Kentucky Law Journal

Volume 40 | Issue 3 Article 8

1952

# Remedies of Good Faith Occupier Who Has Improved Land--In Kentucky

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*Promissory Restraints*

A promissory restraint is found in those situations where there is an agreement not to alienate, either in the form of a covenant in a conveyance or lease, or a contract with respect to the sale of an interest in land. The validity of such restraints is important in determining whether such agreements will be specifically enforced. In most jurisdictions, the validity of promissory restraints on real property is determined in the same way as is the validity of analagous forfeiture restraints.[31] As in the case of a forfeiture restraint, a promissory restraint may be dispensed with if all the parties concerned agree to do so. In this respect these two types differ from the disabling restraint under which property cannot thereafter be alienated even though all the parties so desire. This apparently is the reason why promissory restraints are treated similarly to forfeiture restraints, despite the fact that they more closely resemble disabling restraints in form.

In last analysis, a given rule on alienation is a result of balancing the beneficial character of the purposes of the restraint as against the extent to which alienability would be hindered, if the provision in question were held valid. While courts seldom have much to say about purpose, it is a most important factor in determining the character of the rule. One may well anticipate that, in the face of new purposes which are definitely in accord with good public policy, the courts may make new exceptions to the old doctrines with respect to direct restraints.

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## REMEDIES OF GOOD FAITH OCCUPIER WHO HAS IMPROVED LAND – IN KENTUCKY

Courts have long been faced with the problem of providing an adequate remedy for the good faith purchaser of land who makes valuable improvements thereon, and is later ejected from the land because of a superior title in a third person. The purchaser, usually called an "occupying claimant", cannot recover the improvements themselves where they have become a part of the realty, but since he has expended a sum of money and enhanced the value of another's property because of an honest mistake, the law should afford him

[31] SIMES, *op. cit. supra*, note 1, at 355.

some relief. The need for a remedy may be more clearly illustrated by the following hypothetical fact situation.

Suppose A purchases land in good faith from B, who had obtained a deed to the land from one who had an imperfect record title and no title by adverse possession. A, reasonably believing that he has title, builds a $10,000 house on the land. C, the true owner, proves his superior title, and ejects A from the land. Is A entitled to recover any of the money he has expended? If he can, what is the measure of damages and what is the proper method to determine them? It is the purpose of this note to discuss the possible remedies of A in Kentucky.

*Statutory Remedy*

Most states, including Kentucky, have so-called "betterment acts" or "occupying claimants statutes" enacted for the benefit of a claimant who finds himself in the position described in the hypothetical situation. Kentucky's statute is typical.[1]

> "If any person, believing himself to be the owner by reason of a claim in law or equity *founded on a public record,* peacefully occupies and improves any land, and the land, upon judicial investigation, is held to belong to another, the value of the improvements shall be paid by the successful party to the occupant, or the person under whom and for whom he entered and holds, before the court rendering judgment or decree of eviction causes the possession to be delivered to the successful party." (Italics writer's)

By the literal wording of the statute, it would seem that a claimant could recover the value of any improvements from the successful party in the forcible detainer action. And indeed, in a majority of states having similar statutes, he can[2] recover if he is in good faith and has color of title but in Kentucky, under an old interpretation of the phrase, "founded on a public record," the claimant can recover nothing unless he can trace his chain of title back to the Commonwealth. Under the assumed facts of the hypothetical case, A obtained the property from B under a faulty title, thus A's claim in law is *not* founded on a public record. The Kentucky Court has consistently held that the claimant must be able to trace title back to the grant of a patent.[3] Apparently, there are two exceptions to this

[1] KY. REV. STAT. 381.460 (1948).

2 TIFFANY, REAL PROPERTY, sec. 625 (3rd ed., 1939); RESTATEMENT, RESTITUTION, sec. 42, comment, subsection 1 (1937).

[3] Golden v. Blakeman, 223 Ky. 517, 519, 3 S.W 2d 1095, 1096 (1928); Wintersmith v. Price, 23 Ky. L. Rep. 2005, 66 S.W 2 (1902); *See,* Hardin v. Robinson, 243 Ky. 648, 652, 49 S.W 2d 563, 564 (1932); Darnell v. Jones, 24 Ky. L. Rep. 2090, 2092, 72 S.W 1108, 1109 (1903); Shaw v. Robinson, 111 Ky. 715, 723, 64 S.W 620, 623 (1901).

rather harsh rule: first, where a purchaser is in possession under a judgment awarding land to him,[4] and second, where a bona fide purchaser at a judicial sale, later held void, makes improvements thereon.[5]

It will immediately be perceived that such an interpretation of the statute limits the number of recoveries under it, and this observation is substantiated by a dearth of litigation under the statute. It is interesting to analyze the early decisions under the Kentucky Occupying Claimants Act, and to discover the reasoning underlying this unique interpretation.

Probably the first case under the act was *Clay* v *Miller*,[6] decided in 1816. In holding that the occupant could not recover, the court gave a very inadequate explanation, amounting to little more than a mere conclusion of law It said, "The foundation of Miller s claim is, therefore, the deed from Williams, unconnected with any deduction of title from the Commonwealth; and as such we cannot suppose he has brought himself within the occupying claimant law"[7]

The case of *Lewis* v *Singleton*[8] gives some insight into the historical rationalization of the peculiar Kentucky rule. It seems that in England and Virginia controversies about title to land were settled by tracing the title back to the original grant from the crown. When the proper title was determined, principles of equity were invoked, and if by a reasonable search of title, a man could have discovered the defect, he was unable to recover. So, according to our court, when the Kentucky Legislature enacted the statute, it intended such a test to be carried over into our law The land problem in Kentucky was rather complicated since the land had been derived from Virginia. As a result, there was a maze of overlapping patents from Virginia and Kentucky and also many conflicting junior and senior patents. With this situation in mind, the Kentucky Court may well have been justified in feeling that the Legislature intended such an interpretation. The court pointed out, "If, in scrutinizing his title, either legal or equitable, he could arrive at the foundation, without defects, in some public record, or in other words, some office where the appropriation was allowed by the government to be made to such cases the statute peculiarly and exclusively applies."[9]

The leading case in Kentucky, *Fairbarn* v *Means*,[10] reaffirms this

[4] *See*, Kidd v. Roundtree, 285 Ky. 442, 444, 148 S.W 2d 275, 276 (1941).
[5] *See*, Soper v. Foster, 256 Ky. 157, 158, 75 S.W 2d 1080, 1081 (1934).
[6] 7 Ky. (4 Bibb.) 461 (1816).
[7] *Id.* at 461.
[8] 9 Ky. (2 A. K. Marsh.) 214 (1820).
[9] *Id.* at 215.
[10] 61 Ky. (4 Met.) 323 (1863).

rule, and in applying it points out that mere belief that the title is traceable to a patent is insufficient. It was held that there must in fact be an uninterrupted chain of title. The plaintiff who had made improvements claimed the land under a junior patent to Bryant. One of the links in their chain of title was a deed executed in 1815, by a sheriff, conveying the land to Young, in pursuance of a sale executed for taxes. It was not shown that the officer had authority to sell the land. The defendant had obtained the land as heirs of a senior patentee. Recovery was denied under the statute because of the break in the chain of title. The Court felt that the belief referred to in the statute was one which may only be judicially determined, and which, therefore, must be founded upon the fact that the occupant holds a title granted by the Commonwealth. The Court said that it was impossible to determine just what actual belief the claimant had. The court also felt that the intent of the statute was to relieve occupants holding apparent, but invalid, titles granted by the state.

It is submitted that the basic reason laid down by the court, in applying such a narrow interpretation to the situation in the *Fairbaum* case, was the historical development set out in the *Lewis* case. It may be conceded that such reasoning had a sound basis in the early days of the Commonwealth, but in practical application today, the interpretation of the statute is, at most, an anachronism in the law

Of course, if it be assumed that the claimant can trace his title to a patent from the Commonwealth, the technique he must use in realizing recovery is prescribed by statute, which provides[11] that either party to the eviction action may request the court to appoint a jury of twelve freeholders to meet on the property and ascertain the value of the improvements *as of the time the jury is empaneled.*[12] The occupant is given a lien, which may be enforced in the usual way[13] It is important to note also that the measure of damages under the statute is *the value of the improvements,* which will generally be commensurate with the amount actually spent.

Before passing to a discussion of the claimant's remedy in equity, it is interesting to note that the original Kentucky Occupying Claimants Act was declared unconstitutional by the Supreme Court of the United States. In *Green* v *Biddle,*[14] decided in 1823, it was held that the act materially impaired the property rights of the rightful owner of land given to them under a Compact between Kentucky

[11] KY. REV. STAT., secs. 381.470 *et. seq.* (1948).
[12] KY. REV. STAT. sec. 381.500(3) (1948).
[13] KY. REV. STAT. sec. 381.550 (1948).
[14] 21 U. S. (8 Wheat.) 1 (1823).

and Virginia, and since the Compact was constitutional, the statute was invalid. This case has never been overruled on this point, and, in fact, has been cited in at least one later Federal case.[15] A careful search fails to disclose a single Kentucky case following the Supreme Court decision, although one case mentions it in passing.[16] It would seem, therefore, that Kentucky has a statute almost identical in substance to one that was declared unconstitutional over 125 years ago. A possible explanation of this unusual fact is that the statute might well have been considered to be unconstitutional only in regard to its interference with property rights conferred under the Compact.

*Equitable Remedy*

Although there was some authority to the contrary,[17] the general rule at common law was that equity would aid one who innocently made improvements on land, and had no legal remedy against the owner, by allowing him to recover for the improvements, at least to the extent that they had improved the value of the land.[18] Kentucky has been in accord with this general rule since the case of *Barlow* v *Bell*,[19] decided in 1818. The court, in this often cited case, by way of dictum, stated the rule, " but regarding courts of equity in supplying the defects of the common law we should have no hesitation in relieving the possessor (sic) for improvements made upon the land, whilst he bona fide considered it his own."[20] Our court has unequivocally followed this rule.[21]

The theory of recovery in equity is based upon the fundamental principle of unjust enrichment of the person who has been successful in the eviction action,[22] and therefore damages are determined by the extent to which the value of the land has been enhanced by the addition of the improvements.[23] Of course, the occupant must have improved in good faith,[24] and the improvements must be of a permanent nature.[25] In many states where recovery in an equitable

[15] Kentucky Union Co. v. Kentucky, 219 U. S. 140, 162 (1910).
[16] Eastern Kentucky Coal Lands v. Commonwealth, 127 Ky. 667, 691, 106 S.W 260, 267 (1907).
[17] Westerfield v. Williams, 59 Ind. 221 (1877); Nelson v. Allen, 9 Tenn. 360 (1830); note, 40 COL. L. REV. 145 (1940).
[18] 2 TIFFANY, REAL PROPERTY, sec. 625 (3rd ed., 1939).
[19] 8 Ky. (1 A. K. Marsh) 246 (1818).
[20] *Id.* at 246.
[21] Strunks Lane v. Anderson, 297 Ky. 578, 180 S.W 2d 385 (1944); Darnall v. Jones, 24 Ky. L. Rep. 2090, 72 S.W 1108 (1903); Hawkins v. Brown, 80 Ky. 186 (1882).
[22] 8 Ky. (1 A. K. Marsh.) 246 (1818); 31 C. J. 314.
[23] Strunks Lane v. Anderson, *supra* note 21.
[24] *Ibid.*
[25] Darnall v. Jones, *supra* note 21.

action is permitted, the occupant must be the defendant in the eviction suit and assert his right to recover for improvements by way of a counterclaim.[26] However, Kentucky also permits the occupant to recover as a plaintiff.[27] When the good faith occupant recovers judgment, he has a lien on the property which may be enforced in the usual manner.[28]

In comparing the statutory and equitable remedies, it is obvious that the damages allowed under the statute may be more advantageous to the claimant. In most cases, the actual value of the improvements will exceed the enhanced value of the improved land. When, as in our hypothetical fact situation, A puts the $10,000 house on the land, the value of the land may not have been enhanced to that extent. If not, the claimant must stand the loss which is represented by the difference. If the Kentucky Court should have an opportunity in the future to directly reconsider the limiting effect of its interpretation of our statute, it is submitted that the difference in damages factor should be weighed carefully and that the court should decide whether as a matter of policy the claimant is to be limited to damages based on unjust enrichment in equity

In conclusion, it appears that the reasons for limiting recovery under the statute to those who are able to trace their title back to the Commonwealth were primarily historical. They were probably justifiable historically, in view of the newness of the country, and the possibility of overlapping patents, but today such reasons do not exist. It is only reasonable and logical that the statute should be broadened in its scope to aid all bona fide claimants, and this conclusion is strengthened by the fact that the Kentucky interpretation stands alone. The Kentucky Court has indirectly recognized the weakness of the interpretation by its readiness to apply equitable principles to situations not covered by the statute. It may, however, be argued that the overturning of a precedent over 130 years old amounts to judicial legislation, and that the job of changing the statute should be left up to the legislature.

If the foregoing analysis of Kentucky law is applied to the hypothetical situation assumed at the outset of this discussion, it is clear that A, the claimant, has two general bases for recovery against C. If he is able to trace his title back to an original grant from the state, he may simply invoke the statutory remedy and procedure prescribed.

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[26] 31 C. J. 315.
[27] Parker v. Stephens, 10 Ky. (3 A. K. Marsh.) 197 (1920); Barlow v. Bell, *supra*, note 19.
[28] Strunks Lane v. Anderson, *supra*, note 21.

If, however, a search reveals that his title is not traceable back to a patent, he must assert his claim in equity on a theory of unjust enrichment. In either event, he is entitled to a lien which he may enforce against the land.

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## THE VALIDITY OF THE GIFT OVER IN KENTUCKY DETERMINED THROUGH CONSTRUCTION OF ESTATE IN FIRST TAKER

When one devises or bequeaths property absolutely, but purports to provide in the same instrument for a gift over of so much of the property as remains undisposed of by the first taker at death, the gift over is invalid and of no effect. The theory underlying this well established, long standing rule of property law is that a fee simple has been given to the first taker, leaving nothing which can be the subject of a gift over or remainder.[1] This view of the invalidity of the gift over is consistent with fundamental concepts of property law, but it is not always clear that the real intent of the testator is given effect through this construction. An instrument containing his kind of gift over provision often presents the courts with a difficult construction problem because the specific terms of the will may vary considerably from case to case, depending on the definiteness with which the estate of the first taker is described.

In comparatively recent years, a series of interesting cases has reopened the question of the validity of this type of gift over provision in Kentucky and other states.[2] Although the rule of property law would seem to be unchanged, it is being applied with a new rule of construction which places much more value on the intent of the testator as drawn from the whole of the instrument. To this extent at least, it seems particularly evident that the Kentucky Court has broken away from the consequences of the old rule and will construe the gift over valid when it finds that such is the intent of the maker as drawn from the entire instrument.

It is the purpose of this note to discuss the effect of these cases against the background of earlier Kentucky decisions and to point

[1] 2 SIMES, LAW ON FUTURE INTERESTS, at 510 *et. seq.* (1936).

[2] Stewart v. Morris, 313 Ky. 424 (S.W 2d 1950), 231 S.W 2d, 70; Jacobs v. Barnard, 307 Ky. 321, 210 S.W 2d 972 (1948); Hanks v. McDannell, 307 Ky. 243, 210 S.W 2d 784 (1948).