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

By David C. Howard†

IV

NOT every adverse claim to property constitutes a cloud upon the title of the true owner. A claim which does not cast a doubt upon title does not injure the *jus disponendi* and is not, therefore, a cloud. For this reason instruments which cannot be identified as affecting the plaintiff's property,1 or which are so obviously invalid that they do not injure its market value2 cannot be removed as clouds. A merely pretended claim is not a cloud since it does not deter prospective purchasers.3 When there is no existing claim which constitutes a cloud but a plaintiff files his bill *quia timet* to prevent a defendant from perfecting a claim which it is alleged will constitute a cloud the bill must show that the threatened acts will actually injure the marketability of the plaintiff's title.4 Bills *quia timet* are addressed to the sound discretion of the court and unless injury to the plaintiff's property is reasonably to be feared no relief will be granted.5

On principle the question of whether a claim constitutes a cloud upon title would seem to be capable of determination by rather simple tests. Every outstanding claim is a business risk and is so considered by careful purchasers of property. If, however, the claim is purely fanciful this risk is so slight that it will not deter a reasonable buyer. Wholly invalid claims may, on the other hand, constitute clouds upon title. Intelligent laymen know that able lawyers and learned courts may differ in the application of the law to a particular case and are unwilling to purchase property

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which may involve them in expensive litigation even though ably advised that a favorable judgment is probable. If the outstanding claim lowers the value of property in the eyes of the average reasonable purchaser the markability is affected and the claim constitutes a cloud upon the title.\(^6\) When an adverse claim causes such an injury to the *jus disponendi* it would seem immaterial what its form is or by what sort of evidence it must be proved. Yet the form of the instrument and the method of proving the adverse claim become all important under the rules followed in a majority of jurisdictions. Some courts almost habitually ignore the injury to the plaintiff’s title caused by the existence of the defendant’s claim and treat all cases as if equity had no jurisdiction other than for cancellation,\(^7\) and in a majority of states the narrow rules which historically governed bills for cancellation have been applied to and have limited the usefulness of bills to remove cloud.

The rule most often applied as a limitation upon bills to remove cloud is that relief will not be granted if the instrument attacked as a cloud upon title is void upon its face. This requirement is obviously borrowed from bills for cancellation as to which it is proper to refuse relief against instruments void upon their face since there is no danger that the defendant will be prejudiced by the loss of his legal defense. An instrument void upon its face may, however, lower the value of property in the eyes of reasonable purchasers and thus injure the plaintiff’s title.\(^8\) The circumstance that the instrument is in fact void in no way mitigates this loss and, in the words of Professor Pomeroy, the rule refusing relief \(^9\) “leads to the strange scene, almost daily . . . , of defendants urging that the instruments under which they claim *are void*, and therefore that they ought to be permitted to stand unmolested, and of judges deciding that the court cannot interfere, *because the deed or other instrument is void*, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff’s title, greatly depreciating its market value, and the judge himself who repeats the rule would neither

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\(^6\) Virginia Coal Co. v. Kelley, 93 Va. 332, 24 S. E. 1020 (1899); De Camp v. Carnahan, 26 W. Va. 539 (1882); Whitehouse v. Jones, 60 W. Va. 680, 685, 55 S. E. 730 (1906).

\(^7\) See, for instance, the following cases: Leggie v. Chandler, 95 Me. 220, 49 Atl. 1059 (1901); Scott v. Onderdonk, 14 N. Y. 9 (1856); Washburn v. Burnham, 63 N. Y. 132 (1875).

\(^8\) Virginia Coal Co. v. Kelley, 93 Va. 332, 24 S. E. 1020 (1899); Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730 (1906).
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buy the property while thus affected nor loan a dollar upon its security.”  

Nevertheless this rule represents the law of a majority of American states.  

Many jurisdictions have gone further and have held that an instrument apparently valid on its face may not be removed as a cloud if its invalidity must necessarily appear in any attempt to enforce it, or if the defendant has no prima facie case after the plaintiff has shown his record.  

Similarly it is held that a claim originating in a person who is a stranger to the true title is not a cloud.  

In New York it has even been held that an instrument apparently valid may not be removed as a cloud upon title if it is not complete upon its face and the evidence to support it is not documentary but oral.  

These additional qualifications upon the jurisdiction seem difficult to defend even on the principles governing cancellation and can only be explained as having originated in the early historical limitations which have always fettered that form of equitable relief.

The rigor of the artificial rule by which courts refuse to remove as a cloud upon title any instrument void upon its face is somewhat lessened by equally artificial exceptions which have grown up in the jurisdictions where the rule is established law.  

Thus, it is held that even an instrument void upon its fact is a cloud

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10. Posey v. Conoway, 10 Ala. 511 (1846); Chaplin v. Holmes, 37 Ark. 643 (1881); Pear lee v. Cohen, 44 Cal. 29 (1872); Mayes v. Daddie, 2 App. D. C. 20 (1895); Miles v. Strong, 62 Conn. 65, 25 Atl. 459 (1882); Rays v. Middleton, 36 Fla. 99, 17 So. 327 (1895); Briggs v. Johnson, 71 Me. 235 (1880); Van Doren v. New York, 9 Paige 368 (N. Y. 1842); Scott v. Onander, 14 N. Y. 9 (1856); Busbee v. Macy, 85 N. C. 220 (1881); Kirk v. Duren, 45 S. C. 597, 23 S. E. 554 (1885); Brown v. Cohn, 88 Ws. 527, 60 N. W. 228 (1894); Pierpont v. Elliott, 6 Pet. 95 (U. S. 1832). In Missouri an instrument is a cloud upon title although the invalidity of the adverse claim is apparent on its face if it can be discovered only by legal acumen.  

13. Lytle v. Sandefur, 93 Ala. 591, 9 So. 280 (1897); Welton v. Stickleby, 1 App. D. C. 363 (1893); Benner v. Kendall, 21 Fla. 53 (1885); Mustian v. Jones, 30 Ga. 861 (1871); Douglas v. Nourzon, 16 Kan. 615 (1876); Nickerson v. Loud, 115 Mass. 94 (1874); Drake v. Jones, 27 Mo. 428 (1858); Ward v. Dewey, 16 N. Y. 519 (1858); Comish v. Fees, 74 Wis. 490, 43 N. W. 507 (1889).
upon title if made *prima facie* evidence by statute.\(^15\) So, also, an instrument executed under apparent legal authority may be removed as a cloud though void upon its face,\(^16\) and an instrument void upon a complete survey of title records may be removed as a cloud if by its use the defendant can make out a *prima facie* case which would require evidence on the part of the plaintiff to rebut.\(^17\) The result of the last-named exception is to create a sharp conflict in the authorities as to whether there is jurisdiction to remove cloud from title when, on the face of the record, the instrument casting the cloud does not convey title as against the plaintiff. In some jurisdictions the courts, applying broadly the rule that an instrument void upon its face cannot be removed as a cloud, hold that there can be relief only where the grantor in the deed creating the cloud had of record the interest which he purported to convey.\(^18\) Other jurisdictions hold that jurisdiction exists to remove cloud if the grantor formerly had an interest, thus enabling the claimant to make out a *prima facie* case without exhibiting the flaw in his title.\(^19\)

Only a few jurisdictions are today administering relief for the removal of cloud from title unhampered by the artificial restrictions above discussed. In some states equity has by statute been given power to remove as clouds upon title instruments which are void upon their face,\(^20\) and those which will appear invalid if any

\(^{15}\) Lick v. Ray, 42 Cal. 83 (1872); Sloan v. Sloan, 25 Fla. 53, 5 So. 603 (1889); Palmer v. Rich, 12 Mich. 414 (1883); Minnesota Co. v. Palmer, 20 Minn. 468 (1874); Perdins v. Buer, 95 Mo. App. 70, 68 S. W. 939 (1902); Scott v. Onderdonk, 14 N. Y. 9 (1858); Ketchin v. McFarley, 26 S. C. 1 (1886); Dean v. Madison, 9 Wis. 402 (1859); Rich v. Braxton, 158 U. S. 375 (1875).

\(^{16}\) Glos v. Furman, 164 Ill. 585, 45 N. E. 1019 (1897); Bishop v. Norman, 98 Ind. 1 (1884); Key City Co. v. Munsell, 19 Iowa 305 (1885); Shaw v. Ledyard, 12 Grant Ch. 382 (Up. Can. 1886); Linnell v. Battery, 17 R. I. 241, 21 Atl. 608 (1889) (*dictum*).

\(^{17}\) Pixley v. Huggins, 15 Cal. 127 (1880); Alden v. Trubee, 44 Conn. 455 (1876); Budd v. Long, 13 Fla. 288 (1871); Dart v. Orme, 41 Ga. 376 (1870); Key City v. Munsell, 19 Iowa 305 (1885); Gary v. Simpson, 60 Me. 136 (1872); O'Hare v. Downing, 130 Mass. 16 (1880); Linnell v. Battery, 17 R. I. 241, 21 Atl. 608 (1889).


\(^{19}\) Pixley v. Huggins, 15 Cal. 127 (1880); Budd v. Long, 13 Fla. 288 (1871); Key City Co. v. Munsell, 19 Iowa 305 (1885); Gary v. Simpson, 60 Me. 136 (1872); O'Hare v. Downing, 130 Mass. 16 (1880); Linnell v. Battery, 17 R. I. 241, 21 Atl. 608 (1889).

\(^{20}\) Kittle v. Belgrade, 86 Cal. 556, 25 Pac. 55 (1890); Simms v. Carleton, 44 Fla. 719, 33 So. 40 (1898); Campbell v. Disnay, 93 Ky. 41, 18 S. W. 1027 (1892); Rumbo v. Manufacturing Co., 129 N. C. 9, 58 S. E. 581 (1901); Morris v. Clackamas, 40 Ore. 536, 67 Pac. 662 (1901); Broderick v. Carey, 98 Wis. 419, 74 N. W. 95 (1898).
attempt is made to enforce them.\textsuperscript{21} A few states have passed statutes giving equity broad powers to remove cloud from title thus eliminating the narrow restrictions imposed by early decisions.\textsuperscript{22} Apart from statute only a few jurisdictions have developed bills for the removal of cloud from title as a logical and independent ground of equity jurisdiction, unhampered by the limitations applicable to bills for cancellation. Prominent among these are Indiana, Virginia and West Virginia. In these states any instrument may be removed as a cloud upon title if it injures the marketability of the property in the eyes of a reasonable purchaser.\textsuperscript{23} If it can be shown that the marketability is affected by reason of the defendant’s claim relief will be given even though the instrument itself is void upon its face,\textsuperscript{24} or will necessarily be shown to be invalid if any attempt is made to enforce it.\textsuperscript{25} Instruments executed by persons not in the plaintiff’s chain of title,\textsuperscript{26} or which can only be connected with the plaintiff’s property by the introduction of parol evidence may\textsuperscript{27} likewise be removed as clouds upon title if they injure the marketability of the property.

Once it is established that any claim injuring the \textit{jus disponendi} will be treated as a cloud upon title the form of the instrument becomes immaterial. Patents issued by the state, grants by commissioners of delinquent and forfeited lands\textsuperscript{28} or by

\begin{itemize}
\item \textsuperscript{21} Rumbo v. Manufacturing Co., 129 N. C. 9, 39 S. E. 581 (1901).
\item \textsuperscript{22} See collection of authorities as to effect of such statutes in 4 \textit{Pomeroy, Eq. Juris.,} 3 ed., \textsection 1396 et seq.; note, 12 L. R. A. (N. S.) 67-81.
\item \textsuperscript{24} Virginia Coal Co. v. Kelley, 93 Va. 332, 24 S. E. 1020 (1896); De Camp v. Carnahan, 26 W. Va. 839 (1882); Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730 (1906).
\item \textsuperscript{25} Otey v. Stuart, 91 Va. 714, 22 S. E. 513 (1893); Austin v. Brown, 37 W. Va. 634, 17 S. E. 207 (1892); Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220 (1897); Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603 (1902).
\item \textsuperscript{26} McNemara Synd. v. Boyd, 112 Va. 145, 70 S. E. 694 (1911); Big Huff Coal Co. v. Thomas, 76 W. Va. 161, 85 S. E. 171 (1916).
\item \textsuperscript{27} Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713 (1887); Virginia Iron Co. v. Roberts, 103 Va. 661, 49 S. E. 184 (1905).
\item \textsuperscript{28} Smith v. O'Keefe, 43 W. Va. 172, 27 S. E. 353 (1897) (\textit{dictum}).
\end{itemize}
commissioners of school lands, tax deeds, deeds executed by private individuals and contracts to convey property in fee all purport to give paramount titles and may constitute clouds removable in equity. Options give no present title in property but if unexpired may by the exercise of the option become binding contracts to convey; before acceptance they give a right in rem in the property and may therefore constitute a cloud upon the title. Conveyances of mineral interests in property and coal, oil, gas or other leases convey lesser interests than title in fee yet reduce the value of the whole and are removable as clouds. Mortgages and deeds of trust, judgments, mechanics’ liens, statutory tax liens, or any other form of incumbrance injure the marketability of property as do judicial proceedings having as an object

40 Sheds v. Frosser, 16 N. D. 180, 112 N. W. 72 (1907).
41 Powell v. Parkersburg, 28 W. Va. 698 (1894); Tygart’s Valley Bank v. Philippi, 28 W. Va. 218, 18 S. E. 489 (1900).
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the obtaining of a decree against property; any of these may, therefore, be removed as clouds upon title.

Two forms of instrument have given rise to some division among the authorities. A claim under an instrument such as those referred to in the preceding paragraph attacks the owner's right to present enjoyment of the property and in this respect can be distinguished from claims to an estate in remainder only. On this ground it was held in Virginia that the claim of a defendant to the ownership of a reversionary interest in slaves, subject to a life estate in the plaintiff, was not such a cloud as could be removed in equity. This view seems to ignore the obvious possibility that the owner of the true title may desire to sell his interest in the property in which case the existence of an adverse claim to the remainder would lower the price obtainable almost as much as a claim to an interest in fee. Accordingly it has been held elsewhere that a bill to remove cloud may be brought even though the defendant claims only an estate in remainder. There is also a difference of opinion as to whether a notice stating that a named person claims title to described property constitutes a cloud. It has been held that since such an instrument is not legally recordable it does not create a cloud upon title. The difficulty with this reasoning is that it is the claim back of the instrument, not the instrument itself which constitutes the cloud. Since the instrument is recorded without legal authority persons not examining the record would have no constructive notice of the claim, but anyone finding the instrument upon the record would have actual notice sufficient to put him upon inquiry. If investigation would disclose a claim of doubtful but possible validity it would surely be a cloud upon the title. For this reason it has been held in at least two jurisdictions that such an instrument may be cancelled as a cloud upon title.

43 Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603 (1897).
44 Randolph v. Randolph, 2 Leigh 540 (Va. 1831); see also Bush v. Martins, 7 Leigh 321 (Va. 1886).
45 Dickerson v. Dickerson, 211 Mo. 483, 110 S. W. 700 (1908); Roberts v. White, 32 R. I. 522, 40 Atl. 123 (1911).
48 Walter v. Hartig, 106 Ind. 123, 6 N. E. 5 (1880); Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894).
49 Sankey v. Hunger, 42 Ind. 44 (1873); Ontario Co. v. Lindsay, 3 Ont. 66 (1892).
The origin of jurisdiction to remove cloud from title by the
cancellation of instruments has given rise to a phraseology and
policy applicable only to the removal of clouds created by written
instruments. This natural tendency has been strengthened by the
fact that courts have seldom been called upon to remove as a
cloud upon title any other sort of claim. The legal remedy of
ejection is usually available against a person claiming a right
by adverse possession. Only when a person claiming title by
prior adverse possession brings no action at law to enforce his
rights is there an outstanding claim adverse to the paper title
which cannot be reached at law. When, however, such a claim
exists it is difficult to see wherein it does not constitute a true
cloud upon title, and in at least one state the courts have taken
jurisdiction to remove such claims without inquiry into their
nature. A majority of courts are, however, bound by the old
phraseology and practice, which limit relief to cases where the
cloud is created by a written instrument. There are dicta in
West Virginia in favor of and against such relief but in Vir-
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In addition to the independent jurisdiction of equity to remove
cloud from title, a cloud may be removed as an incident to the
granting of other equitable relief. To prevent a multiplicity of
suits a court of chancery, having jurisdiction of the subject-
matter and of the parties on another ground, may remove a
cloud upon title in the same proceeding. Thus equity, having
taken jurisdiction to partition property, to enjoin a trespass,
set aside a fraudulent conveyance, to relieve against mis-

\[49\] Wilson v. Wilson, 124 Ind. 472, 24 N. E. 974 (1889); Brown v. Cox, 158 Ind.
364, 63 N. E. 568 (1902).
\[50\] Bush v. Western, Prec. Ch. 530 (Eng. 1762); Adler v. Sullivan, 115 Ala. 582,
22 So. 87 (1896); Wells v. Rhodes, 59 Conn. 493, 22 Atl. 286 (1892); Wafens v.
Lewis, 106 Ga. 758, 32 S. E. 854 (1899); Parker v. Shannon, 121 Ill. 452, 13 N.
E. 155 (1887).
\[51\] Custer v. Hall, 71 W. Va. 119, 76 S. E. 183 (1912).
\[52\] Hitchcox v. Morrison, 47 W. Va. 206, 34 S. E. 993 (1893).
\[54\] Morrison v. American Ass'n., 110 Va. 91, 65 S. E. 469 (1909); Custer v. Hall,
71 W. Va. 119, 76 S. E. 183 (1912).
\[55\] De Camp v. Carnahan, 26 W. Va. 859 (1885) (explained on this ground in
Clayton v. Barr, 29 W. Va. 256 (1897)); Davis v. Settle, 45 W. Va. 17, 26 S. E.
557 (1897).
take, or to compel a conveyance by an actual or a constructive trustee will cancel the claim of the defendant as a cloud upon the title of the property in litigation and thus settle the whole controversy in one proceeding.

When equity has jurisdiction on grounds independent of the removal of cloud from title, the plaintiff no longer has the burden of establishing jurisdictional grounds for this form of relief. It is, therefore, unnecessary for the plaintiff to prove that he is in possession of the property or is for some other reason unable to bring an action at law. Even though the plaintiff’s legal remedies may be adequate the balance of convenience may justify the removal of cloud from title in order to avoid a multiplicity of suits. The fact that equity has jurisdiction on grounds other than for the removal of cloud does not, however, relieve the plaintiff from the burden of proving that he has a substantial interest in the property and that the defendant’s claim is a real cloud upon his title. In determining what constitutes a substantial interest in property the courts have, as a matter of authority, been more liberal than in bills for the removal of cloud as an independent ground of jurisdiction and have applied the logical rule that any person having a substantial proprietary or pecuniary interest in the property is entitled to maintain a bill for relief.

VI

It is everywhere recognized that the granting of relief in equity is a matter resting in the sound judicial discretion of the court. According to one theory this discretion is not exercised upon the facts of the particular case but is rather a discretion directed to the judgment of courts of equity as a whole, a discretion regulated

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58 Jefferson v. Gregory, 113 Va. 61, 73 S. E. 452 (1912).
61 Jefferson v. Gregory, 113 Va. 61, 73 S. E. 452 (1908); Davis v. Settle, 43 W. Va. 17, 26 S. E. 569 (1897); Blake v. O’Neal, 63 W. Va. 483, 63 S. E. 410 (1908); Big Huff Coal Co. v. Thomas, 76 W. Va. 161, 85 S. E. 171 (1915); Sayers v. Buckhart, 85 Fed. 246 (1898).
64 Smith v. O’Keefe, 43 W. Va. 172, 27 S. E. 353 (1898).
by rules analogous to those of the common law but somewhat more elastic in application. A second theory holds that the granting of relief in equity is a matter of sound discretion in the individual case, guided by previous decisions in analogous cases but addressed to the question whether the balance of convenience favors granting or refusing relief upon the particular facts before the court. This second view accords with the long-established practice of English courts of chancery, and has been adopted and followed by the courts of Virginia, West Virginia, and several other states.

In no form of equitable relief is the court more often called upon to exercise this judicial discretion than in bills for the removal of cloud from title. Whether or not a cloud shall be removed as an incident to jurisdiction on some other ground is always a matter to be determined by the balance of convenience in the particular case. Bills quia timet are also addressed to the sound discretion of the court, and relief to prevent a threatened cloud will be given only if the court believes that injury to the plaintiff’s property is reasonably to be feared. Moreover, to show himself entitled to relief a plaintiff must always prove that his title is superior to that of the defendant and therefore a “better title.” In addition, bills for the removal of cloud require the exercise of judicial discretion to determine whether equity will try title. In this respect, bills to remove cloud and injunctions for

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69 Stated by Lord Hardwick in Joyce v. Statham, 3 Atk. 388 (Eng. 1764); Chancellor Kent in Seymour v. Delaney, 3 Johns. Ch. 22 (N. Y. 1822); Justice Field in Willard v. Taylor, 3 Wall. 577 (U. S. 1869); 2 Szony, Eq. Juris., § 742.
69 Underwood v. Hitchcox, 1 Ves. Sr. 279 (Eng. 1794).
72 Goodwin v. Collins, 3 Del. Ch. 789 (1870); Banaham v. Melaney, 200 Mass. 40, 85 N. E. 839 (1908); Williams v. Williams, 50 Wls. 311, 6 N. W. 814 (1887).
74 2 Szony, Eq. Juris., §§ 701, 702, 707.
75 Watson v. Wiggington, 28 W. Va. 538 (1886).
the protection of real estate are similar. Every decree removing a cloud from title and every permanent injunction against trespass adjudges that the defendant has no title in the property to which he lays claim or upon which he has entered. Therefore, unless there has been a prior determination of title at law it is impossible to grant either of these forms of relief without trying title. A prior determination of the question of title by a court of law may and often does precede an application for an injunction, but the essential jurisdictional ground for the removal of cloud from title is the lack of a legal remedy by which title can be established. During the early years of the existence of courts of equity, when bills for the removal of cloud from title were unknown, chancery flatly refused to try questions of legal title. It is still true that equity has no jurisdiction to try title in the absence of some recognized form of equity jurisdiction, but when such jurisdiction exists the question whether equity will try title is now a matter resting in the sound discretion of the court, to be determined by the balance of convenience in the particular case.

Perhaps the most important consideration determining the balance of convenience in the trial of title is the settled policy of courts of equity not to invade the province of the jury. This is sometimes stated broadly as a rule against the trial of legal title in a court of chancery, but by the better authority the policy is held to be directed merely against depriving the parties of any rights which might be secured to them by a trial of title before a jury. This policy originated in the traditional reluctance of

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77 Slater v. Gunn, 170 Mass. 509 (1897); Delaware Co. v. Breckenridge, 57 N. J. Eq. 154, 41 Atl. 966 (1898); Livingston v. Livingston, 6 Johns. Ch. 407 (N. Y. 1834).
78 Davis v. Leo, 6 Ves. 733 (Eng. 1802).
81 Scott v. Means, 50 Ky. 460 (1882); Carswell v. Swindel, 122 Md. 636, 96 S. E. 956 (1915); Allen v. Halliday, 22 Fed. 658 (1883); 32 C. 1235.
82 Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682 (1896); Starn v. Huffman, 62 W. Va. 912, 52 S. E. 179 (1906); Griner v. Geary, 59 S. E. 149 (W. Va. 1916);
courts of chancery to extend their jurisdiction over the field already occupied by courts of law, and in the United States has been strengthened by constitutional guarantees of the right of trial by jury. When the right of trial by jury is not infringed the policy is not applicable. Therefore, if no contest is made upon a question of title, or if the defendant does not claim his right to a jury trial in the lower court, the balance of convenience clearly favors determining the whole issue in chancery. Likewise, if the invalidity of the defendant's title is so apparent that if the issue were being tried by a jury it would be the duty of the court to direct a verdict for the plaintiff, a trial of the title by the chancery court does not deprive the defendant of any substantial right which he would have before a jury, and the balance of convenience normally favors granting full relief in equity.

When a question of title is an important issue in an injunction proceeding or bill to remove cloud there are several considerations which may affect the exercise of the court's discretion in the particular case. When the controversy as to title turns upon a question of law, or upon the construction of a deed, or some other issue of fact which under established principles would be


Derry v. Ross, 5 Col. 295 (1880); Tantlinger v. Sullivan, 80 Va. 218, 45 N. W. 765 (1890); Huff v. Olson, 101 Wis. 118, 76 N. W. 1121 (1899) (discrediting Smith v. Oconomowoc, 49 Wis. 694, 6 N. W. 229). But see Ballantine v. Harrison, 37 N. J. Eq. 581 (1882). All of the above cases involved bills for an injunction against trespass but the requirement that the defendant claim his right to a jury trial in the lower court would seem equally reasonable in the case of a bill to remove cloud. In Freer v. Davis, 52 W. Va. 1, 43 S. E. 164 (1903), the defendant against whom the jurisdiction of equity had been invoked prevailed in the lower court but the bill was, nevertheless, dismissed on the ground that equity was without jurisdiction to try an issue of fact. It is to be noted, however, that the defendant was in possession of the disputed property and the legal remedy of the plaintiff was fully adequate so that there would have been no jurisdiction to remove cloud even if the title had turned upon a question of law.


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passed upon by the court if the case were before a jury, it is obvious that no one will be prejudiced by a hearing of the whole cause in equity. It has, therefore, been held, both as to bills for permanent injunctions and for the removal of cloud from title that the balance of convenience favors a trial of such issues by the chancery court. Only when the validity of the claim sought to be removed as a cloud depends upon a matter of fact which at law would be left to the verdict of a jury does the rule of policy have direct application. It seems to be established that in such a case the chancery court will not itself try title either on a bill for a permanent injunction, or for the removal of cloud from title. The situation being one in which equity has jurisdiction and the only question being the exercise of the court’s discretion, it is submitted that it should be determined by the balance of convenience in the particular case, but the distinctions taken by the decided cases should work justice in the majority of instances.

When a court of equity has decided that an issue of fact, brought before it on a bill to remove cloud, should properly be determined by a jury there is a further appeal to the discretion of the court to determine what disposition shall be made of the case. Two courses are open: The plaintiff’s bill may be dismissed, or a trial of the issue of fact may be secured by directing an issue out of chancery to be tried by a jury in a court of law or before

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88 Criner v. Geary, 89 S. E. 149 (W. Va. 1916) (interpretation of will). Some cases of classes are regularly passed upon by courts of equity even though issues of fact are involved and as to these the existence of such an issue is no hindrance to the exercise of equitable jurisdiction even though a question of title is indirectly decided, Starn v. Harman, 82 W. Va. 612, 52 S. E. 178 (1906); Mustard v. Big Creek Development Co., 69 W. Va. 713, 72 S. E. 1021 (1911) (fraud).


90 See cases cited under notes 87, 88, supra.

91 Freer v. Davis, 52 W. Va. 1, 43 S. E. 164 (1903); Baki v. Taylor, 55 W. Va. 652, 47 S. E. 992 (1903); Lumber Co. v. Odell, 71 W. Va. 206, 76 S. E. 343 (1912); Land Co. v. Gray, 73 W. Va. 503, 80 S. E. 821 (1914); Myers v. Bland, 87 S. E. 888 (W. Va. 1916); West Virginia Pulp & Paper Co. v. Doddrill, 221 Fed. 730 (1915).


95 Miller v. Mills, 95 Va. 337, 28 S. E. 337 (1897); Alexander v. Davis, 42 W. Va. 465, 26 S. E. 291 (1898).
the chancery bar.\textsuperscript{97} In this respect the problem presented to the court on a bill to remove cloud is much more complicated than on a bill for a permanent injunction against trespass. If a court finds that the award of an injunction turns upon an issue of fact properly to be tried by a jury it can without injustice to the parties dismiss the bill and leave the plaintiff to his action of ejectment, a remedy available because of the defendant's invasion of the plaintiff's premises.\textsuperscript{98} If it is necessary to protect the plaintiff further a temporary injunction may issue until there can be a trial of the title at law.\textsuperscript{99} The rights of the plaintiff in a bill for the removal of cloud cannot be so easily protected, if the bill is dismissed. Jurisdiction to remove cloud exists only because there is no legal remedy by which the plaintiff's title can be vindicated. In one West Virginia case the defendant was preparing to bring ejectment and it was therefore probable that the issue would be immediately tried at law, for which reason the bill was properly dismissed.\textsuperscript{100} In the absence of such special circumstances it is submitted that the court should direct an issue out of chancery to be tried by a jury, either at common law or before the chancery bar. In Virginia and West Virginia the usual practice seems to be to direct that issues of fact be tried before the chancery bar.\textsuperscript{101}

A bill for the removal of cloud brought by a plaintiff having only an equitable interest in the property beclouded presents special problems for the exercise of the discretion of equity in trying title. Equitable rights are as varied in form as the legal interests to which they correspond. Some of these rights, as for instance equitable rights given as security, are substantially equivalent to the analogous legal interests and relief by a bill to remove cloud should be governed by similar principles.\textsuperscript{102}

\textsuperscript{97} Miller v. Wills, 95 Va. 337, 28 S. E. 337 (1897).
\textsuperscript{98} Freer v. Davis, 52 W. Va. 1, 43 S. E. 164 (1902); Lumber Co. v. Odell, 71 W. Va. 206, 76 S. E. 848 (1903); Land Co. v. Gray, 73 W. Va. 503, 80 S. E. 821 (1914); Myers v. Bland, 87 S. E. 868 (W. Va. 1916).
\textsuperscript{99} Freer v. Davis, 52 W. Va. 1, 43 S. E. 164 (1902); Pardee v. Lumber Co., 70 W. Va. 68, 73 S. E. 82 (1911); Walden v. Lumber Co., 70 W. Va. 470, 74 S. E. 687 (1912). Prior to Freer v. Davis, the Supreme Court of Appeals of West Virginia had refused to issue even a temporary injunction where title was in dispute and properly to be tried at law. See McMillan v. Ferrel, 7 W. Va. 223 (1874); Becker v. McGraw, 48 W. Va. 539, 37 S. E. 532 (1900); and discussion of all of these cases in The Bar, November 1915, p. 44.
\textsuperscript{100} Harman v. Lambert, 76 W. Va. 370, 85 S. E. 660 (1915).
\textsuperscript{101} Miller v. Wills, 95 Va. 337, 28 S. E. 337 (1897); Stevens v. Duckett, 107 Va. 17, 67 S. E. 601 (1900); Vanguilder v. Hoffman, 22 W. Va. 1 (1883); State v. Jackson, 56 W. Va. 558, 49 S. E. 465 (1904).
\textsuperscript{102} See discussion pp. 17, 18, supra, and cases cited.
able interests such as the right of a *cestui que trust* merely entitle the holder to the beneficial interest in property and it is the duty of the holder of the legal title to protect it from adverse claims. Should the holder of the legal title fail in this duty the *cestui que trust* can, by proceeding in equity, compel him to act.\(^{103}\) When the trustee is in a position to sue the adverse claimant at law equity will ordinarily compel him to pursue this course. However, if the holder of the legal title must himself bring a bill to remove cloud to destroy the adverse claim, a court of equity having taken jurisdiction to compel the trustee to protect the property might well remove the cloud caused by the adverse claim in the same proceeding.\(^{104}\) Similarly the owner of an equitable interest which entitles his holder to an immediate conveyance of the property can ordinarily protect his property by securing the legal title by a proceeding in equity and then bringing an action at law against the adverse claimant, but if the adverse claim must ultimately be reached by a bill to remove cloud this relief may be given as an incident to the proceeding to secure the legal title, and this whether the adverse claimant is the holder of the legal title\(^{105}\) or some third party.\(^{106}\) The above situations show that the doctrine adopted by many courts that the owner of a merely equitable interest may not bring a bill to remove cloud but must “get in” the legal title and then sue at law,\(^{107}\) is applicable to only a limited number of the cases involving equitable titles. There should be no other rule than that courts of equity will exercise their sound discretion in each case and determine whether or not an equitable interest can be protected by means other than the removal of cloud and the trial of title in chancery.

**VII**

Originally the jurisdiction of equity was solely in *personam*.\(^{108}\) Chancery could act only by bringing pressure to bear upon the person of the defendant and if the latter preferred to lanquish

\(^{103}\) Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748 (1892).

\(^{104}\) Slick *v.* Reene, 62 W. Va. 557, 59 S. E. 510 (1907); Blake *v.* O'Neal, 63 W. Va. 483, 61 S. E. 410 (1908).

\(^{105}\) Depue *v.* Miller, 65 W. Va. 120, 64 S. E. 740 (1909); Taylor *v.* Taylor, 76 W. Va. 469, 85 S. E. 652 (1916).


\(^{107}\) Glenn *v.* West, 103 Va. 521, 49 S. E. 671 (1905); Hitchcox *v.* Morrison, 47 W. Va. 206, 34 S. E. 993 (1901); Jones *v.* Crim, 66 W. Va. 301, 86 S. E. 367 (1906).

\(^{108}\) Massie *v.* Watts, 6 Cranch 158 (U. S. 1810); Hart *v.* Sanson, 110 U. S. 151 (1883); Pardee *v.* Aldridge, 189 U. S. 429 (1902).
in jail rather than obey the decree of the Chancelor there was no remedy.\footnote{J. R. v. M. P., Y. B. HEN. VI, fol. 13, pl. 3 (Eng. 1459); Platt v. Woodruff, 61 N. Y. 375 (1852).} The disadvantages of this situation as applied to bills to remove cloud from title are obvious. A court of equity, having the defendant before it, can issue a decree removing a cloud from title even though the property itself lies in another jurisdiction.\footnote{Stoneburger v. Roller, 2 Va. Dec. 437, 25 S. E. 1012 (1898).} Usually, however, the plaintiff desires to proceed in the jurisdiction in which the land is situated and this he cannot do unless the defendant whose claim constitutes the cloud is domiciled within that jurisdiction or personal service can be obtained upon him there.

Early in the last century several American states took steps to remedy this situation by enacting statutes giving equity jurisdiction \textit{in rem} as to property within the state. Among the first to adopt such legislation was Virginia, where the statute took the form of allowing the court to appoint a commissioner in chancery who might be authorized to execute any instrument which the absent defendant could execute if personally present.\footnote{Acts of Va., 1813, c. 17, §§ 2, 3.} The statute adopted in Virginia has been retained in substantially its original form by both Virginia\footnote{Code of Va., 1887, § 3418.} and West Virginia\footnote{Code of W. Va., 1916, c. 132, § 4.} and clearly gives the chancery courts of those states jurisdiction \textit{in rem} over property within their respective borders.

Wholly aside from this statute the Supreme Court of Appeals of West Virginia in Tennant's Heirs v. Fretts,\footnote{67 W. Va. 569, 68 S. E. 387 (1910).} held that equity has jurisdiction \textit{in rem} to remove a cloud upon title. This case is supported by the decisions of only one other jurisdiction, the Supreme Court of Wisconsin having held that equity has jurisdiction \textit{in rem} in all cases, even in the absence of statute\footnote{McMillan v. Barber Asphalt Paving Co., 151 Wis. 45, 138 N. W. 94 (1912).}. The result reached by the courts of West Virginia and Wisconsin is certainly most desirable, and, though without historical foundation, is consistent with the broad development of the principles of equity jurisdiction.\footnote{See Erlanger's Heirs v. Miller, 101 Wis. 372, 77 N. W. 11 (1899); Fretts v. Tennant, 118 Wis. 397, 92 N. W. 43 (1902).} \textit{Tennant's Heirs v. Fretts} extends jurisdiction \textit{in rem} to remove cloud beyond that given by the West Virginia statute only in that it permits the exercise of that jurisdiction without the interposition of a commissioner in chancery.

\footnote{Cf. Houston, THE ENFORCEMENT OF DECREES IN EQUITY, 67.}
to act in behalf of the defendant, a result reached elsewhere by statute.\textsuperscript{117}

\textbf{VIII}

There are four ways in which a court may decree the removal of a cloud from title: (a) By enjoining the defendant from asserting his claim; (b) by cancelling the instrument upon which the claim is based; (c) by requiring the defendant to convey or release his claim; (d) by declaring the defendant’s claim invalid and void. The first three forms of decree are available in a proceeding \textit{in personam}; the fourth only when equity has a broad jurisdiction \textit{in rem}. Even such statutes as those of Virginia and West Virginia permitting the court to appoint a commissioner in chancery whose acts are equivalent to those of the absent defendant probably do not justify a decree of the fourth type.\textsuperscript{118}

For this reason legislation of more recent origin has been so framed as to permit the court to wipe out clouds upon title by a decree \textit{in rem}.\textsuperscript{119} The decision in \textit{Tennant’s Heirs v. Fretts}, supra, would seem to justify the same result in the absence of statute.

Each of the three first-named forms of decree has its own peculiar disadvantages and limitations. An injunction restraining a defendant from further asserting his claim gives complete relief as against the parties to the suit but, does not have the effect of transferring the defendant’s title as against strangers.\textsuperscript{120} An injunction has the further weakness that it does not clear the records of the instruments adverse to the plaintiff. For these reasons some other form of decree is usually to be preferred where there is an existing cloud upon the title. If the bill is brought \textit{quia timet} to prevent the creation of a cloud upon title an injunction is the proper form of decree and gives complete relief.\textsuperscript{121}

When a cloud upon title consists of an instrument or instruments adverse to the plaintiff and the elimination of these instruments will leave the plaintiff with the record title, cancellation provides an effective method of removing the cloud. If, however, the outstanding claim is one based upon a possession adverse to the plaintiff there is nothing which can be reached by cancellation.

\textsuperscript{117} Cf. Huston, 16-19.

\textsuperscript{118} Cf. Huston, chs. II, IV.

\textsuperscript{119} Cf. Huston, 16-19.

\textsuperscript{120} Lockwood \textit{v.} Mead Land Co., 71 Kan. 739, 81 Pac. 496 (1905); Weed Sewing Machine Co. \textit{v.} Baker, 40 Fed. 56 (1889).

\textsuperscript{121} Ignuano \textit{v.} Jones, 65 W. Va. 59, 64 S. E. 640 (1906); Bradley \textit{v.} Swope, 87 S. E. 86 (W. Va. 1916); Chapman \textit{v.} Brewer, 114 U. S. 158 (1885).
Nor can cancellation clear the title of a plaintiff who himself acquired his interest in the property by adverse possession, for the cancellation of the paper title would leave him without any title of record.

In a majority of cases a release or a conveyance by the defendant of his interest in the property is, from the plaintiff's viewpoint, preferable to relief by injunction or cancellation. A conveyance not only establishes beyond question the superiority of the plaintiff's title but gives him the benefit of any claim or interest which the defendant may have had. When the defendant owes a duty to the plaintiff by reason of the existence of some fiduciary relationship or an express undertaking, there is no difficulty in granting such relief. In the absence of such a relationship or obligation the courts of Illinois have been unwilling to compel a defendant to convey his rights to the plaintiff or to execute a release. Other courts have found no difficulties in this situation, and, in the absence of jurisdiction in rem, the usual form of decree enjoins further assertion of title by the defendant, cancels the deeds under which the defendant claims and orders the execution of a release of his rights. An obligation on the defendant to release his claim may well arise from the fact that his assertion of a right has injured the plaintiff's title.

It is manifest that a decree in rem establishing the title of the plaintiff as against the adverse claim of the defendant avoids the difficulties inherent in these various forms of decrees in personam. Power to issue such a decree permits a court of chancery

122 Pratt v. Kendig, 128 Ill. 298, 21 N. E. 495 (1889); Casstevens v. Casstevens, 227 Ill. 547, 81 N. E. 709 (1907). See also Kennedy v. Kennedy, 43 Pa. St. 413 (1862).

123 In Briggs v. French, 2 Sumner 251, 261 (U. S. Cir. Ct. 1835), the decree entered read as follows: "It is further ordered, adjudged, and decreed by the Court that the said defendant, his heirs and assigns, be perpetually enjoined not to set up or assert any title thereto against the said plaintiff, his heirs and assigns, under said levy; and that the said defendant do execute in due form of law, within thirty days from the entering of this decree, a deed of release of all his right and title under the said levy to said plaintiff, his heirs and assigns, in such form as shall be settled by * * one of the Masters in Chancery of this Court."

124 The form of decree entered by the Supreme Court of Appeals of West Virginia is of this type. In granting relief to the plaintiff in accordance with the prayer of his bill the Court in Halsted v. Aliff, 89 S. E. 179 (W. Va. 1916), entered the following decree: "This Court, proceeding to enter such decree in this Court as the Circuit Court * * should have entered, doth adjudge, order and decree that the defendants, * * their employees, servants, agents and assigns be and they are hereby enjoined, inhibited and restrained from entering or trespassing in any
to deal with the claims of absentee defendants without useless formality and by its own acts to fix the status of a particular title as between the parties. For these reasons statutes and decisions sustaining broadly the power of equity to act in *rem* represent the best tendencies of our courts toward a useful extension of bills to remove cloud from title.

manner upon the tract of land of complainants mentioned and described in the bill in this case, and from setting up any claim of title thereto, and that the plaintiffs hereby be forever quieted in their title to, and ownership of, said land * *.

ORDER BOOK 28, p. 469.