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Evidence--Res Ipsa Loquitur--Does the Doctrine Raise a True Presumption of Law or Only a Permissible Inference of Fact?

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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 ejection 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.

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

genuine presumption; but "whether the rule creates a full presumption, or merely satisfies the plaintiff's duty of producing evidence sufficient to go to the jury, is not always made clear in the rulings." 9 WIGMORE, EVIDENCE (3d ed.) §2509, 378-379. Others regard it as a mere permissive inference, (1928) 53 A. L. R. 1494, also 1 JONES, EVIDENCE (4th ed. 1938) §104a, a view which has been stated by the United States Supreme Court. See *Sweeney v. Erving*, 228 U. S. 233, 33 S. Ct. 416, 57 L. ed. 815 (1913).

Courts often complicate the question by using *res ipsa loquitur*, *prima facie* case, and presumption of negligence as synonymous terms. The general rule, however, is that the maxim *res ipsa loquitur*, if applicable, does not shift the burden of proof, in the sense of "the risk of non-persuasion," to the defendant, but merely requires that some evidence be produced. *Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989 (1891); *Keithly v. Hettinger*, 133 Minn. 36, 157 N. W. 897 (1916); *Womble v. Merchants Grocery Co.*, 135 N. C. 474, 47 S. E. 493 (1904); *Hughes v. Atlantic City R. R.*, 85 N. J. L. 212, 89 Atl. 769 (1914). In *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 119, 2 S. E. (2d) 898 (1939), the court quotes 2 JONES, EVIDENCE 936, to the effect that *res ipsa loquitur* is "merely a short way of saying that the circumstances attendant upon the accident are themselves of such character as to justify a jury in inferring negligence as the cause of the injury. It in no wise modifies the general doctrine that negligence is not presumed." The other view, in affirming that a genuine presumption arises out of *res ipsa loquitur*, places the burden of going forward with the evidence on defendant, and entitles plaintiff to a directed verdict if defendant offers no evidence. Wigmore finds the justification of such rule in the circumstance that evidence of the true cause of the injury is practically accessible to the person charged but inaccessible to the injured person. 9 WIGMORE, EVIDENCE §2509. It has been said to be wholly useless to have a distinct doctrine of *res ipsa loquitur* with the effect merely of laying the foundation for a permissible inference of negligence and that it would best serve its excuse for being if treated as a presumption which shifts the burden of proof to the defendant. Carpenter, *Doctrine of Res Ipsa Loquitur* (1934) 1 U. OF CHI. L. REV. 519 ("burden of proof" used in the sense of burden of going forward with the evidence). In the instant case, Judge Kenna, dissenting on this point, suggested that "the exact contrary" is rooted in West Virginia. Locally, the doctrine was first discussed by name in *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733 (1897), where the courts said, "In a case of negligence where the rule of *res ipsa loquitur* is applicable . . . the rebuttable presumption

of negligence retains its original force until overcome by proof of affirmative acts of due care of the defendant." In later cases, the general effect has perhaps been to create a true rebuttable presumption of law, throwing upon the defendant the duty of going forward with the evidence. *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187 (1902); *Jacobs v. Baltimore & Ohio R. R.*, 68 W. Va. 618, 70 S. E. 369 (1911); *Edmonds v. Monongahela Traction Co.*, 78 W. Va. 714, 90 S. E. 230 (1916); *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808 (1918); cf. *Jones v. Riverside Bridge Co.*, 70 W. Va. 374, 73 S. E. 942 (1912). But cf. *Diotollavi v. United Pocahontas Coal Co.*, 95 W. Va. 692, 122 S. E. 161 (1924). The instant case and the *Webb* case, together with the modification of the *Parr* and *Blevins* cases, indicate a definite attempt to settle this question as to the treatment of *res ipsa loquitur*, as being, not a genuine presumption, but a permissible inference. C. T.

MINES AND MINERALS—LEASES—COVENANT TO PAY MINIMUM ANNUAL ROYALTY FOR TERM.—Plaintiff sued for cancellation of a coal-mining lease and for relief from payment of further minimum royalties under the lease to the date of expiration thereof, claiming that the coal had been exhausted. The lease was for thirty years, twenty-five of which had passed, contained a promise to pay a minimum three thousand dollars per year subject to increases contingent on production and was of all coal in the Sewell seam under a designated tract. The trial court sustained a demurrer to the bill of complaint. *Held*, that, despite the general right to rescind for mutual mistake of fact, relief could not be granted since the promise to pay was unqualified and the lessee assumed the risk. Rulings affirmed. *Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*, 37 S. E. (2d) 519, 163 A. L. R. 871 (W. Va. 1946).

Plaintiff contended that the minimum royalty provision was incidental to the primary obligation set forth in the lease, diligently and in a workmanlike manner to mine the Sewell seam of coal, and that its obligation ceased when such coal had been so far exhausted that there was no longer workable coal in the property, and further asserted mutual mistake of fact. Defendant sought a construction that a lease for a term at a minimum annual royalty by express stipulation to be treated as rent reserved upon contract constitutes an absolute undertaking of the lessee to pay the minimum rental during the entire term from which lessee may not be relieved because of unfavorable mining conditions or exhaustion of coal absent expression of a contrary intention.

The authorities are not in accord as to application to mining leases of the general rule permitting rescission for mutual mistake of fact. Note