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# Equity--Removal of Cloud on Title--Right to Bring Suit When Defendant Has Possession

K. K. H.

*West Virginia College of Law*

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preference for the constructive trust analysis by the American Law Institute, RESTATEMENT, AGENCY (1933) §414(2); RESTATEMENT, RESTITUTION (1937) §194(2), unite in opposing the use of the Statute of Frauds by a dishonest agent to secure for himself land purchased under an orally created agency. It is submitted that the constructive trust approach is the sounder in this situation.

M. S. K.

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EQUITY—REMOVAL OF CLOUD ON TITLE—RIGHT TO BRING SUIT WHEN DEFENDANT HAS POSSESSION.—Plaintiff corporation sued in equity to remove cloud on title to a tract of which defendants were in actual possession. Defendants had gone into possession as tenants of plaintiff's grantor, and defended under a claim of hostile possession under unrecorded instruments, the nature of which was unknown to plaintiff. Decree for plaintiff. *Held*, that under the governing statute, equity has jurisdiction to remove a cloud on title even though defendant is in actual possession of the property. *United Thacker Coal Co. v. Newsome*, 38 S. E. (2d) 660 (W. Va. 1946).

Independently of statute, a bill to remove cloud on title to real estate could be maintained only by one in actual possession. *Jones v. McKenzie*, 122 Fed. 390 (C. C. A. 8th, 1903); *Hansford v. Rust*, 107 W. Va. 624, 150 S. E. 223 (1929); *Jackson v. Cook*, 71 W. Va. 210, 76 S. E. 443 (1912). *But cf.* HOGG, EQUITY PLEADING & PRACTICE (Carlin's ed. 1929) §122 (exceptions in cases involving suits to cancel tax deeds, estates in remainder, or where equitable title only is asserted). It did not lie when neither party was in possession. *Sansom v. Blankenship*, 53 W. Va. 411, 44 S. E. 408 (1903). At law, ejectment is the proper remedy when defendant is in actual possession or claims title thereto or some interest therein. W. VA. CODE (Michie, 1943) c. 55, art. 4, §5. In West Virginia, by statute, questions of cloud on title to real property may be determined "without allegation or proof of actual possession of the same." *Id.* at c. 51, art. 2, §2. Italics supplied. (The statute was adopted in 1929.) The effect of the statute has been considered in three cases. The decision in *Flynn Coal & Lumber Co. v. White Lumber Corp.*, 110 W. Va. 262, 157 S. E. 588 (1931), was based on plaintiff's actual possession, but the court said, by way of dictum, that, under the statute, such possession would not be necessary. In *Pocahontas Coal & Coke Co. v. Bower*, 111 W. Va. 712, 163 S. E. 421 (1932), neither party was in actual possession and plaintiff was allowed to maintain an action to remove cloud; the court, basing its decision squarely on the statute, said that it "merely declares in effect, that whereas, formerly a suit to remove cloud could be maintained

only where the plaintiff was in actual possession, it may now, by virtue of the act, be maintained though he be not in actual possession," *id.* at 719, 163 S. E. at 424, although stating further that the statute was not intended to substitute for ejectment a chancery proceeding for removal of cloud. The instant case in effect holds that, by virtue of the act, suit to remove cloud may be maintained although plaintiff has neither actual nor constructive possession. Elsewhere statutes give equity jurisdiction to remove cloud when plaintiff is "in or out of possession." Under such statutes it has been held plaintiff might maintain his action when defendant is in actual possession of the disputed property, *Ely v. New Mexico & A. R. R.*, 129 U. S. 291, 9 S. Ct. 293, 32 L. ed. 688 (1889) (Arizona Statute), although the statute did not employ the expression "actual possession." The Florida statute, in which the term "actual possession" is used, further provides that the action may be maintained only against a defendant not in actual possession, thereby recognizing equity jurisdiction only where plaintiff has actual or constructive possession. FLA. COMP. LAWS (1927) §5005.

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#### K. K. H.

EVIDENCE—RES IPSA LOQUITUR—DOES THE DOCTRINE RAISE A TRUE PRESUMPTION OF LAW OR ONLY A PERMISSIBLE INFERENCE OF FACT?—Plaintiff suffered injuries when she ate a piece of cake manufactured by defendant company. The doctrine of *res ipsa loquitur* was invoked, and the trial court instructed that, if the jury believed that plaintiff was injured as a result of eating this cake, there is "a *prima facie* presumption of law that said defendant was guilty of negligence." Verdict and judgment for plaintiff. *Held*, that the instruction was reversible error. Reversed and remanded. *Holley v. Purity Baking Co.*, 37 S. E. (2d) 729 (W. Va. 1946).

The doctrine of *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 119, 2 S. E. (2d) 898 (1939), in which the court said that *res ipsa loquitur* "does nothing more than warrant certain inference from established facts," was reaffirmed. *Parr v. Coca Cola Bottling Works*, 121 W. Va. 314, 3 S. E. (2d) 499 (1939) and *Blevins v. Raleigh Coca Cola Bottling Works*, 121 W. Va. 427, 3 S. E. (2d) 627 (1939) were re-examined and point 1 of the syllabus of each case, which stated that a *prima facie* presumption arose and that defendant must present proof to meet such presumption, modified to conform to the instant holding. The conflicting West Virginia decisions reflect a diversity observable in other jurisdictions. Many American courts view *res ipsa loquitur* as a