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BILL TO REMOVE CLOUD FROM TITLE—WITH REFERENCE TO THE STATE OF THE AUTHORITIES IN VIRGINIA AND WEST VIRGINIA.

By David C. Howard*

I

REAL ACTIONS, by which alone land was recoverable at early common law, were of two kinds: actions *droitural* based upon the plaintiff's title, and actions *possessor" which involved the right of possession. The writ of right was a typical action of the first class and the writ of entry the most common *possessor" remedy. During the fifteenth and sixteenth centuries both classes of real actions were almost wholly supplanted by ejectment—"a purely possessory action, but one fitted to a feudal system where possession of property rather than title was chiefly safe-guarded." Only a few real actions found a foothold in the American Colonies but the writ of right was employed in several jurisdictions including Virginia, and writs of entry were adopted in Massachusetts and some other states. One or two states converted the action of trespass

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1 4 Minor, Institutes, 420 et seq.

2 Sedgewick & Waite, Treatise on Trial of Title to Land, § 8 et seq.; 3 Essays in Anglo-American Legal History, 615.

3 Maitland, Mystery of Seisin, 2 L. Quart. Rev. 481.

4 See Shaw v. Clements, 1 Cal 429 (Va. 1798); Polling v. Petersburg, 3 Rand. 563 (Va. 1825); Taylor v. Bursides, 1 Grat. 165 (Va. 1844); Liter v. Green, 2 Wheat. 306 (U. S. 1817); Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. 99 (U.S. 1830). Although the writ of right was abolished by Code of Va., 1849, c. 135, § 38, taking effect July 1, 1850, an action begun in 1847 was heard by the West Virginia Court in 1855, Fisher v. Camp, 26 W. Va. 576; and in one case an action on a writ of right seems to have been allowed in West Virginia without reference to the fact that the action had been abolished. Geiszler v. Ingersoll, 2 W. Va. 558 (1862). The writ of right had been simplified and rendered more effective by Acts of Va., 1785, c. 59, and Code of Va., 1819, c. 118, but this writ along with the writ of entry and writ of formdon were abolished by Code of Va., 1849, c. 135, § 38, effective July 1, 1850, and still in force in Virginia and West Virginia. Code of Va., 1904, § 2759; Code of W. Va., 1913, c. 90, § 38. Following Code of Va., 1849, c. 135, § 2, ejectment may be brought "in the same cases in which a writ of right might have been brought prior to the first day of July, 1850." Code of Va. 1904, § 2723; Code of W. Va., 1913, c. 90, § 2.

5 Wells v. Prince, 4 Mass. 64 (1807); Higbee v. Rice, 5 Mass. 344 (1809); Jackson, Real Actions, 2.

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into a remedy for the trial of title, but, as in England, ejectment soon became the most important action for the recovery of real estate. Since that time this form of action has been broadened and strengthened by statutory enactment, and, in a few jurisdictions, has given away to a wholly statutory legal action. Nevertheless, the writ of entry and the action in ejectment have left their permanent impress upon the common law remedy for the recovery of real estate which remains essentially possessory in its nature. In the meantime the substitution of commercial for feudal standards has made title rather than possession of first importance and has demanded an effective remedy for making marketable the title of a plaintiff in peaceful possession of real estate. This need is supplied by the equitable bill to remove cloud from title. In some states this remedy has been superseded by a statutory suit to determine title, equitable in form and very broad in its scope, but in a majority of jurisdictions there remain many cases in which adequate relief can only be given by a bill to remove cloud. Especially is this true in jurisdictions such as Virginia and West Virginia which cling rather closely to the common-law forms of action.

The jurisdiction of equity to remove a cloud from title seems first to have been exercised by Lord Eldon. Prior to 1800 the English courts of chancery had, in proper cases, compelled the cancellation of instruments, and this even in cases where there was a defense at law, but, in the absence of grounds for cancellation, it had been held that equity had no jurisdiction to issue an injunction to remove a cloud from title to real estate. Then,

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7 SEDGWICK & WATTS, TREATISE ON TRIAL OF TITLE TO LAND, § 80 et seq.; 3 ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 643.
8 See, for example, Code of Va., 1904, §§ 2722-2756; Code of W. Va., 1913, c. 90.
9 This is the nature of the "action for the recovery of real estate" which has been established in many of the so-called "Code" states. See, for instance, Gen. Stat. Kan. 1915, §§ 7527-7529; Ky. Codes, Rev., 1900, §§ 6, 125; R. S. Mo., 1909, §§ 2382, et seq.
10 Stark v. Starrs, 6 Wall. 402 (U. S. 1867); Holland v. Challen, 110 U. S. 15 (1883).
12 In Welby v. Duke of Rutland, 2 Bro. Parl. Cas. 39 (Eng. 1773), a plaintiff holding legal title and possession of property brought a bill to enjoin the defendant from further claims to the property on the ground that such claims might create a
for a time, it was held that equity was without power even for cancellation in any case in which the law courts would not permit recovery. Decisions of Lord Rosslyn and Sir R. Pepper Arden (Lord Alvanley), however, established the rule that equity does not lose jurisdiction to cancel an instrument by reason of the existence of a legal defense. In \textit{Byne v. Vivian}, 5 Ves. Jr. 604, (Eng. 1797), the most important of these decisions, Lord Rosslyn cancelled a void annuity and a term for years given as security. Sir John Mitford, (Lord Redesdale), then attorney-general, urged in argument that there was jurisdiction on the ground that equity alone could clear the plaintiff’s title of the cloud caused by the existence of the defendant’s deed, but the court seems to have ignored the suggestion for the decision treats the case as one for cancellation simply. \textit{Byne v. Vivian} was followed by Lord Eldon in \textit{Bromley v. Holland}, 7 Ves. Jr. 3 (Eng. 1803), a case involving substantially similar facts. In his opinion Lord Eldon refers to the suggestion made by Lord Redesdale and holds that “the colour of title the deed furnishes as throwing a cloud upon title is one of the circumstances that founds the jurisdiction.” Eight years later in \textit{Hayward v. Dimsdale}, 17 Ves. Jr. 111 (Eng. 1810), Lord Eldon cancelled a deed by which a bankrupt had attempted to give a preference on the ground that “there is jurisdiction in this court to order a deed forming a cloud upon title, to be delivered up, though the deed is void at law,” and there is a \textit{dictum} to the same effect in his opinion in \textit{Mayor of Colchester v. Lowten}, 1 Ves. & B. 226, 244 (Eng. 1813).

Mitford’s suggestion that equity should act to remove clouds from title has found little favor in the English courts. The decisions of Lord Eldon, setting forth the doctrine, have been treated as examples of cancellation merely, and to this day the English courts of chancery exercise no jurisdiction to remove clouds from title. In striking contrast is the reception given the doctrine in

\begin{quote}
\textit{cloud upon title}. A demurrer to the bill was sustained by Lord Apsley (Earl Bathurst) and his decision affirmed in the House of Lords.
\end{quote}


The need for relief against a cloud upon title is obviously much less in England
the United States. Through the medium of Mitford's own treatise on Equity Pleading, and through Maddock's Chancery, and Story's Equity Jurisprudence, each of which cited and followed Mitford's text, Lord Eldon's decisions were brought to the attention of American lawyers. Within a few years these cases were supported by decisions of the leading jurists of the country. In Hamilton v. Cummings, 1 Johns. Ch. 515 (N. Y. 1815), Chancellor Kent deemed cancellation of an invalid bond on the authority of Byrne v. Vivian, and Lord Eldon's decision in Bromley v. Holland, using language which has been cited in later cases as justifying jurisdiction to remove cloud from title. In a case of earlier date Chief Justice Marshall, without citation of authority sustained what was in substance a bill to remove cloud, and in Peirsoll v. Elliott, 6 Pet. 97 (U. S. 1832), he held, on the authority of Bromley v. Holland, that equity had jurisdiction to remove a cloud from title. Justice Story upheld the jurisdiction in Briggs v. French, 1 Sumner 504 (U. S. Cir. Ct. 1833). The result was that within a few years jurisdiction to remove cloud from title was an established form of relief in both federal and state courts.

Jurisdiction to remove cloud from title rests upon grounds wholly distinct from those which govern cancellation of instruments. Equitable relief by cancellation is of ancient origin. At common law, fraud, illegality, payment and many other defenses could not be made to an action at law upon an instrument under seal. The sole remedy was in equity which cancelled the instrument and thus prevented a recovery at law. When unsealed

because of the lack of a registry system. An instrument adverse to the rights of the holder of the legal title would not be among the papers shown to a purchaser and would not, therefore, so much injure the property as if recorded.

17 MITFORD, PLEADING & PRACTICE IN Eq., 3 ed., 104 n. c.; MITFORD & TYLER, PL. & PRAC. IN EQ., 223.
18 MADDOCK, CHANCERY, 4 Am. ed., 226, citing MITFORD, PL. & PRAC. IN EQ.
19 2 STORY, Eq. Juris., 13 ed., § 700, citing MITFORD, PL. & PRAC. IN EQ.
20 Chipman v. City of Hartford, 21 Conn. 488 (1852); Munson v. Munson, 28 Conn. 582 (1859); Pettit v. Shepherd, 5 Paige 493 (N. Y. 1835); Scott v. Onderdonk, 14 N. Y. 9 (1856).
21 Alexander v. Pendleton, 8 Cranch 402 (U. S. 1814).
23 Chipman v. City of Hartford, 21 Conn. 488 (1852); Leigh v. Everhart, 4 T. B. Mon. 379 (Ky. 1827); Apthorp v. Comstock, 2 Paige 482 (N. Y. 1831); Pettit v. Shepherd, 5 Paige 493 (N. Y. 1835); Oakley v. Williamsburg, 6 Paige 262 (N. Y. 1837).
24 Ames, Specialty Contracts and Equitable Defenses, 9 Harv. L. Rev. 49.
instruments came into use these also were cancelled where the defense was purely equitable. Later the law courts gradually acquired power to permit these defenses to be made at law but equity, having once had jurisdiction, retained it as to defenses arising out of the inception of the instrument, though somewhat illogically it ceased to allow cancellation for causes arising subsequent to the execution of the instrument. In modern times the jurisdiction for cancellation has been extended to cases where there is a valid legal defense but the instrument is negotiable and there is danger that it will be transferred to a *bona fide* purchaser.

Some jurisdictions also permit cancellation in any case in which a legal defense exists but must be established by parol evidence and is, therefore, liable to loss through failure of the memory of witnesses or their death. In a majority of jurisdictions, however, an instrument cannot be cancelled merely on the ground that a legal defense may fail through the loss of parol evidence, and, in all, an instrument void upon its face is held not to require cancellation. These decisions are rested upon the ground that such instruments threaten no injury to the persons obligated because there is always an adequate defense available at law. Nevertheless instruments subject to parol defenses and even those void upon their face may, if they concern property, injure its value. The

25 Depew *v.* Howard, 1 Munf. 293 (Va. 1810) (fraud); Morrison *v.* Waggy, 43 W. Va. 405, 27 S. E. 314 (1897) (fraud); O'Connor *v.* O'Connor, 45 W. Va. 354, 32 S. E. 276 (1898) (fraud); McGuire *v.* Ashly, 1 Rand. 76 (Va. 1822) (illegality); Honaker *v.* Board of Education, 42 W. Va. 170, 24 S. E. 544 (1886) (illegality).

26 Lewis *v.* Tobias, 10 Cal. 514 (1858) (payment); see also Gail *v.* Bank, 50 W. Va. 587, 40 S. E. 390 (1901) (payment).

27 Smith *v.* Aykwell, 3 Atkyns 566 (Eng. 1747); Thurman *v.* Burt, 53 Ill. 129 (1870); Gail *v.* Bank, 50 W. Va. 587, 40 S. E. 390 (1901) (dictum).

28 Patterson *v.* Smith, 4 Dana 153 (Ky. 1836); Ludington *v.* Tiffany, 6 W. Va. 11 (1870); Jackson *v.* Kittle, 24 W. Va. 207, 12 S. E. 484 (1890) (dictum); Morrison *v.* Waggy, 43 W. Va. 405, 27 S. E. 314 (1897); Womelsdorf *v.* O'Connor, 53 W. Va. 314, 44 S. E. 191 (1903); Conn. Co. *v.* Home Co., 17 Blach. 142 (U. S. Cir. Ct. 1879).

29 Brooking *v.* Maudsley, L. R. 38 Ch. D. 636 (Eng. 1888) (insurance policy—unseaworthiness); Erickson *v.* First Bank, 44 Neb. 622, 62 N. W. 1078 (1895) (alteration); Venice *v.* Woodruff, 62 N. Y. 462 (1875) (nonperformance of condition precedent); Carroll *v.* Brown, 28 Grat. 791 (Va. 1877) (dictum); Conn. Co. *v.* Bear, 26 Fed. 582 (1886) (insurance policy—breach of condition to continue temperate); Sunset Tel. & Tel. Co. *v.* Williams, 162 Fed. 301 (1908) (terms of contract altered).

30 Gray *v.* Mathias, 5 Ves. Jr. 298 (Eng. 1800); Simpson *v.* Lord Howden, 3 My. & Cr. 97 (Eng. 1837); Venice *v.* Woodruff, 62 N. Y. 462 (1875); Springport v. Teutonia Bank, 76 N. Y. 397 (1882); Sheldon *v.* Myers, 51 Wis. 627, 51 N. W. 1082 (1892); Peirce *v.* Elliott, 6 Pet. 95 (U. S. 1832); Contra: Hamilton *v.* Cummings, 1 Johns. Ch. 517 (N. Y. 1815) (dictum); Hoopes *v.* De Vaughn, 43 W. Va. 447, 27 S. E. 291 (1898) (treating what was in substance a bill to remove cloud as a bill for cancellation merely).
protection of property from such injury is the basis of jurisdiction to remove cloud and distinguishes that remedy from relief by cancellation. Grounds for the cancellation of an instrument may exist in a case in which there is also jurisdiction to remove cloud but the latter relief may be granted in cases where cancellation is unavailable. Relief by cancellation, on the other hand, does not depend upon the effect of the instrument upon property and the question of possession is immaterial.

Jurisdiction to remove cloud from title also differs wholly from jurisdiction to grant a bill of peace. The common law rules governing joinder of parties sometimes make it impossible for a party to obtain relief at law except by bringing many actions concerning what is essentially the same subject-matter. In such a case to protect a party from the annoyance and expense involved in bringing or defending many suits equity gives relief by a bill of peace. Jurisdiction is based upon the prevention of a multiplicity of suits concerning a common question. Such a common question may exist in a case where many actions are brought between the same parties, or where there are numerous plaintiffs or defendants whose claims depend upon the same set of facts or rule of law. Formerly in addition to multiplicity of suits and a common question it was required that there be some additional element such as a common interest in the defendants, an exclusive right claimed by the plaintiff, or an independent ground of equity jurisdiction. The existence of any of these elements is no longer insisted upon by the more liberal courts. But whatever

31 Dull's Appeal, 113 Pa., St. 510, 6 Atl. 540 (1886).
33 Pleasants v. Pleasants, 2 Call 319, 342 (Va. 1800); Randolph v. Kinney, 3 Rand. 394 (Va. 1825) (dictum); Stuart v. Coaller, 4 Rand. 74 (Va. 1826); 4 MINOR, INSTITUTES, 123.
34 Lord Bath v. Sherwin, Prec. in Ch. 261 (Eng. 1709); Bush v. Martina, 7 Leigh 320 (Va. 1836) (dictum); Nelson v. Phares, 53 W. Va. 279, 10 S. E. 398 (1887); Town of Weston v. Ralston, 48 W. Va. 170, 36 S. E. 446 (1900); Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730 (1907).
36 How v. Tenants of Bromsgrove, 1 Vernon 22 (Eng. 1681).
37 Mayor v. Pilkinson, 1 Atk. 282 (Eng. 1737).
38 Tribette v. Illinois Central R. Co., 70 Miss. 182, 12 So. 32 (1893); Miller v. Wills, 65 Va. 337, 28 S. E. 337 (1897).
39 Williams v. County Court, 26 W. Va. 488 (1885); County Court v. Boreman.
its requirements, a bill of peace is essentially unlike a bill to remove cloud though there are cases in which both forms of relief may exist side by side. A bill of peace brought by a plaintiff harassed by many suits concerning the same piece of property is properly called "a bill to quiet title," but this term is often applied to bills to remove cloud, a use both inaccurate and confusing.40

Bills to remove cloud from title do resemble bills for cancellation and bills of peace in that they belong to the protective or preventive jurisdiction of equity and give relief against the improper use of legal instruments and remedies. The object of a bill to remove cloud from title is to declare void a claim which interferes with the marketability of the plaintiff's title. The jus disponendi is to-day one of the most valuable incidents of property. Buyers do not desire to acquire law suits by purchase and adverse claims of title, though invalid, cause property to become salable only at a speculative price if at all.41 The jus disponendi is a legal right but the owner of the legal title may have to wait indefinitely for a legal remedy by which to vindicate it. In the meantime there is an immediate and present injury to the property against which equity very properly relieves.42 Even though the instrument sought to be relieved against produces no immediate diminution in the selling value of the property there always exists the possibility that in other hands or under altered circumstances it will have that effect,43 and against this possibility of future injury to the owner of the legal title equity will give relief quia timet.44 On the same principle equity will enjoin a threatened act by which a cloud would be created.45

Protection of the jus disponendi is just as important in the case

34 W. Va. 362, 368, 10 S. E. 490 (1890) (dictum); Blue Jacket Company v. Scherr, 50 W. Va. 533, 40 S. E. 514 (1901) (dictum).
45 Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682 (1895); Iguano Co. v. Jones, 65 W. Va. 69, 64 S. E. 640 (1906); Castle Brook Co. v. Ferrell, 76 W. Va. 300, 85 S. E. 544 (1915); Bradley v. Swope, 87 S. E. 98 (W. Va. 1916).
of personal property as in that of real estate. Title to either form of property is injured by the existence of adverse claims which constitute a cloud. Personal property, more especially, is rendered wholly unmarketable by any suggestion that there is a dispute regarding the title. Bills to remove cloud should, therefore, be equally available to owners of real and personal property, and by the better authority the relief is extended to both, though there are several decisions holding that a bill to remove cloud from title to personal property will not be sustained. As there are situations in which no legal remedy exists by which title to personal property can be made marketable, these decisions can be justified only on the vague ground that equity extends a greater protection to real than to personal property. In this day of commercial standards such a distinction seems unjustified. The question seems never to have been settled by decisions in Virginia or West Virginia, though there are dicta each way.

Relief by the removal of cloud from title is available only when there is an injury to the jus disponendi for which the law affords no adequate relief. There are, therefore, three requisites which must be met to maintain such a bill: (1) The plaintiff must have a substantial interest in the property beclouded. (2) There must be no legal remedy by which title can be cleared. (3) The adverse claim attacked must be such as to constitute a real cloud upon the plaintiff's right in the property. These will be considered in turn.

II

It is a rule of equity that only persons having a substantial interest in a controversy can maintain a bill for relief, and for

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46 Eagan v. Mahoney, 24 Col. App. 285, 134 Pac. 156 (1913) (dictum); Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048 (1897); Sherman v. Fitch, 98 Mass. 59 (1877); New Haven R. Co. v. Schuyler, 17 N. Y. 592 (1858); Magnuson v. Clithero, 101 Wis. 551, 77 N. W. 882 (1898). It has also been held that a bill to remove cloud may be maintained where personal property is in the possession of officers of the law for purposes of evidence. Honrich v. Robinson, 221 Mass. 308, 108 N. E. 1082 (1915). Equitable relief has been refused, however, in cases where the property was in the hands of a sheriff or marshal pending an action of replevin. Thompson v. Verney, 106 Ill. App. 182 (1903); Jones v. MacKenzie, 122 Fed. 390 (1903). The effect of permitting relief in the latter instance would be to give equity a right to assume jurisdiction in an action of replevin or detinue.


49 Cope v. District Fair Ass'n, 99 Ill. 489 (1881); Smith v. Cornelius, 41 W. Va. 59, 22 S. E. 599 (1895); Bryant v. Logan, 58 W. Va. 141, 49 S. E. 21 (1904).
this reason a bill to remove a cloud from title cannot be maintained by a person having no present interest or title, legal or equitable, and the bill is demurrable if the plaintiff's lack of an interest in the property appears on its face. In general, however, any pecuniary or proprietary interest is sufficient to support a bill in equity. Legal title in the plaintiff is the most obvious example of such an interest and there are broad statements in the cases to the effect that a bill to remove cloud can only be brought by the holder of the legal title, but a legal right in the property is clearly sufficient. The nature of the interest is immaterial. It may be an estate for years, for life, or in remainder, title to the whole or an undivided portion, an interest given merely as security as a lien, mortgage or deed of trust, or even a purely incorporeal right. Nor is the source of the plaintiff's title material so long as it is recognized as within the policy of the law. Rights ac-


60 Gee v. Pritchard, 2 Swans, 402 (Eng. 1818); Dixon v. Holden, 7 Eq. 488 (Eng. 1869); Meisioo v. Guillian, 190 Mass. 352, 76 N. E. 907 (1905) (dictum); Beck v. Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13 (1898); Brandreth v. Lance, 8 Paige 24 (N. Y. 1839); Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (1907); Evans v. Philadelphia Club, 50 Pa. St. 107 (1865); Bartlett v. Bartlett & Son Co., 116 Wis. 450, 93 N. W. 473 (1903); Atlas Underwear Co. v. Cooper Underwear Co., 210 Fed. 347 (1913). For a review of the cases on Equitable Relief against Defamation and Injuries to Personality, showing that the courts seize upon any property interest, however trivial, as sufficient to sustain equitable relief, see 29 Harv. L. Rev. 840.


63 Peterson v. Hall, 57 W. Va. 555, 50 S. E. 603 (1906); Smith v. Linden Oil Co., 69 W. Va. 57, 71 S. E. 187 (1911).


65 Town of Weston v. Ralston, 48 W. Va. 170, 36 S. E. 446 (1901) (right of way).
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quired by adverse possession will sustain a bill to remove cloud since, by lapse of time, the plaintiff has ceased to be a disseisor and become owner of the legal title.\(^58\)

The presence of minerals in real estate gives rise to many legal interests which are peculiarly within the protection of an equitable bill to remove cloud. In all jurisdictions title to coal or ore underlying the soil may be separated from title to the surface by a proper conveyance,\(^60\) and in such a case the owner of the surface\(^60\) and the owner of the coal or ore\(^61\) each has a vested corporeal estate sufficient to support a bill to remove cloud from his respective interests. Because of their fugitive nature oil and gas are not, like other minerals, a part of the reality in place but are somewhat analogous to animals \textit{ferae naturae},\(^62\) or percolating waters,\(^63\) both of which move from place to place and may be reduced to possession by any one of several owners of the surface, differing from animals \textit{ferae naturae} in that, while animals \textit{ferae naturae} are the absolute property of the state and subject to complete control by it, oil and gas are the property of the various owners of the surface and subject to state control only within the limits governing other property rights.\(^64\) Since these minerals are not a fixed part of the reality an owner of the surface has no vested right to the particular oil and gas underlying his tract. Nevertheless, the courts of Kansas and West Virginia have held that actual title to oil and gas may be conveyed by a grant in fee-simple, separa-

\(^{58}\) Torrent Co. v. Mobile, 101 Ala. 559, 14 So. 557 (1893); McCormack v. Silsby, 82 Cal. 72, 22 Pac. 524 (1890); Tracy v. Newton, 57 Iowa 210, 10 N. W. 336 (1881); Gardner v. Terry, 59 Mo. 523, 12 S. W. 888 (1889); Watson v. Jeffrey, 39 N. J. Eq. 62 (1884); Taylor v. Hedrick, 110 Va. 461, 65 S. E. 65 (1909); Pendleton v. Alexander, 8 Cranch 465 (U. S. 1814).


\(^{60}\) Steinman v. Vicars, 89 Va. 355, 39 S. E. 227 (1901).

\(^{61}\) Va. Iron Co. v. Roberts, 103 Va. 661, 49 S. E. 884 (1905). In Comley v. Ford, 65 W. Va. 429, 64 S. E. 447 (1909), the court recognizes that the owner of the coal under a tract of land possesses a vested corporeal estate in the property out of which he may create an estate for years.


\(^{64}\) State v. Ohio Fuel Oil Company, 150 Ind. 21, 48 N. E. 809, 177 U. S. 190 (1896); West v. Kansas Natural Gas Co., 221 U. S. 229 (1910); Kansas Natural Gas Co. v. Haskell, 172 Fed. 545 (1909).
ing the title in these minerals from title to the surface.\textsuperscript{65} In Pennsylvania and a majority of the states where the question has arisen, more consideration is given to the fugitive nature of oil and gas, and, although an absolute conveyance gives the grantee all the rights of the grantor in the oil and gas underlying his property, it is recognized that this interest is limited to an exclusive right to explore for and remove oil and gas if found.\textsuperscript{66} When, as in Kansas and West Virginia, a conveyance of oil and gas separates title in these products from title to the surface, a grantee of the oil and gas has an estate in the land analogous to the interest possessed by a grantee of coal or ore and may maintain a bill to remove a cloud upon this interest.\textsuperscript{67} In jurisdictions where the rule of the Pennsylvania court prevails the rights of a person who has reserved or been granted an exclusive interest in oil and gas, apart from the ownership of the surface, are less easy to define. Such a person has a vested right to remove oil and gas if found and, as an incident of this right, an exclusive right to explore upon the property and drill for these minerals. The right to remove oil and gas when found would seem to be incorporeal; the right to possession for purposes of exploration is, on the other hand, an estate, a corporeal interest in the land itself. Together these rights constitute a substantial interest in the property which would seem sufficient to support a bill to remove cloud.\textsuperscript{68} It is submitted that under either the West Virginia or the Pennsylvania rule the owner of the surface should be allowed to bring a bill to remove a cloud upon his interest even though he has no right to the oil and gas underlying his property but no reported case seems to have involved this question.

Additional complications as to the legal rights in property arise


\textsuperscript{67} Peterson v. Hall, 57 W. Va. 535, 50 S. E. 603 (1906); Smith v. Linden Oil Co., 69 W. Va. 57, 71 S. E. 167 (1911); contra: Zinn v. Zinn, 54 W. Va. 483, 46 S. E. 204 (1904), overruled by Peterson v. Hall, supra.

\textsuperscript{68} Search through the digests has failed to reveal a case outside of West Virginia where a bill to remove cloud has been brought by an owner of oil and gas separated from title to the surface. Since, as appears below, this is the only remedy available to such a person, there must be many such cases in the jurisdictions where rights in oil and gas are frequently in litigation.
when it is leased for the purpose of mining and removing the minerals underlying it. In Pennsylvania the courts are very ready to construe a lease of coal or ore property to be an absolute sale and conveyance of the coal in place,69 but in other jurisdictions unless the intent to make an absolute grant of these minerals clearly appears, a lease of coal or ore property, whether on a rental or royalty basis, conveys no title in the coal or ore.70 The lessee has, however, an exclusive right to take possession of the property for the purpose of exploring for and removing such coal or ore as may be found. The right to remove coal or ore seems to be incorporeal—a mere right to convert reality into personal property. The right of possession for purposes of exploration and removal is, on the other hand, corporeal. Under the usual lease for a term of years it is a vested estate for years in the land, a chattel real.71 These interests are sufficient to support the right of a lessee of coal or ore property to maintain a bill to remove cloud.72 The lessor, on his part, has a reversionary interest in the property subject to the expiration, surrender or forfeiture of the lease and this has been held to justify relief by the removal of cloud.73 When such a lessor has no rights in the surface but by severance is owner of only the coal or ore a more difficult problem is presented, but even in that case he has reversionary rights74 which constitute a present estate in the property. The usual equitable remedy should therefore be available to him.

Under the usual form of oil and gas lease there is likewise no conveyance of the legal title in these products. The lessee has an exclusive right to remove oil and gas if found,75 but this right

69 See Canal Co. v. Genet, 169 Pa. St. 343, 32 Atl. 559 (1895); Coolbaugh v. Lehigh & Wilkes-Barre Coal Company, 213 Pa. St. 28, 62 Atl. 94 (1906); and cases collected in note to latter case in 1 L. R. A. (N. S.) 207.
70 McColl v. Bear Creek Coal Min. Co., 162 Ia. 491, 143 N. W. 532 (1913); Shenandoah Land & Coal Co. v. Hise, 92 Va. 235, 23 S. E. 303 (1895); Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493 (1899); Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179 (1907) (dictum); Chandler v. French, 73 W. Va. 658, 81 S. E. 825 (1914); Loveland v. Longberry, 45 W. 60 (1901).
becomes vested only upon the discovery of these minerals,\textsuperscript{76} or their discovery in paying quantities.\textsuperscript{77} There seems to be a division in the authorities as to whether this right even after the discovery of oil or gas is corporeal\textsuperscript{78} or incorporeal.\textsuperscript{79} Although a lessee possesses a lesser interest, his right after the discovery of oil would seem analogous to that of an owner of these minerals when severed from the surface. But an oil and gas lease also gives the lessee a right to take possession of the property and carry on explorations for oil and gas by drilling or by other means. Whatever the nature of the lessee’s right in the oil and gas this right to possession is a vested estate analogous to the interest of a lessee of coal or ore property. It may be taxed separately from the interest of the lessor,\textsuperscript{80} and is in other respects treated as a chattel real. It follows that the lessee of oil and gas property either before\textsuperscript{81} or after\textsuperscript{82} the discovery of these products has an interest in land sufficient to sustain a bill to remove cloud. The lessor, likewise, has a substantial interest in the property. Prior to the discovery of oil and gas he possesses title in these minerals subject to the limitations resulting from their fugitive nature. After discovery of oil and gas the right of the lessee to these minerals becomes a vested one within the limits prescribed by the lease. At all times, however, the lessor retains some interest in the property for the lease never conveys away the whole of his title, but gives rights of exploration and removal only for a limited time or “for as long as oil and gas are found in paying quantities.” A lessee might cease operations and abandon property which a higher

\textsuperscript{76} So. Penn Oil Co. v. Snodgrass, 71 W. Va. 433, 76 S. E. 961 (1911).
\textsuperscript{77} Bur Gian u. So. Penn Oil Co., 243 Pa. St. 128, 89 Atl. 823 (1913); Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 32 S. E. 655 (1902); Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978 (1898). In Steelsmith v. Gartlan, supra, a discovery of oil or gas, not in paying quantities, was held insufficient to give a vested right in these products where the lessee had not explored further under the lease. In South Penn Oil Co. v. Snodgrass, supra, the oil was not discovered in paying quantities, but the lessee continued explorations for the mineral. It is, of course, possible that this distinction rather than the question of whether the oil or gas is found in paying quantities, may determine the time at which the lessee’s right to the oil and gas becomes vested.
\textsuperscript{78} Hall v. Vernon, 47 W. Va. 295, 300, 34 S. E. 764 (1899).
\textsuperscript{81} Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220 (1907).
\textsuperscript{82} Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978 (1898); Urpman v. Lowther Oil Co., 55 W. Va. 501, 44 S. E. 433 (1909); Castlebrook Carbon Co. v. Ferrell, 75 W. Va. 300, 85 S. E. 544 (1915).
market price or new discoveries of oil or gas might render workable and valuable. This ultimate right of the lessor to oil and gas not discovered or not removed is a legal interest which, it is submitted, is sufficient to support a bill to remove cloud. When a bill is brought by a lessor before the discovery of oil and gas it is uniformly held that he has a sufficient title to maintain it. 83 When the bill is brought after the discovery of oil or gas by the lessee one West Virginia case has held that an assignee of the lessor has not a sufficient interest to support a bill. 84 This case seems clearly erroneous and it was overruled on this point by a subsequent decision, 85 now supported by at least two other West Virginia cases. 86

Any person owning an equitable interest in a piece of property has a substantial proprietary right which is injured by the existence of a cloud upon the title and on general equitable principles such a person should be allowed to maintain a bill to have it removed. But on this point there is great divergence among the authorities. It seems to be well settled that a cloud may be removed as an incident to other relief given to enforce or protect an equitable right. 87 In cases in which there is no independent ground of equity jurisdiction the federal courts and those of Virginia have refused to allow the owner of a merely equitable interest to maintain a bill to remove cloud from title, 88 and there are dicta and one decision in West Virginia to the same effect. 89 This view has been defended on the ground that the owner of the equitable right may get in the legal title and then sue in ejectment. 90 There are

88 Steed v. Baker, 13 Grat. 380 (Va. 1855); Glenn v. West, 103 Va. 521, 49 S. E. 671 (1905); Tax Title Co. v. Deneen, 107 Va. 201, 57 S. E. 586 (1907); Buchanan v. Smith, 115 Va. 704 (1914); Frost v. Spitley, 121 U. S. 552 (1897). On the same ground must be justified the Virginia cases denying a bill to remove cloud to a plaintiff whose only right in property is a right to redeem from a sale for taxes. Parsons v. Newman, 99 Va. 298, 38 S. E. 186 (1901); Baker v. Briggs, 99 Va. 360, 38 S. E. 277 (1901); Mathews v. Glenn, 100 Va. 352, 41 S. E. 735 (1902); though the courts treat these as cases where the plaintiff has no interest in the property.
90 Glenn v. West, 103 Va. 521, 49 S. E. 671 (1905); Hitchcock v. Morrison, 47
several difficulties with such a theory. Many equitable rights do not entitle the holder to a conveyance of the legal title, yet the owner of such an interest should not be refused the only available method of destroying claims adverse to his rights. Even though an equitable right be one entitling the holder to a conveyance of the legal title it does not follow that recovery of the title will give him a right to maintain ejectment. If he recovers possession as well as title he must still attack any adverse claim by a bill to remove cloud and thus employ the remedy denied him in the first instance. At all events the theory wholly disregards the fact that the balance of convenience would clearly favor settling the whole controversy in one proceeding. The injustice of denying to the owner of an equitable interest the right to maintain a bill to remove cloud is illustrated by the ease of equitable rights given as security. Under this rule if the obligation secured by an equitable interest in property is due, the holder must either enforce his lien at once (thus securing the removal of the cloud as an incident to the enforcement of his lien) or he must run the risk that the passage of time will render the cloud more difficult to overcome. If the debt secured by the equitable lien is not due there would appear to be no remedy whatever available if a bill to remove cloud is denied. Elsewhere equitable rights support equitable remedies and there seems to be no reason why an equitable interest should not give its holder a right to remove a cloud from the property to which the right attaches. In Virginia a statute passed in 1912 changes the rule established by prior decisions and permits the holder of a purely equitable title to maintain a bill to remove cloud, and several West Virginia decisions reach the same just result in the absence of statute. In one of these cases the adverse claim attacked as a cloud was that of a person holding the legal title to the property. It is submitted, however, that the result


Acts of Va., 1912, 76; see Buchanan Co. v. Smith, 115 Va. 704, 80 S. E. 794 (1914).


Depue v. Miller, 65 W. Va. 120, 64 S. E. 740 (1909).
should be the same where the adverse interest is that of a third person, and in two of these cases relief was given against a party claiming under an independent chain of title.96

A person who has conveyed real estate, retaining no lien upon the property, but covenantee to warrant and defend its title obviously has no right in rem in the property conveyed. He is, however, liable to make restitution for any injury which his grantees or their assigns may suffer by reason of a defect in the title. This risk of loss, though contingent, is real and substantial, and gives a warrantor of title a pecuniary interest in protecting title to the property sufficient to support a bill to remove cloud.97 The few cases holding that a warrantor of title may not maintain a bill to remove cloud are rested upon the very technical ground that such a person has no property right in the land conveyed.98

By the general rule pecuniary interests equally with proprietary ones entitle a plaintiff to equitable relief,99 and on this ground a warrantor of title should be allowed to bring a bill to remove cloud. Two West Virginia cases support the weight of authority in this view,100 a position hardly consistent with refusing to grant a bill to remove cloud to the holder of an equitable interest in property.

III

The courts usually state that the second requirement of a bill to remove cloud is that the plaintiff allege,101 and prove102 that


97 Chipman v. Hartford, 21 Conn. 488 (1852); U. S. Bank v. Cochran, 9 Dana 395 (Ky. 1840); Sultif v. Smith, 58 Kan. 559, 50 Pac. 455 (1897); Begole v. Hershey, 86 Mich. 130, 48 N. W. 790 (1891); Stryer v. Sprague, 63 Minn. 414, 65 N. W. 669 (1895); Jones v. Nixson, 102 Tenn. 95, 50 S. W. 740 (1898); Pier v. Fond du Lac, 53 Wis. 421, 10 N. W. 686 (1881); Remer v. Mackay, 35 Fed. 86 (1888).

98 Gloe v. Goodrich, 178 Ill. 20, 51 N. E. 643 (1898).


102 Kane v. Va. Coal and Iron Co., 97 Va. 329, 33 S. E. 627 (1899); Otey v. Stuart, 51 Va. 714, 22 S. E. 513 (1895); Steinman v. Vicars, 99 Va. 586, 39 S. E. 227 (1901); Smith v. Thomas, 99 Va. 36, 37 S. E. 784 (1901); McConnell v,
he is in possession of the property. It is true that a person out of possession usually has an adequate legal remedy, and for that reason cannot maintain a bill to remove cloud;\(^\text{103}\) and since a plaintiff in possession cannot bring ejectment he is always entitled to equitable relief, but it does not follow that a plaintiff not in possession is never allowed to bring a bill to remove cloud. If he is without an adequate legal remedy his right to such relief is as great as that of a person in possession. More accurately stated, therefore, the second requirement of a bill to remove cloud from title is that there be no adequate legal remedy by which title can be cleared.\(^\text{104}\) In the state courts the scope of the jurisdiction is even broader since if the legal remedy was at a prior time inadequate and equity then took jurisdiction that jurisdiction is retained even though the legal remedy has now been made adequate.\(^\text{105}\) But in the federal courts jurisdiction is strictly limited to cases where the legal remedy is at present inadequate. Section 267 of the Judicial Code restricts the chancery jurisdiction of the courts of the United States to cases where there is no plain, adequate and complete remedy at law,\(^\text{106}\) and as a result equity loses its jurisdiction to remove cloud from title as rapidly as common law actions become available.\(^\text{107}\)

In a majority of cases the existence of an adequate legal remedy depends upon whether or not the plaintiff in a bill to remove

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\(^{103}\) Lange v. Jones, 5 Leigh 192 (Va. 1834); Glenn v. West, 103 Va. 521, 49 S. E. 671 (1905); Beatty v. Edgell, 75 W. Va. 252, 83 S. E. 903 (1914).


\(^{106}\) R. S. § 709; U. S. Comp. Sta. § 1244.

\(^{107}\) Grand Chute v. Winegar, 15 Wall. 373 (U. S. 1872).
cloud is in a position to bring ejectment. As has been seen the common-law action of ejectment was purely possessor and could only be brought by a plaintiff out of possession, or in possession of a part of the property only and suing to recover a portion from which he had been dispossessed.108 A plaintiff in actual possession of property could not maintain ejectment against a defendant who had not dispossessed the plaintiff but was making claims of title.109 This became, therefore, the typical case in which equity assumed jurisdiction to remove cloud from title.110 The scope of the action of ejectment has been much enlarged in both Virginia and West Virginia but these statutory changes seem not to have made the action available to a plaintiff in undisturbed possession of his property. This has been specifically decided in Virginia.111 There are dicta to the effect that Acts of W. Va., 1877, ch. 110, § 5, allows a plaintiff in possession to bring ejectment,112 but the phraseology of the statute would seem to limit the right to sue an adverse claimant to cases where the property is unoccupied or occupied by some other defendant in the suit.113 It is clear that the legal remedy was at one time inadequate and equity then took jurisdiction. Whatever may be the present rule as to ejectment it is settled that equity has retained this jurisdiction and a plaintiff in actual possession of property is entitled to maintain a bill to remove cloud.114 Possession by a tenant,115 or co-tenant116 is sufficient. The motive for taking possession is immaterial.

113 Code of W. Va., 1913, ch. 90, § 5.
115 Tax Title Co. v. Denoon, 107 Va. 201, 57 S. E. 586 (1907); Mackey v. Maxin, 63 W. Va. 14, 59 S. E. 742 (1907).
116 Davis v. Settle, 43 W. Va. 17, 28 S. E. 557 (1897).
and a plaintiff may acquire possession of unoccupied property for this very purpose.\footnote{Perry v. McDonald, 69 W. Va. 619, 72 S. E. 745 (1911).} The possession must, however, be rightfully acquired; if possession is taken by ejecting another,\footnote{Perry v. McDonald, 69 W. Va. 619, 72 S. E. 745 (1911) (dictum).} or by inducing the tenants of another to attorn to the plaintiff,\footnote{Meade v. King, 111 Va. 283, 65 S. E. 997 (1910); Harmon v. Lambert, 76 W. Va. 370, 85 S. E. 689 (1915).} these acts bar the right of the plaintiff to claim relief in equity.

At common law a plaintiff could not maintain ejectment if neither he nor the defendant was in possession of the property. If the premises were wholly unoccupied the plaintiff, as owner of the property, held constructive possession and had no legal remedy against a person who had not entered upon the property.\footnote{Harrington v. Port Huron, 86 Mich. 46, 48 N. W. 641 (1891).} A fortiori if the property were occupied by a third person the owner was not able to bring ejectment against a mere claimant to the title. Equity was the only source of relief and took jurisdiction to remove cloud from title.\footnote{Matthews v. Marks, 44 Ark. 436 (1884); Graham v. Florida Co., 33 Fla. 356, 14 So. 786 (1894); Gloe v. Beckman, 183 Ill. 158, 55 N. E. 656 (1894); Dodd v. Cook, 11 Gray 495 (Mass. 1858); Palmer v. Yorks, 77 Minn. 20, 79 N. W. 587 (1898); Bayes v. Nason, 54 Neb. 143, 74 N. W. 408 (1898); Low v. Staples, 2 Nev. 209 (1865); Davenport v. Stephens, 95 Wis. 456, 70 N. W. 661 (1897); Holland v. Challen, 110 U. S. 15 (1888).} In Virginia the scope of the action of ejectment was enlarged by Code of Va., 1849, ch. 135, § 5, which provided that if the premises were unoccupied any person "claiming title thereto or some interest therein" might be made defendant. This provision was adopted by Code of W. Va., 1868, ch. 90, § 5, and is still in force in both states.\footnote{Code of Va., 1904, § 2726; Code of W. Va., 1913, c. 90, § 5. See Stearns v. Harman, 80 Va. 48 (1885); Mackey v. Maxin, 63 W. Va. 14, 59 S. E. 742 (1907); Harvey v. Tyler, 2 Wall. 328 (U. S. 1864). The remedy by ejectment was further extended by Acts of W. Va., 1877, c. 110, § 5, which provided that it might be brought against a mere claimant to the title where the property was occupied by a third person. A statute similar in effect was passed in Virginia in 1895. Acts of Va., 1895-96, 514, now Code of Va., 1904, § 2726. The West Virginia statute is now found in Code of W. Va., 1913, c. 90, § 5.} The effect of these statutes is to permit an action in ejectment where neither the defendant nor plaintiff is in possession and though the defendant has never entered upon the property. It by no means follows that equity has lost its power to remove cloud from title under these circumstances. The familiar principle that equity having once taken jurisdiction never loses it (except under the specific terms of the federal statute) is applicable, and in Virginia it has been held that equity will cancel a cloud upon title in such a
BILLS TO REMOVE CLOUD FROM TITLE

In West Virginia the courts seem to have lost sight of this principle. An allegation of possession will be construed to imply actual possession, but a majority of the cases hold that, if the bill or proof shows that the plaintiff’s possession is only constructive, relief by bill to remove cloud will be refused. No cases seem to have arisen where a third party was in possession of the property but there is a dictum holding that relief will also be denied in such a case. Since equity had jurisdiction to remove cloud from title before the legal remedy became adequate these decisions seem erroneous. They can only be supported on the ground that such a jurisdiction was never exercised in Virginia prior to the enactment of the Code of 1849, and that since that time the legal remedy has been adequate. The difficulty with this theory is that the absence of a decision would not mean the absence of jurisdiction to remove cloud from title. Such jurisdiction would be inherent in the chancery courts of Virginia and therefore possessed by the courts of West Virginia. The doctrine of the Virginia courts granting relief by bill to remove cloud where neither the plaintiff nor defendant is in possession of the property is in harmony with the established rule in other jurisdictions, while the West Virginia cases are not followed elsewhere.

Special problems as to possession arise in cases involving mineral rights. When title to the surface and title to the minerals have not been separated, possession of the surface is possession of the minerals underlying it. But after separation of the minerals from the surface each is subject to a separate possession, and possession of the surface does not carry with it possession of the

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124 Sansom v. Blankenship, 53 W. Va. 411, 44 S. E. 408 (1903); Simmons Creek Coal Co. v. Doran, 142 U. S. 417 (1891).
127 See cases under note 121, supra.
coal, or the oil and gas underlying it. When, therefore, title to coal or ore has been separated from title to the surface by an absolute grant it is possible to take possession of the coal or ore, apart from possession of the surface, by mining and removing these minerals. Likewise, when coal or ore property has been leased for mining purposes the lessee may, for the purpose of removing these minerals, take a possession of the property independent of the possession of the owner of the surface. The same situations exist in the case of oil or gas. When these minerals have been separated from the surface by an absolute grant the grantee may take possession of the property for the purpose of drilling for these products, and when a lease has been executed the lessee of oil and gas property may take possession for the purpose of searching for these products and removing them if found, while the lessor remains possessed of the surface for other purposes. As regards the possession of the lessee under an oil and gas lease the question of whether oil and gas have been discovered would seem immaterial. The right of exploration exists in any event and if explorations are actually being carried on the lessee may properly be said to be in possession. Of course if the lessee has never prospected upon the property possession of the whole remains in the lessor.

In the case of mineral interests, as with other property, a person in possession is without any adequate legal remedy against an adverse claimant and therefore entitled to bring a bill to remove cloud. Thus when title to the surface has not been separated from title to the minerals a person in possession of the surface, and therefore of the minerals, can bring a bill to remove cloud from

129 Morrison v. Am. Association, 110 Va. 91, 65 S. E. 469 (1909); Wallace v. Elm Grove Coal Co., 58 W. Va. 449 (1906); but see Virginia Ir. Co. v. Kelley, 93 Va. 332 (1897), where after separation of the minerals from the surface a plaintiff in possession of the surface, but claiming both surface and minerals, was allowed to maintain a bill to remove cloud from the minerals.


134 Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220 (1897).
either the surface or the minerals. So, also, a person in possession of the coal or ore underlying a tract of land, whether as grantee of the mineral interests or as lessee, is without legal remedy and can secure relief against an adverse claim only by a bill to remove cloud. And a grantee of oil and gas or a lessee of oil and gas property, if in possession, is without legal remedy and therefore allowed to bring a bill to remove cloud. Difficulties arise only in those cases in which a plaintiff not in possession seeks to bring a bill to remove cloud. Here a flat rule that only persons in possession of property can bring a bill to remove cloud would work the greatest injustice. The owner of coal or ore strata or the lessee of coal or ore property which has been occupied by an adverse claimant has a legal remedy by ejectment and no need of a bill to remove cloud. Likewise, when not in possession, a grantee of oil and gas or any other person whose interest is construed to be actual ownership of these minerals has a right to bring ejectment and no need of the equitable remedy. The legal rights of a lessee of oil and gas property are much less clear. It has been held in West Virginia that such a lessee may bring an action of unlawful detainer to obtain possession of property, but since this action is inconclusive as to title and does not bar future actions, it is not an adequate protection of the lessee’s rights. A few Pennsylvania cases have permitted the lessee of oil and gas property to bring ejectment, but these have been cases where the lease was construed to be in substance a conveyance of the oil and gas, and other decisions of the same court have held

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that when an oil and gas lease passes no title to these products the lessee cannot bring ejectment. The right of a lessee of oil and gas property to bring ejectment seems never to have been directly passed upon by the courts of Virginia or West Virginia, but it has been held that such a lessee may bring a bill to remove cloud from his interest though not in possession of the property. If ejectment is not maintainable by such a lessee this is obviously a necessary ruling if the lessee is not to be deprived of all means for protecting his rights. There is an even more striking need for an equitable remedy for the protection of the interest of a lessor of mineral property. Even when out of possession a lessor of coal or ore property or of oil and gas interests has no right to bring ejectment. Yet an adverse claim may obviously injure the market value of the lessor's rights and for this reason he is permitted to bring a bill to remove cloud.

Remaindermen, owners of purely equitable interests, persons holding property as security, and vendors bound by a warranty of title are not ordinarily in possession of the property in which they have an interest. Yet none of these parties can bring ejectment. The legal rights of a remainderman extend only to the protection of the inheritance from injury, and in the absence of such injury he has no legal rights against a claimant to the property even though the latter has entered the premises. Even when the inheritance is injured his action is trespass on the case and of no effect in establishing title. So, also, the owner of a merely equitable title cannot ordinarily bring ejectment. An exception to this rule exists in the case of the cestui que trust of a dry trust who is allowed an action of ejectment, but only as a short cut to secure an equitable right. The existence of the legal remedy does not cut off or limit the cestui's right to equitable relief.
cases the owner of a purely equitable interest has no legal remedy whatever against an adverse claimant to the property. His only relief is in equity, and if denied a remedy there on the ground that he is not in possession of the property he would in many instances be wholly unable to protect his property rights. Persons holding property merely as security are similarly without means of protecting the title by legal action. In case it becomes necessary to sell property under the terms of a mortgage or deed of trust equity alone can clear the title so as to enable the person making the sale to secure a fair price for the property. The warrantor of title, likewise, has no right to possession of the property and no legal remedy by which he can protect it. To deprive these persons of the right to bring a bill to remove cloud from title because they have no possession of the property would be the grossest injustice. It would also be contrary to the rule that equity will grant a bill to remove cloud upon title in any case in which there is no adequate legal remedy. The cases very properly hold, therefore, that a bill to remove cloud can be maintained by a reversioner; by the owner of a purely equitable interest, by a person holding property as security, or a vendor bound by a warranty, without proof of possession in the plaintiff. The holder of an easement would seem to be in the same situation. An easement is a purely incorporeal right, not subject to possession, and which will not sustain an action of ejectment. The owner of an easement should therefore be permitted to bring a bill to remove a cloud upon his interest, and such relief has been granted in at least one instance.

In West Virginia an anomalous doctrine has arisen as to tax deeds. An invalid tax deed issued by the State obviously creates a cloud upon title which equity has jurisdiction to remove provided only there is no adequate legal remedy available. When the

152 Alexander v. Davis, 42 W. Va. 465, 26 S. E. 291 (1898); Depue v. Miller, 65 W. Va. 120, 64 S. E. 740 (1909).
153 Acts of Va., 1912, 76; see Buchanan Co. v. Smith, 115 Va. 704, 80 S. E. 794 (1914); Kinsports v. Rawson, 36 W. Va. 237 (1892); Depue v. Miller, 65 W. Va. 120, 64 S. E. 740 (1909); Dudley v. Browning, 90 S. E. 878 (W. Va. 1916).
156 Town of Weston v. Ralston, 48 W. Va. 170, 194, 36 S. E. 448 (1899).
plaintiff seeking to attack a tax deed is himself in possession of the property he cannot bring ejectment and his right to a bill to remove cloud is unquestioned.\textsuperscript{157} If, however, the property has been occupied by the grantee under the tax deed he can be ousted by legal process and it would seem that there is no ground for giving equitable relief. In Virginia, therefore, a bill to remove cloud from title cannot be sustained in such a case,\textsuperscript{158} but in West Virginia the cases have uniformly held that a tax deed may be removed as a cloud upon title even though the claimant under the tax deed is in possession and there is an adequate remedy at law,\textsuperscript{159} and these decisions have been held binding in the federal courts.\textsuperscript{160} Some of the more recent decisions admit that these cases cannot be sustained on principle as bills to remove cloud,\textsuperscript{151} and one suggests that the rule originated early in the history of the state when there were large areas of wild and uninhabited land upon which clouds could easily be created and which justified the courts in giving a special protection to the owner of the legal title.\textsuperscript{162} Although these cases as to tax deeds cannot be supported when viewed as bills to remove cloud, some of them can be sustained upon other grounds. Code of W. Va., ch. 31, § 27, which has been in force since 1866,\textsuperscript{163} provides that if real estate has been sold for taxes and the owner, or his heirs or assigns, claim that the taxes on account of which the sale was made were not in arrears, they may, within five years, bring a proceeding in equity to have the tax deed set aside. This equitable relief is not conditioned upon the inadequacy of the legal remedy and the statute therefore justifies the result reached in several of the West Virginia cases, though it seems to have been specifically relied upon in only one.\textsuperscript{164}

\textsuperscript{158} Carroll v. Brown, 29 Grat. 791 (Va. 1877) (dictum); Glenn v. West, 103 Va. 521, 52 S. E. 791 (1906). In Hale v. Fenn, 25 Grat. 261 (Va. 1874), there was nothing to show that the plaintiff was in possession but it is stated in Carroll v. Brown, supra, that such was the case.
\textsuperscript{159} Orr v. Wiley, 19 W. Va. 160 (1881) (nothing to show who was in possession); Simpson v. Edmiston, 23 W. Va. 675 (1884); Clayton v. Barr, 34 W. Va. 290, 12 S. E. 704 (1890) (dictum); Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 790 (1906) (dictum); but see Lawson v. Coal Land Co., 73 W. Va. 296, 81 S. E. 583 (1913).
\textsuperscript{160} Harding v. Guice, 80 Fed. 162 (1897); Sayers v. Burkhardt, 85 Fed. 246 (1898); Rich v. Braxton, 158 U. S. 375 (1895).
\textsuperscript{161} Judge Brannon in Whitehouse v. Jones, 60 W. Va. 680, 687, 55 S. E. 790 (1908).
\textsuperscript{162} Harding v. Guice, 80 Fed. 162 (1897).
\textsuperscript{163} Acts of W. Va., 1866, c. 90, § 27.
\textsuperscript{164} Jones v. Dils, 18 W. Va. 759 (1881).
Two of these tax-deed cases, decided in the federal courts, may be justified on the theory that they permit a plaintiff to maintain a bill to remove cloud when neither the plaintiff nor defendant is in possession of the property, but though this theory is supported by the weight of authority elsewhere it is at variance with the general rule in West Virginia. The remaining cases involving tax deeds cannot be supported on principle. They must be regarded as setting forth an anomolous doctrine applicable only to this special form of instrument.

[TO BE CONTINUED]

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165 See note 126, supra.