously. The section as now revised is sufficiently clear, although not as positively worded as the comparable New Jersey statute cited. There is, however, probably much to be said for New York's inclusion of the option given to the legal representative to seek court approval, as this procedure would be desirable in a situation where an issue could be determined with more economy before conveyance.

DENNIS J. CAREY.

AMENDMENT TO THE CIVIL PRACTICE ACT RELATING TO EXAMINATIONS BEFORE TRIAL.—On March 24, 1948, Section 288 of the Civil Practice Act was amended to provide that where a party to an action or an original owner of a claim is a partnership or an individual doing business under his own or under an assumed or trade name, the testimony of an agent or employee may be taken under the same circumstances as would the deposition of an agent or employee of a corporation. The amendment became effective on September 1, 1948.[1]

[1] Laws of N. Y. 1948, c. 453. The section now reads: "Testimony by deposition during pendency of action and before trial. Any party to an action in a court of record may cause to be taken by deposition, before trial, his own testimony or that of any other party which is material and necessary in the prosecution or defense of the action. A party to such an action also may cause to be so taken the testimony, which is material and necessary, of the original owner of a claim which constitutes or from which arose, a cause of action acquired by the adverse party by grant, conveyance, transfer, assignment or endorsement and which is set forth in his pleading as a cause of action or counterclaim. *When an adverse party, or an original owner of a claim whose testimony may be taken by deposition, is a partnership, an individual conducting a business under his own name, or an individual doing business under a trade or assumed name, the testimony of one or more of his or their agents or employees, which is material and necessary, may be so taken.* Any party to such an action also may cause to be so taken the testimony of any other person, which is material and necessary, where such person is about to depart from the state, or is without the state, or resides at a greater distance from the place of trial than one hundred miles, or is so sick or infirm as to afford reasonable grounds of belief that he will not be able to attend the trial, or other special circumstances render it proper that his deposition should be taken." (Amended matter in italics.)