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Equity--Quieting Title--Constitutionality of Statute Removing Requirement of Actual Possession by Plaintiff

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EQUITY — QUIETING TITLE — CONSTITUTIONALITY OF STATUTE REMOVING REQUIREMENT OF ACTUAL POSSESSION BY PLAINTIFF. — The new Official Code of West Virginia gives the circuit courts “jurisdiction in equity to remove any cloud on the title to real property, or any part thereof, or any estate, right or interest therein, and to determine questions of title with respect thereto, without requiring allegations or proof of actual possession of the same.”¹

Before 1929 it was plainly established by the West Virginia decisions that actual possession by the plaintiff was essential to the maintenance of a suit to remove cloud from title.² Manifestly the statute was framed to dispense with this requirement. This writer has failed to find any record disclosing special practical reasons for the introduction of the measure. Presumably it was thought that statutory grant of power was necessary to give equity jurisdiction to quiet the title of one not in possession.

Assuming the desirability of the statute there arises a question as to its constitutionality, which has evoked this note, its purpose being to examine the constitutional objection and suggest a way out, if possible, if the statute is believed invalid in its present form. The present Constitution of West Virginia, which was adopted in 1872, provides: “In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right to jury trial, if required by either party shall be preserved; . . . ”³ It should be observed that only where the case involves the protection of legal titles as distinguished from equitable interests, which are of equitable cognizance exclusively, would it be possible to invoke this provision successfully. It is only where the statute would afford a remedy in equity in a situation where the legal remedy, in this instance, ejectment, would be available and adequate in the jurisdictional sense that the constitutional objection could properly arise.

It appears obvious that this constitutional provision would be emasculated by statutes giving equity jurisdiction over identical situations as to which ejectment or other legal remedies, with their concomitant, jury trial, were available in 1872 without the aid of any of the common bases of equity jurisdiction but by force of

¹ W. VA. REV. CODE (1931) c. 51, art. 2, § 2. This is a substantial re-enactment of the act as embodied in Acts of 1929, c. 36.

² *Payne v. Fitzwater*, 103 W. Va. 12, 136 S. E. 509 (1927). And see the collection of cases in Howard, *Bills to Remove Cloud From Title* (1917) 25 W. VA. L. QUAR. 4, 23n.

³ Constitution of W. Va., art. IV, § 13.

the statutes alone. To give equity jurisdiction where the legal remedy is adequate is a simple way of impairing the right to jury trial.⁴ As to the general import of the constitutional provision there is no controversy. The West Virginia cases, though not deciding the point, contain expressions supporting the view that the right to jury trial extends to any matter to which it was attached at the time of the adoption of the Constitution.⁵ Thus in *Cecil v. Clark*⁶ Judge Brannon wrote: "The clause was intended to preserve a jury trial, if asked, . . . in all matters of such nature as would support a demand for a jury by the law in force at the time of the adopting of the Constitution." That was a partition proceeding in equity wherein by statute the court had jurisdiction to try adverse claims to title. The statute antedated the present constitution so it was concluded that since the jurisdiction of equity existed before the constitution was adopted the case was not covered by the guaranty of jury trial. The fact that the statute had not been declared invalid under earlier constitutions with like guaranties satisfied the court. Though the point is not important here, it is believed that to determine whether equity jurisdiction did exist the court was bound to consider the validity of the statute under earlier constitutions as an original proposition in the absence of an authoritative holding on the point. In any event the quoted passage is considered sound. It indicates that the key to our problem is the distinction between law and equity as two separate remedial systems, only the former of which resorts to trial by jury.

If construed to extend the suit in equity so far as to cover the case where the defendant has actual possession our statute would invade the domain of ejectment and to that extent would clearly violate the guaranty of jury trial. This is the conclusion reached by the Circuit Court of Appeals for the Fourth Circuit in construing the substantially similar guaranty of the Federal Constitution in a quite recent case.⁷ An owner out of possession

⁴ In that part of his dissenting opinion in *Davis v. Settle*, 43 W. Va. 17, 19, 34, 26 S. E. 557 (1896), in which the majority concurred, Judge Brannon referred to the jury trial guaranty as follows: "This does not mean that a matter in which right to the jury had existed before the Constitution may, by legislation, be transferred to a court of equity, and the party deprived of a jury, merely because it does not arise in an action at law, but it refers to matters before the constitution triable by jury."

⁵ *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216 (1898); *Davis v. Settle*, *supra* n. 4; *Barlow v. Daniels*, 25 W. Va. 515 (1885).

⁶ *Supra* n. 5, at 667.

⁷ *Wood v. Phillips*, 50 F. (2d) 714 (C. C. A. 4th 1931).

could maintain ejectment against one in actual possession in 1872.⁸ Equity had no jurisdiction since the legal remedy was adequate. However, where there exists not a set of circumstances ripe for ejectment but one where some common basis for equity jurisdiction is present and it would have been so at the time the Constitution was adopted the result may well be different. Thus the West Virginia court has refused to recognize a right to final injunctive relief against such depredations as cutting timber, if the plaintiff's title is challenged, until he has settled the question of title at law.⁹ (A temporary injunction will be granted if the plaintiff alleges that he has begun or is about to begin an action of ejectment.¹⁰) If our statute covers the case is it to that extent invalid? It can be argued that it is valid since the limitation on equity jurisdiction to try title is purely a self-imposed one based solely on historical reasons and thus does not mean that equity has ever lacked power to act in such matters in the primary sense. The counter-reasoning that the situation is one as to which the litigant could have required a jury trial in fact in 1872 is not so convincing on reflection since it is clear that equity could have brushed away its self-imposed limitation, and if so, it is not perceived that the same result could not be achieved by legislation.

A second and more plausible construction of the statute in its relation to the ejectment situation is available. It may be construed to extend the equitable remedy only to the situation where neither party is in actual possession.¹¹ Its validity as so construed depends upon the answer to two questions. Would a defendant on such a state of facts have been entitled to a jury trial in 1872? If so would the action have been a "suit at common law" within the meaning of the constitutional provision here invoked?

With respect to the first question it appears that ejectment lay in West Virginia where neither party was in actual possession against parties "exercising acts of ownership thereon, or claiming title thereto, or some interest therein, at the commencement

⁸ Though citation of authority for such an obvious proposition is scarcely necessary reference may be had to W. VA. CODE (1863) c. 90, which preserved the action of ejectment as it existed theretofore subject to certain changes not here material.

⁹ *Galford v. Henry*, 93 W. Va. 404, 116 S. E. 683 (1923); *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164 (1902).

¹⁰ *Pardee v. Lumber Co.*, 70 W. Va. 68, 73 S. E. 82 (1911); *Freer v. Davis*, *supra* n. 9.

¹¹ The statute does not purport to enlarge the equitable remedy further than to render actual possession by the plaintiff unnecessary. Removing that requirement would not alone extend the remedy to the case where defendant was in actual possession. Such an innovation would be expected to be made directly and not by implication.

of the suit" both in 1872 and in 1929.¹² The remedy was given by a statute brought over from the Virginia Code of 1860.¹³ The phrasing of the section as it appeared in the West Virginia Code of 1868¹⁴ was slightly changed in 1877¹⁵ but no change in meaning is discernible. This means that the legal remedy to establish one's legal title was adequate in the situation posed, that is, a case of conflict over legal as distinguished from equitable title, which latter, of course, is a matter of exclusive equitable cognizance.

But there yet remains this inquiry: Does not the rule that where equity has once had jurisdiction it will continue to exercise it though the legal remedy has subsequently become adequate, even if the change is made by statute unless the statute was clearly directed toward disestablishing equity's jurisdiction apply? The rule has been recognized in West Virginia in other situations.¹⁶ But somehow it has received no notice in our case. The West Virginia decisions insist on actual possession by the plaintiff in suits to quiet title on the theory that the legal remedy is adequate where this element is wanting.¹⁷ But present adequacy of the legal remedy would not control under the rule under consideration if the remedy were once inadequate and equity thus had jurisdiction. As demonstrated in an able article by the late David Howard the fact that equity never exercised the jurisdiction in Virginia before the remedy in ejectment was enlarged

¹² W. VA. CODE ANN. (Barnes, 1923) c. 90, § 5, now W. VA. REV. STAT. (1931) c. 55, art. 4, § 4, was in effect in 1929. There is a clear dictum in *Wilson v. Braden*, 56 W. Va. 372, 380, 49 S. E. 409 (1905) that the action under the statute lay against one not in possession. And see *Postwaite v. Win*, 17 W. Va. 1 (1880).

¹³ VA. CODE (1860) c. 135, § 5.

¹⁴ W. VA. CODE (1868) c. 90, § 5 read: "The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising acts of ownership thereon, or claiming title thereto, or some interest therein, at the commencement of the suit."

¹⁵ W. VA. ACTS OF 1877, c. 110, W. VA. REV. STAT. (1879) c. 71, § 5 read: "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 the commencement of the action, may also be named as defendant in the declaration." The section survives in this form to date.

¹⁶ *Clifton v. Clifton*, 83 W. Va. 149, 98 S. E. 72 (1919) *dictum*; *Corrothers v. Board of Education*, 16 W. Va. 527 (1880) (enjoining collection of taxes) *dictum*. In *Moore v. McNutt*, 41 W. Va. 695, 700, 24 S. E. 682 (1896) Judge Brannon after stating unqualifiedly that equity had no jurisdiction to quiet title where neither party was in possession because ejectment lay went on to say that it would have jurisdiction under the rule under discussion if the plaintiff was in actual possession even though the statute be deemed to have given such a party the remedy of ejectment. Why he did not apply the rule to the case of unoccupied land is not perceived.

¹⁷ See n. 2, *supra*.

would be no answer.¹⁸ Certainly jurisdiction does not depend upon the casual circumstance of its being invoked by a litigant. And here it seems that under general equitable principles the jurisdiction did exist, although the cases are in conflict on the point.¹⁹ In 1911 the Supreme Court of Appeals of Virginia without referring to an earlier decision to the contrary²⁰ held that actual possession was not essential to the jurisdiction.²¹

The situation in West Virginia is narrowed down to this: The Supreme Court of Appeals by applying the rule that equity jurisdiction survives after the legal remedy becomes adequate, and hereby effectually overruling former decisions, could defeat the so-called right to jury trial. The court not having done so would it be any more an invasion of one's constitutional right to jury trial for the legislature to effect the same result? The practical difficulty with this rationalization, of course, is the probability that the court will not overrule itself with the result that should it be called upon to determine the constitutionality of the statute it would be forced to rely upon its decisions as establishing the fact that the statute covered a situation where the right to jury trial existed. But, it is believed, the above theory embodies the only plausible rationale on which to sustain the statute.

Assuming that the defendant would have been entitled to a jury trial in 1872 the question remains: What is a "suit at common law" within the meaning of the constitutional provision? Is it simply a common law action apart from statute or does it include common law remedies enlarged by statute and new remedies so created, which are to be administered as legal as distinguished from equity proceedings? In construing the Seventh Amendment, which is in substance the same as the West Virginia provision now in question, the United States Supreme Court early adopted the latter meaning. Mr. Justice Story in speaking for the majority in *Parsons v. Bedford*²² reached this conclusion: "In a just sense the Amendment . . . may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." This passage was quoted approvingly by the

¹⁸ Howard, *op. cit. supra* n. 2, at 23.

¹⁹ BISPHAM, *PRINCIPLES OF EQUITY* (9th ed. 1915) § 575.

²⁰ *Stearns v. Harmon*, 80 Va. 48 (1885).

²¹ *McNemara v. Boyd*, 112 Va. 145, 70 S. E. 694 (1911).

²² 3 Pet. 433, 447, 7 L. ed. 732 (1830).

Supreme Court of Appeals of West Virginia in *Barlow v. Daniels*.²³ Both cases, however, were concerned with the respective federal and state constitutional provisions providing that no fact tried by a jury shall be re-examined in any case otherwise than by the rules of the common law and thus are not decisions on the point. If called upon to-day to decide the question, it is believed, however, that the West Virginia Court could not escape the historical and rational force of these dicta. Thus a statutory action of ejectment where neither party is in actual possession, which existed in 1872, would be a "suit at common law" for purposes of the constitutional guaranty of jury trial.

If our statute should be held unconstitutional or the legislature elects to obviate the possibility of such an event the constitutional difficulty could be overcome. The best thing that could be done would be to take away the constitutional provision, not for this purpose alone, of course, but a variety of reasons the successful exploitation of which would incidentally solve our present problem. But resort to this measure is so unlikely that it is passed over here without further comment. A practicable measure would be a change in the statute giving either party a right to a jury trial of any issue of fact which but for the statute either would have been entitled to have so tried. The Virginia statute has a provision to this effect.²⁴

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²³ *Barlow v. Daniels*, *supra* n. 5, at 515.

²⁴ VA. CODE ANN. (Michie, 1930) § 6248.