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Partial Assignments in Kentucky--The Rule in Henry Clay Fire Ins. Co. v. Denker's Exr.

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Further, the Court holds, that entry and subsequent holding of land through mistake as to the true boundary is not adverse holding. But if, as contended here, such entry and possession should be regarded by the Court as adverse possession, regardless of whether or not the entry was made by mistake, then the Statute of Limitations should start running at the time of such entry.

An undesirable result of the Kentucky cases is that they allow acquisition of title to land in cases where the land was willfully taken, thus rewarding the wrongdoer, and deny acquisition in cases where possession was taken with no intent to deprive the titleholder of title without compensation, thus penalizing the innocent taker for not intending to take more than that to which he had title. Public policy would seem to require that the innocent taker be given at least as adequate protection as the willful taker. The Statute of Limitations was not passed to enable wrongdoers to deliberately take another's land, therefore, something akin to a "felonious" intent should not be required to acquire title by adverse possession.[10]

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PARTIAL ASSIGNMENTS IN KENTUCKY—THE RULE IN HENRY CLAY FIRE INS. CO. v. DENKER'S EXR.

Partial assignments without the consent of the obligor are not enforceable at law, because if the debtor originally contracted to pay *in solido*, the creditor cannot, by partial assignment, subject him to more than one law suit.[1]

Equity courts, however, have always recognized the partial assignee[2] and such has been the growth of the equitable recognition accorded him that today he is as adequately protected in most jurisdictions as the total assignee. Equity courts generally allow him a bill to enforce an unpaid debt, provided he joins his assignor,[3] and if the obligor pays the whole debt to the assignor after notice of the partial assignment, the assignee may hold him liable.[4]

The Kentucky court, for the most part, has been very generous in its recognition of the partial assignee. It shared the common confusion[5] of the state courts caused by *Mandeville* v. *Welch*,[6] and said broadly in *Weinstock* v. *Bellwood*,[7] that no cause of action could arise on a partial assignment. But in a long line of decisions, and especially in those beginning with *Columbia Finance and Trust Co.* v. *First Natl. Bank*,[8] the court seemed to follow "the tendency of modern decisions . . . in the direction of more fully protecting the equitable rights of the assignees of choses in action."[9]

A notable and recent exception, however, is the decision in *Henry Clay Fire Ins. Co.* v. *Denker's Exr.*[10] In that case there was an assignment, by written contract and for valuable consideration, of part of the amount due the assignor on a fire insurance policy. Written notice

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Co. v. Cline and York, 185 Ky. 528, 215 S. W. 538 (1919); Combs, et al. v. Ezell, et al., 232 Ky. 602, 24 S. W. (2d) 301 (1930).

[10] City of Rock Springs v. Gus Sturm, 39 Wyo. 494, 273 Pac. 908 (1929).

of the assignment was given the company, which acknowledged its receipt, but did not indicate any acceptance of the assignment. Later the insurance company paid the full amount of the policy to the assignor who converted the whole sum, left the state and was insolvent at the time the assignee sued the insurance company. The Court of Appeals, reversing the decision of the lower court, held that the assignee could not recover, because a partial assignment without the consent of the obligor is a nullity as against him, and "no cause of action arises in favor of the proposed assignee against the debtor."

The court based its holding on a text quotation[11] and the decisions in *Weinstock* v. *Bellwood* and *Kentucky Lumber and Millwork* v. *Montz*,[12] all of which are rather dubious authority for the point. The text quotation has been called "clearly erroneous";[13] the reference to *Kentucky Lumber and Millwork* v. *Montz*, is only to what is there dictum;[14] and the decision of *Weinstock* v. *Bellwood*, based on an early interpretation of *Mandeville* v. *Welch*, had later been impliedly distinguished by the court itself in *Columbia Finance and Trust Co.* v. *First Natl. Bank*, as applying only to the legal rights of a partial assignee as contrasted with his equitable rights.

Moreover, the opinion ignores an excellent line of decisions granting equitable recognition to the partial assignee in many situations. In many of the cases the question of whether acceptance is necessary to create an effective partial assignment is not at issue, but in *Just's Admx.* v. *Woodman*,[15] the court held valid an assignment of $200 from a trust fund, of which the obligor had knowledge but which had never been formally accepted by him. The court there said:

"An order drawn upon a debtor for valuable consideration, payable

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[1] 2 Williston, Contracts (Rev. Ed., 1937), Sec. 442.
[2] 2 Williston, Contracts (Rev. Ed., 1937), Sec. 443.
[3] 2 Williston, Contracts (Rev. Ed., 1937), Sec. 443.
[4] 2 Williston, Contracts (Rev. Ed., 1937), Sec. 444.
[5] Note (Pratt), 13 Corn. L. Q. 129.
[6] 5 Wheat. 277 (U. S., 1820).
[7] 75 Ky. (12 Bush) 139 (1876). See also dictum interpreting Mandeville v. Welch, in Buckner v. Sayre, 57 Ky. (18 B. Mon.) 746, 756 (1857).
[8] 116 Ky. 364, 76 S. W. 156, 25 K. L. R. 561 (1903).
[9] Risley v. Phenix Bank of the City of New York, 83 N. Y. 318, 329 (1881).
[10] 218 Ky. 68, 290 S. W. 1047 (1927).
[11] 5 C. J. 925: "By the great weight of authority an order drawn on a debtor for a part of a fund in his hands and unaccepted by him, will not operate as an equitable assignment of part of the fund as against the drawee, even though drawn on a particular fund specified."
[12] 158 Ky. 328, 164 S. W. 935 (1914).
[13] 80 A. L. R. 425; Cf. 5 C. J. 925 with 6 C. J. S. 1114.
[14] The court here recognized a partial assignment which had been accepted. Any statement in regard to unaccepted partial assignments was dictum. This dictum is interesting in that the court, in quoting Cyc. to prove that partial assignments were recognizable in equity included a statement which a later court seized upon to show it was not.
[15] 147 Ky. 493, 144 S. W. 379 (1912).

> out of a designated fund, or debt, actually due or to become due, operates, when delivered to the payee, as an equitable assignment or appropriation of such fund *pro tanto* and no acceptance by the drawee is necessary to its validity."

In cases other than those involving an acceptance by the obligor and where the parties are properly before a court of equity, the rights of a partial assignee have been recognized and fully protected in many situations. He has been protected against a subsequent total assignment,[16] and given preference over a subsequent partial assignee.[17] He has been preferred over subsequently attaching creditors,[18] and over a subsequent mortgage of the assignor's interests.[19]

The question of whether a partial assignee could bring a bill in equity against an obligor to enforce payment of an unpaid obligation has never been squarely before the Kentucky court. In *Snelling* v. *Boyd*,[20] while it refused to allow an action for specific performance by two partial assignees, each of whom had a half interest derived through different assignors from the original assignor, the court put the decision on the ground that the previous assignors should have been joined, since in an equitable action all parties to be bound should be before the court. The implication seems clearly to be that the partial assignee could sue in equity if he joined the other parties to the transaction. In *Miller* v. *Maloney*,[21] the court allowed the partial assignee to bring a bill in equity to have his partial assignment set off against a judgment secured against him by the obligor. "A chancellor," said the court, "is never controlled by the legal assignability of the instrument evidencing the demand, but looks to the use and affords remedy to those who are equitably entitled to the money due."

Since *Henry Clay Fire Insurance Co.* v. *Denker's Exr.*, there has been no clear case to show how far the court will follow its decision and dictum in that case. In *Inter-Ocean Casualty Co.* v. *Dunn*,[22] and *Stewart* v. *Continental Casualty Co.*,[23] the court held that certain wage assignments for payment of insurance premiums were not effective in the absence of the employers' acceptance, but this would be a necessary holding under the Kentucky statute[24] requiring an acceptance in the case of wage assignments.

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[16] Lexington Brewing Co. v. Hamon, 155 Ky. 328, 160 S. W. 264 (1913).

[17] Columbia Finance and Trust Co. v. First Natl. Bank, supra, n. 8.

[18] Newby v. Hill, 59 Ky. (2 Metc.) 530 (1859); Lutter v. Grosse, 26 K. L. R. 585, 82 S. W. 278 (1904); Kentucky Lumber and Mill Work v. Montz, supra, n. 12.

[19] 107 Ky. 492, 54 S. W. 854, 21 K. L. R. 1212 (1900). But see Summers v. Kilgus, 77 Ky. (14 Bush) 449 (1879).

[20] 21 Ky. (5 T. B. Mon.) 172 (1827).

[21] 42 Ky. (3 B. Mon.) 105 (1842).

[22] 219 Ky. 103, 292 S. W. 742 (1927).

[23] 229 Ky. 634, 17 S. W. (2d) 745 (1929).

[24] Ky. Stat. (Carroll, 1936), Sec. 4758a-2: "No such instrument (written assignment of wages to be paid in the future where the consideration for the assignment is less than $200) shall be valid against

In *Patternson* v. *Miracle*,[25] the court recognized a partial assignment as effective over a subsequent attachment, finding an acceptance of the assignment by the local agent of the insurance company, and presuming that the local agent had the authority to do so in the absence of a showing to the contrary. This possibly indicates a desire on the part of the court to avoid the result of the decision in *Henry Clay Fire Ins. Co.* v. *Denker's Exr.*

The rule in *Henry Clay Fire Ins. Co.* v. *Denker's Exr.*, is contrary to the weight of authority in the United States, and in opposition to the general trend of the law of assignments in the United States and Kentucky in particular. Reason, as well as practical considerations of the commercial world, is against it. It is submitted that it should be restricted as far as possible in the future, if not directly overruled.

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CONSTITUTIONAL LAW—TAXATION AS INCOME OF OFFICER'S SALARY EXEMPT FROM DIMINUTION DURING TERM OF OFFICE.

The Kentucky Income Tax Act, passed by a special session of the General Assembly in 1936, provides:

> "A tax is hereby annually levied for each taxable year upon every resident individual of this State upon his entire net income as herein defined for purposes of taxation. . . ."[1]

Plaintiff, a judge of the circuit court, sought an injunction to prevent defendant, as state commissioner of revenue, from enforcing penalties against him because of his failure to file an income tax report in accordance with the requirements of the statute, contending that the tax, insofar as it affected his salary as judge, was unconstitutional in that it diminished his compensation during his term of office in violation of Sections 161 and 235 of the Constitution of Kentucky.[2] *Held* (three judges dissenting, by a special Court of Appeals, the judges of the regular court having declared themselves disqualified to act), that the tax did not diminish plaintiff's compensation during his term of office within the meaning of the State Constitution, and that the act was therefore valid.[3] The undiminished compensation guaranteed by the Constitution, the court said, means compensation as such, and not "exemption of public officials from any tax that is levied on any other citizen of Kentucky. . . . The Commonwealth,

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the employer of the person to whom such wages are payable unless and until said employer shall signify in writing upon said instrument his assent to said assignment . . ."

[25] 253 Ky. 347, 69 S. W. (2d) 708 (1934).

[1] Ky. Stats. (Carroll, 1936), § 4281b-14.

[2] Ky. Const., § 161: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment, or during his term of office." Id., § 235: "Salaries of public officers shall not be changed during the terms for which they were elected."

[3] Martin, Commissioner of Revenue v. Wolfford, 269 Ky. 411, 107 S. W. (2d) 267 (1937).