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Real Property--Bill to Remove Cloud When Remedy at Law is Adequate

Clara Dwight Whitten
West Virginia University College of Law

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However, one cannot so heartily commend the decision of such a controverted point of law by the mere assumption of it. —Anne Slifkin.

**REAL PROPERTY—BILL TO REMOVE CLOUD WHEN REMEDY AT LAW IS ADEQUATE.**—Complainant brought a bill in equity praying the removal of a cloud from title to four hundred acres of coal the ownership of which was severed from that of the surface, and to which the complainant alleged he had legal title. Defendant was in possession of the surface under a subsequent deed to the whole. The court sustained a demurrer to the bill on the ground that the complainant had an adequate remedy at law. *Payne, Malcolm and Gallaher v. Fitzwater, et al.*, 136 S. E. 507 (W. Va. 1927).

The common law rules governing bills to remove cloud from title are in effect in West Virginia. In the case at bar the mineral was undeveloped and neither the complainant nor the defendant was in actual possession. West Virginia and Virginia have, in a long line of decisions, established the rule that in order to give equity jurisdiction to remove cloud from title the complainant must have not only equitable and legal title but actual possession of the lands in controversy. Constructive possession is not a sufficient basis to sustain a bill to remove cloud from title. *Hitchcock v. Morrison*, 47 W. Va. 206, 34 S. E. 993; *Wallace v. Elm Grove Coal Company*, 58 W. Va. 449, 52 S. E. 485; *Mackey v. Maxin*, 63 W. Va. 14, 59 S. E. 742. There is an exception in some jurisdictions to the effect that where the lands in controversy are vacant and unoccupied, constructive possession of the legal owner is sufficient. There seems to be no such exception in West Virginia. The general rule is that a bill to remove cloud can be maintained only when the complainant is in actual possession of the land. This rule however is subject to the exception that when the complainant holds the legal and equitable title and there is no adequate remedy at law available, equity will give relief, *Swick v. Rease*, 62 W. Va. 557, 59 S. E. 510; *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183; 4 *Pomeroy, Equity* (3rd ed.) 1399. The court held in the principal case that ejectment furnished an adequate remedy at law. This would not have been true at common law, but West Virginia and
Virginia have made several statutory changes in the action of ejectment. Ch. 90, §5 of the W. Va. Code provides: “If the premises be occupied the occupant shall be named defendant in the declaration; and whether they be occupied or not any person exercising acts of ownership thereon, or claiming title thereto, or any interest therein at commencement of the action may also be named as defendant in the declaration.” Under this section it is possible for one out of possession to bring ejectment against another out of possession who asserts an adverse claim. Stearn v. Harmon, 80 Va. 48, also Ch. 90, §35 of W. Va. Code provides: “Any such judgment in an action of ejectment shall be conclusive as to right of possession established in such action upon the party against whom it is rendered and against all persons claiming from, through and under such party, by title accruing after commencement of such action except as hereinafter mentioned.” Thus, the effective thing in an ejectment suit in West Virginia is the judgment, and not the writ of possession as was the case at common law. So, as it seems that the complainant could have effectively cleared his title of the defendant’s claim at law under our ejectment statute, it seems that the decision of the case is sound so far as the law is concerned.

—Clara Dwight Whitten.