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Constitutional Law--Declaratory Judgments--Right to Trial by Jury

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An automobile liability insurer sued for a declaratory judgment regarding liability to an insured motorist and his injured guest, and for cancellation of the policy as to any liability growing out of an accident. Held, insured and his guest were entitled to the jury trial which they demanded on the issues of allegedly false statements made by the insured to the insurer regarding the accident, and an alleged breach by the insured of the customary co-operation clause, since in an action against the insurer by the injured third person such matters would be legal issues triable by jury. *Pacific Indemnity Co. v. McDonald et al.*, 21 F. Supp. 122, (D. Ore. 1938).

Fraud on an insurer occurring at the inception of the contract operates to give the defrauded insurer an election of remedies: (1) a good defense to an action at law on the policy by the injured third person, the question of fraud being normally for a jury; (2) an equitable suit for rescission or cancellation of the policy, the matter of jury trial to be governed by established rules of procedure in equity. The breach of conditions subsequent in the principal case was made the basis of a suit for a declaration of non-liability, the breach of such conditions being a good defense, by the weight of authority, to an action at law on the policy by the injured third person.

It has been said that declaratory judgment proceedings are based upon equitable principles which lay at the foundation of bills *quia timet*. Accordingly, a noted author has said that "the power granted by the declaratory judgment statutes is more strictly a direction to use an existing power than an authorization of new power." Under these theories, the constitutional guaranty of jury trial cannot be invoked in declaratory proceedings, because the action is essentially equitable.

State that passengers are covered by the policy only when: (1) he is riding as a paying passenger, (2) he must be in a licensed plane, (3) the plane must be owned by an incorporated passenger carrier, (4) the plane must be operated by a licensed pilot, and (5) it must be operated over routes between definitely established airports.


3Id. at 63, b and c.

4Royal Indemnity Co. v. Watson, 61 F. (2d) 614 (C. C. A. 5th, 1932); United States Fidelity & Guaranty Co. v. Wyer, 60 F. (2d) 856 (C. C. A. 10th, 1932); Metropolitan Casualty Co. v. Blue, 219 Ala. 37, 121 So. 25 (1929); Harrison v. United States Fidelity & Guaranty Co., 225 Ill. App. 363 (1929).


Furthermore, "the right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury." Therefore, if these statutes are considered as merely extending the application of an existing branch of equity jurisdiction, solutions of the jury question under comparable statutes are in point. Thus, statutes conferring jurisdiction upon courts of equity to enjoin public nuisances have been upheld as against contentions that such statutes violate the constitutional guaranty of trial by jury. Similar results have been reached concerning statutes providing for the use of the injunction to prevent crime. The constitutional principle is that the right to trial by jury is guaranteed "in suits at common law", having reference to the condition of the law as it existed at the time of the adoption of the Constitution.

Analysis of the problem is made more difficult by the view that declaratory relief is neither strictly equitable nor legal, although its historical sources are almost exclusively equitable. However, in *Aetna Casualty & Surety Co. v. Quares* and *Brown v. Kalamazoo Circuit Judge*, the court based its decision entirely upon the nature of the issues to be tried, and the method under which they would be tried without the intervention of a declaratory judgment statute. The case involved a breach of a co-operation clause in a policy, the holding being that in a declaratory proceeding such defenses must be tried at law if either party insists; further, that irrespective of the statutory provision, the right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary asked that the controversy be determined under the declaratory procedure.

**Steve White**

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2. *Mugler v. Kansas*, 123 U. S. 123, 8 S. Ct. 273 (1887); *Fulton v. State*, 171 Ala. 572, 54 So. 688 (1911); *Eilenbecker v. District Court*, 134 Iowa 31 (1890); *Chase v. Revere House*, 232 Mass. 88, 122 N. E. 162 (1919); see also *Gregg v. People*, 65 Colo. 390, 176 Pac. 483 (1918); *King v. Con. ex rel. Smith*, 194 Ky. 143, 238 S. W. 373 (1922). The analogy arises from the fact that such statutes extend the existing equitable power to enjoin, to fields wherein it was not previously exercised.


5. *Borchard, Declaratory Judgments* (1934) p. 120. At page 138, the author says: "The source of the power ought not to be considered as of any other than historical importance, for in principle declaratory relief is sui generis and is as much legal as equitable."

6. *Borroughs, Declaratory Judgments* (1934) p. 120. At page 138, the author says: "The source of the power ought not to be considered as of any other than historical importance, for in principle declaratory relief is sui generis and is as much legal as equitable."


8. *26 U. S. C. A. Sec. 400 (3): "When a declaratory of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

Case Comments

Adverse Possession—Effect of an Unexpected Judgment in Ejectment on the Continuity of Adverse Possession.

Appellants entered upon a tract of land about 1903 and remained in possession thereof continuously until 1934 when they conveyed it to appellee by warranty deed. However, in 1916 (18 years before the conveyance) a judgment in ejectment had been recovered against them by a third party. There was no writ of execution or other process issued on this judgment, and no change of possession. Appellee brought action for a return of the purchase money and cancellation of the deed, alleging that appellants had no title to the property at the time of the conveyance. Appellants contended that since no action was ever taken on the 1916 judgment, and more than fifteen years had elapsed, it was now ineffectual and their title to the land was good at the date of conveyance. Held that appellants had no title, because the 1916 judgment settled conclusively the rights of the parties, and that so long as the judgment was in effect appellants were estopped to claim title, so that their possession from 1916 to 1931 was not adverse within the meaning of the statute of limitations. Creech v. Jenkins, 276 Ky. 163, 123 S. W. (2d) 267 (1938).

There are three different views or positions taken by the courts as to the effect of an unexecuted judgment in ejectment on the running of the statute of limitations, viz: (1) a judgment, not executed, has no effect on the running of the statute, i.e., the continuity of adverse possession is not broken; (2) a judgment, though unexecuted, breaks the continuity of adverse possession, but the statute of limitations may start running again, if no action is taken, although the judgment is still alive and could be enforced; (3) a judgment, although not executed, not only breaks the continuity of adverse possession but estops the defendant to claim title and suspends the running of the statute of limitations during the life of the judgment.

Early Kentucky decisions accepted the doctrine of Smith v. Hornback, which is in accord with the first view. In 1916 Smith v. Hornback held that a judgment in ejectment, never executed and under which possession has never been surrendered, does not stop the running of the statute of limitations. Accord: Pleak v. Chambers, 35 Ky. (5 Dana) 62 (1837); Petty v. Malier, 15 B. Mon. 591, 54 Ky. 474 (1855); Martin v. Hall, 152 Ky. 677, 153 S. W. 997 (1913). See also Rice's Heirs v. Lowan, 5 Ky. (2 Bib) 149 (1810).
Hornback was clearly overruled by Perry v. Eagle Coal Company\(^2\) which apparently is in accordance with the second view. This view is more logical and supported by the weight of authority in this country.\(^2\)

In the Perry case the plaintiff claimed title by adverse possession and alleged that the title of the defendant in error was champertous and void because it was secured while the land was held in adverse possession. A judgment in ejectment rendered against plaintiff in error twelve years before the institution of the action had never been executed and he had remained in possession thereof. Title had been acquired by defendant in error from the plaintiff in the first action, after the judgment was rendered. In its decision the court distinguished between adverse possession which is sufficient under the statute of limitations and such adverse possession as would make a deed void under the statute against champerty. To quote the language of the court:

"... but a possession sufficient under the statute of limitations is, in many instances, not sufficient adverse possession to make void a conveyance of land under the statute against champerty."

The judgment was held to be conclusive as to the rights of the parties, and that plaintiff in error was estopped to deny the title of the owner, during the life of the judgment, and that therefore his possession was not such adverse possession as would render the conveyance by the owner void. In considering the plea of title by adverse possession, by plaintiff in error, it was held that his adverse possession had been interrupted by the judgment and that twelve years adverse possession after the judgment was not sufficient to acquire title under the statute of limitations. The language of the court strongly indicates

\(^{170}\) Ky. 824, 186 S.W. 875 (1916).

\(^2\) In Corpus Juris (2 C. J. p. 109, Sec. 168) it is said that according to the weight of authority the mere recovery of a judgment in ejectment will not of itself stop the running of the statute of limitations—that there must be an actual change in possession. But Corpus Juris Secundum (2 C.J.S. p. 725, Sec. 153) reads that in some jurisdictions a judgment in ejectment will not interrupt the continuity of adverse possession if the judgment is not executed but that elsewhere the judgment of itself, without execution, will change the character of such possession from being adverse "for the time being at least" and stops the running of the statute of limitations "at that point of time."

Courts are vague as to their position on the first two views and generally fail to distinguish between them when they refuse to adopt the third. The facts in most of the cases cited in support of the rule that the judgment has no effect, show that sufficient time had elapsed for the running of the statute since the judgment, not necessarily holding that the continuity of the adverse possession was not broken. Likewise, in the cases holding that the adverse possession was interrupted, the judgment was still alive when the action was brought or sufficient time had not elapsed since the judgment for the running of the statute. So they do not necessarily hold that possession after the judgment was not adverse. No recent case in any other jurisdiction is found whose facts and holding are parallel to those of the principal case and its two precedents (see note 5, infra) in Kentucky.
that it considered the adverse possession sufficient under the statute of limitations to vest title, had there been sufficient time elapsed, when it says:

"In this case in order to constitute a good plea of adverse possession, it would be necessary to deny that only 12 years, or any less than 15 years, had transpired between the rendition of the judgment in the suit of the Barren Fork Mining & Coal Company against appellant and the institution of this suit, which denial was not made."

When viewed as a whole the Perry case sets out three points:
(a) the judgment in ejectment breaks the continuity of adverse possession, and (b) the statute of limitations must start running again from that point of time, but (c) the doctrine of estoppel may be applied to any action or defense by the defendant against the plaintiff or his successor, so long as the judgment is alive. Since the decision was rendered in this case it has been generally accepted by the courts as the law of Kentucky on this matter.4 But in applying the doctrine of estoppel the unnecessary attempt of the court to justify its application by speaking of two kinds of adverse possession has been misleading.

When the court in the instant case and its two precedents5 decided since 1930, purport to follow the Perry case it is apparent that they rely upon the language of the court, in that case, wherein the doctrine of estoppel was applied. Such language of the court was not applicable, or at the most, mere dicta, to the plea of title by adverse possession and by relying upon it a result was reached which is far different from that reached in the Perry case, and one never intended by it. Greene v. Strubbe6 held that where one retains possession after judgment in ejectment against him, his possession is not adverse in absence of notice to the owner. However, in that case the defendant was an old man and the plaintiff permitted him to continue to live on the land, and though he died within five years, his family lived on until the action was instituted about 25 years after judgment was rendered.

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4 Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S.W. 130 (1916) held that "any adverse possession, which he might have had or claimed before the institution of the action in which the judgment was rendered is extinguished by the judgment, and if he would create a title to the lands, in himself, he must remain in adverse possession of the land for fifteen years after the judgment." Travis v. Bruce, 172 Ky. 729, 190 S.W. 393 (1916) recognized and accepted this same doctrine. Kentucky Union Co. v. Cornett, 234 Ky. 360, 58 S.W. (2d) 655 (1933) held that a judgment rendered less than 15 years before the action was instituted had interrupted the adverse possession and no title was acquired by virtue of the statute of limitations. Whether possession after the judgment was considered as adverse, by the court, is not clear from the case. Greene v. Strubbe and Angel v. Le Moyne (see note 5) cite the Perry case as authority but reach a decision quite different.


6 234 Ky. 380, 28 S.W. (2d) 469 (1930).
It might be considered that at least part of this possession was by consent of the owner, and hence not clearly within the third view. Although it is clearly not in point, Clark v. City of Henderson\(^2\) may have influenced the court in its decision in the Greene case. In Angel v. Le Moyné\(^3\) it was held that where a party continued in possession after adverse judgment determining title, time between rendition of the judgment and its expiration by limitation could not be counted in determining adverse possession for the statutory period. There is some doubt as to whether the facts of that case necessarily bring it within the third view.\(^9\) The facts of the principal case and its holding clearly place it in accord with the third view. Here, appellants continued in possession of the land, so far as evidence shows, in the same adverse manner as before, for eighteen years, no action ever being taken on the judgment. Yet they were adjudged to have no title by adverse possession.

To hold that the defendant's possession retained during the life of an unexecuted judgment cannot be adverse to the plaintiff gives, in effect, a greater force to an unexecuted judgment than to one executed. Such holding tends to defeat the very purpose for which the statute of limitations was enacted. Suppose that the judgment is executed and the defendant is dispossessed. Shortly thereafter he again gains possession under some other unfounded claim of title. Is it not likely that his possession thus would be considered as adverse and if it so continued for fifteen years would give title to him? Should the adverse possession of such a defendant be any less obnoxious to the statute of limitations than that of a different party? If the possession of the defendant cannot be counted as adverse during the life of the judgment, then the title to the land and the right of possession may rest in obscurity and uncertainty for thirty years instead of not more than fifteen years as contemplated by the statute.

It is submitted that in the principal case and in Angel v. Le Moyné and Greene v. Strubbe the court has been misled by the language of the decisions where champerty was alleged, or for some other reason, the doctrine of estoppel was applied. That "defendant is estopped to deny the title of the plaintiff or claim adverse possession" and that "defendant's possession during the life of the judgment is not adverse", etc., have been construed as applying to the statute of limitations, and this has resulted in the announcement of a rule contrary to sound principles of law and against the weight of authority.

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\(^{\text{*}}\) 205 Ky. 779, 266 S.W. 664 (1924). This case held that possession retained after consent judgment was rendered was not adverse.

\(^{\text{2}}\) 237 Ky. 366, 35 S.W. (2d) 540 (1931).

\(^{\text{3}}\) In the Angel case (see note 5, supra) a judgment was rendered in 1898 but not affirmed until 1901. The action was begun in 1914. So 15 years had not elapsed since the judgment became final and the institution of the action. However, the language of the court indicates that the possession after the judgment was not considered as adverse.