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James M. Terry
University of Kentucky

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ADVERSE POSSESSION—NECESSITY OF INTENT TO CLAIM LAND UNCONDITIONALLY IF ENTRY IS THROUGH MISTAKE.

Plaintiffs and defendants owned cemetery lots separated by a four-foot aisle. In 1915, a grave was located by a relative of defendants' at a point which he had previously been shown as being on defendants' lot. This point was in fact located in the aisle and on plaintiffs' lot, but through mistake was pointed out to the party locating the grave as being on defendants' lot. Later another grave was similarly located.

In 1933, it was definitely established that the two graves were partially located in the aisle between the two lots, and partially upon plaintiffs' lot. Suit was then brought to require defendants to remove the bodies. Defendants contended they had acquired title by adverse possession.

The Court of Appeals of Kentucky admitted that title to a cemetery lot could be acquired by adverse possession. On this point the Court's holding is in accord with many American cases. But the Court further held that the defendants had acquired no title by adverse possession, as they had entered through mistake as to the true location of the line, intending to claim only to such line, and that because they did not intend to claim the land unconditionally, regardless of the true line or the rights or title of others, their holding could not thereafter ripen into title by adverse possession. This holding of the Court is in accord with the cases previously decided in Kentucky on this point. And in a very recent case, the Court held, as it did in the principal case, that occupation of land by mistake as to the true boundary line is not adverse holding.

It is submitted that the rule adopted by the Court of Appeals in this type of case is not the better one, and that the trend of authority is away from the rule in this case. The doctrine upon which the hold-

3 Turner v. Morgan, 158 Ky. 511, 165 S. W. 684 (1914); Stratton v. Syck, 176 Ky. 750, 197 S. W. 389 (1917); Heinrichs v. Polking, 185 Ky. 433, 215 S. W. 179 (1919); Brookshire v. Hughes, 203 Ky. 174, 261 S. W. 1109 (1924); Wilson v. Shepherd, 244 Ky. 225, 50 S. W. (2d) 540 (1932).
5 Costener v. Schrock (Mo.) 252 S. W. 381 (1923); Gist v. Doke, 42 Ore. 225, 70 Pac. 704 (1902); Christian v. Bulbeck, 120 Va. 74, 90 S. E. 661 (1916); City of Rock Springs v. Gus Sturm, 39 Wyo. 494, 278 Pac. 908 (1929); Note, 97 A. L. R. 113; Note, 33 L. R. A. (N. S.) 923; Tiffany, Real Property, Sec. 505.
Ings in the Kentucky cases rest is an ancient one, having its remote origin in the English doctrine that to start the Statute of Limitations running there must be a disseisin, and the early view that there could be no disseisin by mistake; that in order to disseise, in cases other than disseisin at election, the disseisor must intend to disseise. In other words, at the present time the law in Kentucky is that a party must unconditionally intend to claim land which he has in possession without title, but believing same to be within the calls of his deed, or he cannot acquire title by adverse possession. His mental intent, as expressed by what he may say, perhaps in an unguarded moment, is given greater weight than the fact that he has taken physical possession of the land and occupied it as his own.

In the Kentucky cases cited above the Court distinguished between cases where entry was made through mistake as to the true line and the subsequent intent of the claimant was stated to be to claim to the *true line*, and cases where the intent was stated to be to claim to the *line of enclosure*. It is submitted that the two “intents” which the Court distinguishes are perhaps the *same* intent, that often the only difference is the choice of words used to describe that intent. For illustration, in a case where a party has enclosed more land than called for in his deed through mistake as to the true boundary line, that party might, if asked what he claimed, say, “I intend to claim to my fence.” Such intent would be sufficient to constitute the required intention to hold the land adversely. But in making the above statement, the claimant might possibly mean to say, “I intend to claim to my fence, which I regard as being located on the deed line.” But if in describing this same intent as applied to the same holding, the claimant stated, “I intend to claim to my deed line,” then he would not, in Kentucky, be allowed to acquire title by adverse possession to the land enclosed by him by mistake. It is submitted that the “two” intents mentioned by the Court: (1) the intent to claim to the line of enclosure, and (2) the intent to claim to the deed line, are, in the *mind of the claimant*, the same intent expressed by words carrying a different import, and that no distinction should be made between cases where that intent is expressed in one way and cases where it is expressed in another. The Court should look to the actual intent, and not to the words expressing that intent, where the words are capable of two interpretations. The claim as evidenced by the physical enclosure should be the one recognized by the Court, rather than the claim as limited by a verbal, and perhaps careless, expression of its extent.

The crux of the matter is, what intent is necessary to start the Statute of Limitations running? The Court of Appeals has held that limitation does not begin to run until there is adverse possession.

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* Supra, n. 3.
* Bond v. O'Gara, 177 Mass. 139, 58 N. E. 275 (1900).
* Beeler v. Coy, 48 Ky. (9 B. Mon.) 312 (1848); Clinchfield N. Ry.
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.19

JAMES M. TERRY

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 assignee2 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 confusion5 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 Nati. 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."

A notable and recent exception, however, is the decision in Henry Clay Fire Ins. Co. v. Denker's Exr.9 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