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BILLS TO QUIET POSSESSION AND TITLE.

THAT the judgment of a court having competent jurisdiction is, while unreversed, conclusive upon parties and privies, and estops them from litigating a fact once passed upon, is a maxim of both the civil and the common law. The maxim equally applied to actions respecting the title to real estate and to those respecting personal property. When, however, the action of ejectment was substituted for real actions, it was found that, owing to an ingenious legal fiction, a recovery in ejectment constituted no bar to a second, or to any number of similar actions for the same premises. By the fiction of a lease, entry and ouster, and the recovery of a fictitious term of years, the same issue could be tried between the same parties, as the record would exhibit an entirely different issue and between different parties. In this way it was possible for a party in possession with both a legal and equitable title to be annoyed by continued litigation, which sometimes resulted in ruin. In order to suppress this vexatious and oppressive litigation, courts of equity finally interposed, and allowed what is known as a "bill of peace" to be filed, which sought to procure a repose from any farther litigation of the title to the property.

But to justify any interference upon the part of equity, the courts insisted that it should appear that the title was *vexatiously* litigated. And Lord COWPER, in a celebrated case, refused to interfere where five several verdicts and judgments in ejectment had been rendered in favor of one party. *Lord Bath* v. *Sherwin*, 10

Mod. 1. But the House of Lords overruled this decision, and established the jurisdiction: 4 Brown's Cases in Parliament 373. "It has not been usual," says one of our federal judges, "to exhibit a bill in chancery for quieting title between two individual claimants until after *several* verdicts at law. But it seems not to have been held that any precise number of verdicts at law was necessary before a bill of peace could be sustained. The better rule would seem to be, that the title at law has been fully and fairly established by one or more trials." *Harmer* v. *Gwynne*, 5 McLean 315. See also 2 Term Rep. 601.

In order to maintain a bill of peace, it was necessary that three circumstances concur:

1. It was necessary that the plaintiff or complainant should be in possession of the premises at the time of filing the bill.

2. It was necessary that his possession should have been disturbed by legal actions.

3. It was necessary, finally, that his right to the possession should have been successfully maintained in the litigation, and his title satisfactorily established at law.

In the absence of any of these three circumstances, equity refused to interfere. *Shepley* v. *Rangely*, Davies Rep. 242, 249. It was not enough that he feared his possession would be disturbed, or that some one was actually claiming an adverse interest in the property. "When the question is merely whether A. or B. is entitled to the property, and there has been no actual suit between them, there has been no instance where such a suit has been entertained." So says Lord REDESDALE in *Devonsher* v. *Newenham*, 2 Sch. & Lefroy 208. See, also, *Welby* v. *Duke of Rutland*, 2 Bro. Parl. Cases 39; *Shepley* v. *Rangely*, Davies Rep. 242, 250. It was the fact that the right to possession had already been litigated and successfully established at law that furnished the equity or the ground upon which such bills were originally entertained. In course of time, however, it came to be noticed that great injury might be wrought, not only to individuals, but to the public as well, by the assertion of an interest in or claim to real property by persons who were not only out of possession, but who refused to put their claim to the test of a legal trial. The assertion of such claims tended to throw doubt upon the validity of titles, thus rendering them insecure, impairing their value, and rendering it difficult and sometimes impossible to effect a sale of

the property. Such a condition of things was a public misfortune. "There are few greater public misfortunes," it has been said, "than insecurity of titles to real property. It paralyzes industry and destroys that incentive to labor and enterprise which a reasonable certainty of just reward alone will create, and upon which depends the public and private prosperity: *McCoy* v. *Morrow*, 18 Ill. 519. Consequently, we find that in many of the states laws have been enacted to compel the determination of claims to real estate, and to quiet the title to the same. These statutes have been enacted to enable persons who are in possession of real estate to compel parties who claim an interest in such estate to submit their claim to the adjudication of a competent tribunal, which should examine into the foundations of the claim, and forever settle all controversy as to the same. Bills filed for such a purpose are filed for the purpose of quieting the title, as distinguished from the old bills of peace which were filed to quiet the possession *after* the right to the possession had previously been determined in an action at law.

These statutes differ in the different states. In Massachusetts the law is that any one who is in possession of real property claiming an estate therein, may file a petition against an adverse claimant who is not in possession, praying that he may be summoned to show cause why he should not bring an action to try the alleged title. Upon notice being given, the court is authorized to hear the parties, and to make such a decree respecting the bringing and prosecuting of such action as seems equitable and just. This statute has been strictly construed: so strictly that a person is not allowed to file his petition as above provided for, if he has any other remedy of which he can avail himself, notwithstanding the language of the act is broad enough to allow any one who is in possession to file a petition for such purpose. And the court so limits the right that no one can file the petition unless he is in possession of the premises, and receiving profits therefrom. For it is held that unless he is receiving profits, he can, without prejudice, consider himself as disseised by the claimant, surrender his possession, and bring a writ of entry, which will determine his rights: *Clouston* v. *Shearer*, 99 Mass. 212; *Munroe* v. *Ward*, 4 Allen 150. So where one filed his petition under the statute, alleging that he was in possession, and praying that the respondent might be summoned to show cause why she should not be required

to bring an action to test the title, and it appeared that the petitioner had title to the premises as the assignee of an insolvent debtor, under a regular assignment, and that the respondent held a mortgage deed, made to her by the insolvent as security before the insolvency, and under which she was claiming title, the court dismissed the petition upon the ground that the petitioner could bring an action himself to try his title, counting on his own seisin, and electing to consider the respondent's claim as a disseisin: *Hill* v. *Andrews*, 12 Cush. 185.

Under the Missouri statute, where one who is in "possession" can file his petition, as in Massachusetts, and compel the claimant to show cause why he should not bring an action to test his title, the court requires complainant to be in the *actual*, as distinguished from the constructive possession, of the premises. The reason for this being found in the fact that constructive possession is a question of law, and depends upon validity of title. To assume that complainant is in constructive possession of the property is to assume that he has the valid title to the premises, which is the precise question to be determined: *Von Phul* v. *Penn*, 31 Mo. 334; *Rutherford* v. *Ullman*, 42 Id. 216, 218.

In Tennessee it was deemed wise to provide that a party in possession could bring an action of ejectment against any one out of possession claiming legal title to the property: *Smith* v. *Lee*, 1 Coldw. 549; *Langford* v. *Love*, 3 Sneed 308. This enables the validity of the claim to be settled, and quiets the title but not the possession. The language of most of the statutes authorizing persons to file bills to quiet their title is that any person "in possession" is entitled to do so. In the construction of these statutes a question has been raised as to what must be the nature and character of this "possession" to justify a court of equity in assuming jurisdiction of the bill. Such a question arose in *Comstock* v. *Henneberry*, 66 Ill. 212, the facts of the case being as follows: The defendant had recovered possession of the premises in dispute in an action of forcible entry and detainer, and had been put into possession by the sheriff. Subsequently the complainant, or those representing him, broke into the house and retook possession, during the absence of the defendant, and refused to surrender it, claiming the legal title to the property. The complainant then filed his bill to quiet his title, claiming to be in "possession" of the premises. The court dismissed his bill, and said: "Is the

appellee to be considered as in possession when he commenced his suit? He was in the actual possession, but he obtained it unlawfully and forcibly. He cannot take advantage of his own wrongful and illegal acts as the foundation for equitable jurisdiction and relief. The appellee is to be treated as out of possession for all the purposes of this suit, so far as jurisdiction is concerned." This was followed by *Hardin* v. *Jones*, 86 Ill. 316, which reasserted the same doctrine. "But that possession that gives jurisdiction in such cases must be such as was acquired in a lawful way, for it cannot be that equity will lend its aid to protect a possession wrested from another by violence, or obtained by the use of any unfair or corrupt means." Possession in this case had been obtained by corrupting the tenant of the defendant, and complainant's bill was therefore dismissed. Similar doctrine has also been asserted in Oregon, and the court there reiterates the doctrine that a wrongful possession cannot be made available as a ground upon which a standing in a court of equity can be obtained. "If an unlawful possession be used to give a party a standing in a court of equity to quiet a title, then a person who is a tenant of another can enter under his landlord, and then set up an equity in himself and dispute his landlord's title and abrogate the well-established rule that a tenant cannot dispute his landlord's title. So also if such a rule prevails, one who claims an equity in land can dispossess the owner of the legal title by force, and then take advantage of his tortious entry to try his equity and make his forcible entry and possession lawful. Such a construction would encourage entries on land by force and breakers of the peace in possession: *Tichenor* v. *Knapp*, 6 Oregon 205. It must be confessed that the reasons assigned for giving this construction of these statutes are forcible. It is a fundamental principle of equity jurisdiction that he who comes into equity should come with clean hands, and it has passed into a maxim that no one shall be allowed in equity to take advantage of his own wrong. It is not unreasonable, therefore, to doubt the intention of the legislature to pass an act which disregards these ancient and wise principles, and it seems that courts are warranted in assuming that the legislature had no such intention, unless that intention has been unmistakably expressed. In Nevada, however, a different view has been taken of this subject, and we find that court interpreting the statute literally, saying: "The mode of acquiring possession is of no consequence. The

statute gives the right of action to any person in possession, irrespective of the mode by which possession has been acquired. We are not authorized to create exceptions, or impose limitations which the statute does not recognise, and can perceive no good end to be subserved by doing so even if we had the power: *Scorpion S. M. Co.* v. *Marsano*, 10 Nevada 378. In California, too, we find the Supreme Court of the state announcing that it does not matter how possession is acquired: *Reed* v. *Calderwood*, 32 Cal. 109. We should think it proper, nevertheless, to construe the statute equitably, especially as courts are not confined in the construction of statutes to the exact language used. "The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter: (4 Bacon's Abr., tit. *Statute*, 1, sects. 38, 45, 5 a). In New Jersey, the statute on this subject differs from those in the other states in that it requires the complainant to be in "*peaceable* possession." This may be construed to mean simply a possession which was not obtained by force and has not been retained by it. This is perhaps the most natural, and, therefore, the most reasonable construction which can be placed upon the words, although we have heard it urged that whatever would be a breach of the covenant for quiet enjoyment would render the possession unpeaceable within the meaning of the statute. In *Powell* v. *Mayo*, 9 C. E. Green 178, 181, the New Jersey court, in passing upon the statute, said: "It requires possession merely; the only qualification being that it shall be peaceable as contradistinguished from disputed or contested possession, and that it shall be under claim of ownership. Quiet occupation under claim of title gives the complainant standing in court under the act." And attention is called to the fact that the complainant had not heard of any adverse claim being made to the property until four years after conveyance of the property to him. This possibly implies that his possession would not be regarded as peaceable within the meaning of the statute, had he knowingly purchased a litigious title.

In Kansas, the statute requires that complainant should be "in possession by himself or tenant." And here we find the court holding that a constructive possession is not sufficient. We think no other conclusion could be reached, owing to the peculiar phraseology of the act, and the court well says that "constructively, the owner of land is as much in possession when it is occupied by his

tenant as when by himself, and if the possession mentioned in the section was a mere constructive one, then the words 'or tenant' have no significance; but by giving to the word possession its primary legal meaning of an actual possession, the words 'or tenant' become of importance by extending the right to claim the interposition of the court one step beyond actual possession to that of the tenant of the person:" *Eaton* v. *Giles*, 5 Kans. 28; *O'Brien Creitz*, 10 Id. 203.

In Ohio, where the statute required complainant to have "the legal title and possession," the court held that the possession must be actual, such construction being unavoidable in order to give effect to the word possession: *Hubbard* v. *Clark*, 8 Ohio 384.

It being conceded that the circumstances attending the possession of the complainant are sufficient to authorize the court in assuming jurisdiction of the bill, the question next presented concerns the nature of the claim which is being asserted to the prejudice of the complainant. Is the remedy confined to those cases in which the adverse claimant sets up a legal or an equitable title? It has been held not to be so confined, but "to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held, or to grow out of the adverse pretension. The plaintiff has the right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property:" *Joyce* v. *McAvoy*, 31 Cal. 274. At one time it was held in Ohio that in order to confer jurisdiction, it was essential that the claim made by defendant should be adverse to the complainant's right to the *present* possession of the property. But in *Rhea* v. *Dick*, 34 Ohio St. 422, that doctrine has been overruled.

The next important inquiry which confronts us in the investigation of this subject, is that which relates to the character of the defendants. Who may be made defendants in such a suit? The statutes say "any person or persons" asserting a claim to the land. If the literal construction given to the words "any person in possession" by the courts in California and Nevada (already noticed as allowing any person in possession to maintain the suit without reference to the means by which possession was acquired), was

justified, then the same principle of literal construction would seem to compel us to refrain from placing any limitation upon the number of defendants to such a suit. But such a proposition is so manifestly absurd that we doubt the ability of any one to gain credence for it anywhere. We are not surprised to find the Supreme Court of Michigan repudiating such a doctrine, and declaring that any bill filed to quiet title is subject to the objection of being multifarious, if it makes persons defendants whose claims to the land in dispute are in no way connected: *Hunton* v. *Platt*, 11 Mich. 264; *Hall* v. *Kellogg*, 16 Id. 138.

This brings us to the inquiry, what title must the complainant show himself to be possessed of in order to obtain the relief sought. In most of the states, the statutes throw no light upon this question. In a few states, however, it is expressly required that the complainant should have the legal title to the premises. Where the statute is silent as to complainant's title, and merely requires him to be in possession, is naked possession sufficient to enable him to maintain his bill and obtain relief? In *Stark* v. *Staars*, 6 Wallace 410, the Supreme Court of the United States expressed itself as follows: "We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that any person in possession by himself or his tenant, may maintain the suit. His possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs and perhaps in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

Conceding that possession must be accompanied by a claim of right, the question arises as to the character of the legal or equitable title upon which the claim is founded. Must complainant's title be a paramount one? We think that it is unquestionable that it need not be, and we base the opinion both upon principle and the weight of authority. In fact, so far as we have been able to discover, after a pretty careful examination, we believe that no case has ever been decided under these statutes which declares that complainant must have paramount title. In Michigan it is said that it is not essential that he should show a title which would be perfect against all the world; if apparently good against the

defendant, that will be sufficient: *Rayner* v. *Lee*, 20 Mich. 388; *Hall* v. *Kellogg*, 16 Id. 138. In Kansas it is said that it is no defence for defendant to show paramount title in some one else: *Brenner* v. *Bigelow*, 8 Kans. 501. In another case, in the same court, it is said that "a party in the quiet, peaceable and rightful possession of real estate, claiming title thereto, although his title may be ever so defective, may quiet his title against any adverse claimant whose title is weaker than his, or who has no title at all." *Giltenan* v. *Lemert*, 13 Kans. 481. In Nevada, the rule is "that the burden is upon the defendant, if he admits plaintiff's possession or does not disclaim, to plead and prove a good title in himself," *Scorpion S. M. Co.* v. *Marsano*, 10 Nevada 379. And in Illinois the court say: "We do not understand that a plaintiff in a suit to quiet title is bound to show a perfect title as against all the world, as in the case of a party seeking to recover possession:" *Rucker* v. *Dooley*, 49 Ill. 384.

Any other rule would work great injustice. If A. is in the possession of land having a superior title to that possessed by B., what justification is there for B.'s proclaiming his title better than A.'s to the prejudice of the latter, and how can it help B. that C. may have a title superior to either? If B. had possession of the land he would be entitled to hold it against all but the true owner, and in such case C.'s paramount title would avail him as against A. But no reason is perceived why it should avail him in the assertion of a false claim to land which is in A.'s possession, and in the assertion of which B. can derive no advantage, while A. may suffer much harm. If C. permits A. to remain in possession, it surely is none of B.'s business, and cannot inure in any way to his advantage, while it may result finally, if long enough continued, in transferring the paramount title from C. to A. Finally A.'s title is good against all the world but C., and no one but C. or his representatives can object to it.

The general rule is that one out of possession cannot maintain a bill for the purpose of quieting title: *Stout* v. *Cook*, 41 Ill. 448. And yet in *Shays* v. *Norton*, 48 Id. 105, it is said that equity will entertain a bill to quiet title where complainant holding the legal title is out of possession, provided defendant is in possession claiming equitable title. In Michigan, the right of the legislature to authorize one out of possession to file his bill to quiet title is denied. "It is not in the power of the legislature under our pre-

sent constitution, to provide for the trial of titles to land in equity in the cases which were triable at law at the time the constitution was adopted:" *Tabor* v. *Cook*, 15 Mich. 322. It seems that this objection might be obviated by giving the parties the right to have the issues tried by a jury, and providing that the verdict of the jury should be as binding and conclusive as it would be at law.

In conclusion it may be said that it is claimed that these statutes are to be construed equitably, and that relief will be denied if the particular circumstances of the case indicate the absence of equity in complainant's demand for the relief sought. This may be best illustrated by a case decided by the Supreme Court of Kansas. A party filed his bill to quiet his title against the holder of a tax-sale certificate, alleging certain defects that invalidated the sale. The court conceded that the defects alleged were sufficient to invalidate the sale, but nevertheless dismissed the bill for the reason that he who seeks equity must first do equity. "Counsel contends," said the court, "that because the action is authorized by and brought under the statute, it is not subject to equitable principles; but this is a mistake." The want of equity, as the court thought, consisted in the fact that the complainant justly owed the tax, and should have offered in his bill to pay the same.

Where a bill to quiet title was based upon a tax title and limitation, but failed to show affirmatively the proceedings, and when possession of the land and payment of the taxes under the title commenced, or how it was continued, merely charging generally possession and payment of taxes for the statutory period, the bill was dismissed as not being sufficiently specific.

HENRY WADE ROGERS.

EXEMPLARY DAMAGES.

THERE is, I believe, a growing conviction among the jurists of the present day, that the law of punitive or exemplary damages has been built upon a wrong foundation, and is alike contrary to principle and evil in its effects. I share deeply in this feeling, and in the hope of effecting something, however little, toward a reform, would willingly add a few words to what was once a much discussed question.