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Henry D. Bell

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## BILLS TO REMOVE CLOUD IN TENNESSEE

The bill in equity to remove cloud from title has been recognized in all of the American states. There has been, however, no agreement among the states as to the cases which come within the scope of the bill. Every bill to remove cloud presents two essential questions: (1) does the complainant have an interest in the property which entitles him to maintain the bill, and (2) does the adverse claim constitute a "cloud" on the title which equity will remove? The purpose of this Note is to review the authorities to determine what is necessary to satisfy these two conditions in Tennessee.

### ORIGIN AND NATURE OF THE BILL

English chancery courts at an early day compelled the cancellation of instruments, in proper cases, even where there was a defense at law;<sup>1</sup> but, in the absence of grounds for cancellation, chancery would not issue an injunction to remove a cloud from title to real estate.<sup>2</sup> In *Byne v. Vivian*,<sup>3</sup> Lord Rosslyn cancelled a void annuity and a term for years which had been given as security. Although the court treated the case as one of cancellation, the attorney-general argued that equity had jurisdiction on the ground that equity alone could clear the complainant's title of the defendant's deed.<sup>4</sup> On substantially the same facts, in *Bromley v. Holland*,<sup>5</sup> Lord Eldon referred to the attorney-general's argument in *Byne v. Vivian* and held that "the colour of title the deed furnishes, as throwing a cloud over the legal title, is one of the circumstances that founds the jurisdiction." Subsequent English cases construed *Bromley v. Holland* as a case of cancellation merely,<sup>6</sup> and in England today equity does not exercise jurisdiction to remove cloud from title.<sup>7</sup>

In the United States the doctrine was more warmly received. In *Hamilton v. Cummings*,<sup>8</sup> Chancellor Kent used language which has frequently been cited<sup>9</sup> as justifying the exercise of jurisdiction to remove cloud from title. Later Chief Justice Marshall held, on the authority of *Bromley v. Holland*, that equity had jurisdiction to remove cloud from title,<sup>10</sup> and legal

1. Howard, *Bills to Remove Cloud from Title*, 25 W. VA. L.Q. 4 (1917).

2. *Ibid.*; *Welby v. Duke of Rutland*, 2 Bro. P.C. 39, 1 Eng. Rep. 778 (Ch. 1773) (demurrer sustained).

3. 5 Ves. 604, 31 Eng. Rep. 762 (Ch. 1800).

4. *Id.* at 607, 31 Eng. Rep. at 764.

5. 7 Ves. 3, 11, 32 Eng. Rep. 2, 5 (Ch. 1802).

6. *Duncan v. Worrall*, 10 Price 31, 147 Eng. Rep. 232 (Ex. 1822); *Brooking v. Maudslay*, 38 Ch. D. 636 (Eng. 1888).

7. Before 1925, England had no registry system and there was therefore less need for the relief. It is the recorded instrument which is most likely to cast doubt upon the title. RIVINGTON, *LAW OF PROPERTY IN LAND* (3d ed. 1946).

8. 1 Johns. Ch. 517 (N.Y. 1815).

9. *E.g.*, *Pettit v. Shepherd*, 5 Paige 493 (N.Y. Ch. 1835); *Scott v. Onderdonk*, 14 N.Y. 9 (1856); *Jones v. Nixon*, 102 Tenn. 95, 50 S.W. 740 (1899).

10. *Peirce v. Elliott*, 6 Pet. 95, 8 L. Ed. 332 (U.S. 1832).

writers approved of the doctrine.<sup>11</sup> The result was that the relief of removing cloud from title became an established form of relief in American courts.<sup>12</sup>

Modern legal writers regard the bill to remove cloud from title as a form of relief separate and distinct from bills *quia timet* and bills of peace.<sup>13</sup> "[T]he bill of peace protects against harassing litigation; the bill *quia timet* prevents loss of evidence; and the bill to remove cloud from title promotes marketability by eradicating claims that make the title doubtful."<sup>14</sup> Most courts, however, have not made such a clear distinction; and, as a result, the relief of removing cloud from title has been restricted in some states to cases where *quia timet* relief would be available.<sup>15</sup>

There is language in several Tennessee cases which suggests that the bill to remove cloud is governed by the *quia timet* limitations.<sup>16</sup> But language in other Tennessee cases indicates that the bill to remove cloud has a much broader scope.<sup>17</sup> This seeming conflict is resolved by a view of the cases as a whole, from which it appears that the bill to remove cloud has developed as a particular form of *quia timet* relief.<sup>18</sup> But instead of acting to restrict the scope of the bill to remove cloud, as in some states, the bill *quia timet* has acted in Tennessee to expand the relief given by the bill to remove cloud.

#### WHO MAY MAINTAIN THE BILL

*Possession.* The majority rule, in the absence of statute, is that the complainant must be in possession to maintain the bill; for, if he is out of possession, it is said that his remedy at law in ejectment would be adequate.<sup>19</sup> Tennessee, however, at an early date adopted a contrary view. In 1859 the Tennessee view was clearly enunciated in *Almony v. Hicks*:<sup>20</sup> "A bill to remove a cloud, is a head of equity by itself. It will lie, although the defendants are in possession, and complainants have the legal title, and might sue at law for the recovery of the property, that not being esteemed adequate relief." The specific holding of *Almony v. Hicks* is no longer important, for the owner of legal title with the right to possession may bring ejectment in the chancery

11. MITFORD, CHANCERY PLEADING \*128; 2 STORY, EQUITY JURISPRUDENCE § 700 (5th ed. 1849).

12. Howard, *Bills to Remove Cloud from Title*, 25 W. VA. L.Q. 4, 7 (1917).

13. McCLINTOCK, EQUITY 517 (2d ed. 1948); WALSH, EQUITY 541 (1930).

14. Note, 90 U. OF PA. L. REV. 475, 476 (1942). But see 4 POMEROY, EQUITY JURISPRUDENCE 1027 (5th ed., Symons, 1941), where the line is not so finely drawn.

15. WALSH, EQUITY 546-52 (1930).

16. Jones v. Nixon, 102 Tenn. 95, 97, 50 S.W. 740 (1899); Bank v. Ewing, 80 Tenn. 598, 601 (1883); Merriman v. Polk, 52 Tenn. 717, 719 (1871).

17. Almony v. Hicks, 40 Tenn. 38, 42 (1859); Johnson v. Cooper, 10 Tenn. 524, 530, 24 Am. Dec. 502 (1831).

18. See GIBSON, SUITS IN CHANCERY § 1042 (4th ed., Higgins & Crownover, 1937).

19. Frost v. Spitley, 121 U.S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010 (1887). The rule does not apply in the case of wild land or land under water where possession is not a factor. Pleasant Lake Co. v. Eppinger, 235 Mich. 174, 209 N.W. 152 (1926).

20. 40 Tenn. 38, 42 (1859).

court and have any cloud removed as incidental relief.<sup>21</sup> But the quoted language is significant in that it shows an early disposition of the supreme court to allow the bill for the sole purpose of removing a cloud which would affect the marketability of the title.<sup>22</sup>

In Tennessee a complainant, whether in or out of possession, who has a legal title may maintain the bill whether or not he has a present right to possession. Thus a remainder<sup>23</sup> or homestead right<sup>24</sup> may be protected.

*Title.* In *Jones v. Nixon*<sup>25</sup> the Tennessee Supreme Court recognized an "almost unanimous" general rule that the complainant must show legal title in himself. The court then listed two exceptions to the general rule: (1) where complainant's equitable title is such "as to draw from him [defendant] his legal title"<sup>26</sup> and (2) where the complainant is a vendor who has warranted title.<sup>27</sup> What is meant by the first exception is none too clear. It was stated in *Coal Creek Mining Co. v. Ross*<sup>28</sup> to be applicable in cases which are essentially ejectment bills. It would presumably apply in cases where the defendant in possession has a voidable legal title, although it has apparently never served as a basis for the relief in Tennessee. The second exception, if liberally construed, would be a severe inroad upon the general rule. This vendor-warrantor exception might reasonably be considered as a specific application of a broader exception that any person who previously owned legal title and who has a pecuniary interest in the marketability of the title may maintain the bill.<sup>29</sup> Why should not this rule be carried one step further to allow anyone to maintain the bill who can show a substantial pecuniary interest in the marketability of the title? A judgment creditor of the owner whose land is about to be sold to satisfy his judgment, for example, has a definite pecuniary interest in the marketability of the title. The same is true of a title company which has guaranteed title. There is no Tennessee authority for allowing such parties to maintain the bill, but it would seem that a strong public policy favoring marketability of land would justify the result.

The cases in which the so-called general rule that complainant must have

21. TENN. CODE ANN. § 10377 (Williams, 1934).

22. *Almony v. Hicks* also "virtually changed [the bill to remove cloud] into an action of ejectment." *Coal Creek Mining Co. v. Ross*, 80 Tenn. 1, 8 (1883).

23. *Wiley v. Bird*, 108 Tenn. 168, 66 S.W. 43 (1901); *Dodd v. Benthall*, 51 Tenn. 601 (1871); see *Burkey v. Self*, 36 Tenn. 122, 127 (1856).

24. *Collins v. Boyett*, 87 Tenn. 334, 10 S.W. 512 (1889) (wife out of possession); *Williams v. Williams*, 66 Tenn. 116 (1874) (wife in possession).

25. 102 Tenn. 95, 101, 50 S.W. 740, 741 (1899).

26. *Ibid.*, citing *Coal Creek Mining Co. v. Ross*, 80 Tenn. 1, 8 (1883) which held that complainant in that case had no such equity. Cf. *Ross v. Young*, 37 Tenn. 627 (1858) (complainant's claim to title was based on sheriff's deed, but at time of execution sale defendant had only an equity of redemption).

27. *Ibid.* This was the situation in *Jones v. Nixon*.

28. See note 26 *supra*.

29. See *New York Loan Ass'n v. Cannon*, 99 Tenn. 344, 41 S.W. 1054 (1897), in which it was held that a past owner with only a vendor's lien could have had a void mortgage removed as a cloud, had he done equity himself by paying off the debt which the void mortgage was given to secure.

legal title has been invoked to deny relief to the complainant were cases in which the complainant was out of possession and claiming legal title and right to possession in himself.<sup>30</sup> In such a case the complainant must prove a title which would support an ejectment action at law.<sup>31</sup> The purpose of the rule of *Almony v. Hicks*, allowing a bill to remove cloud where ejectment would also lie, was to prevent a multiplicity of suits, not to lessen the burden of proof upon the claimant out of possession.<sup>32</sup>

#### WHAT CONSTITUTES A CLOUD

Any instrument which appears valid on its face and which, if valid, would encumber the title is a "cloud."<sup>33</sup> Such an instrument might cause injury to the title-owner or warrantor because of loss of evidence proving its invalidity, and it is therefore subject to cancellation on the *quia timet* principle. On the same principle execution of such an instrument may be enjoined.<sup>34</sup>

A majority of the states have ruled that an instrument which is void on its face is not a "cloud" because (1) it can never be the basis of a successful legal action, as no affirmative proof would be necessary to defeat it, and (2) it does not create any doubt as to the complainant's title.<sup>35</sup> Modern legal writers have deplored this rule as unrealistic on the grounds that (1) the instrument may be lost or destroyed and later be proved valid in a legal action; and (2) purchasers are wary of taking title where even a void-on-its-face adverse claim appears on the records.<sup>36</sup> The Tennessee Supreme Court, without giving detailed reasons, has repeatedly declared that it would uphold the cancellation of an instrument void on its face as a "cloud."<sup>37</sup> Here again the court has shown a disposition to look upon marketability of title as a basis of jurisdiction to remove cloud.<sup>38</sup> It would seem that in the case of an in-

30. *Marley v. Foster*, 102 Tenn. 241, 52 S.W. 166 (1899); *Hoyal v. Bryson*, 53 Tenn. 139 (1871); *Ross v. Young*, 37 Tenn. 627 (1858).

31. *Nason v. South Memphis Land Co.*, 138 Tenn. 21, 195 S.W. 761 (1917); *Coal Creek Mining Co. v. Ross*, 80 Tenn. 1 (1883).

32. See also *Stearns Coal Co. v. Patton*, 134 Tenn. 556, 184 S.W. 855 (1916) for a further distinction: defenses of statute of limitations and laches are applicable in actions to remove cloud only where the complainant is out of possession.

33. *Rea v. Longstreet*, 54 Ala. 291 (1875); *Pixley v. Huggins*, 15 Cal. 128 (1860); *Johnson v. Cooper*, 10 Tenn. 524, 24 Am. Dec. 502 (1831).

34. *Jones v. Nixon*, 102 Tenn. 95, 50 S.W. 740 (1899); *Merriman v. Polk*, 52 Tenn. 717 (1871).

35. *E.g.*, *Peirsoll v. Elliott*, 6 Pet. 95, 8 L. Ed 332 (U.S. 1832); *Posey v. Conaway*, 10 Ala. 811 (1846); *Cohen v. Sharp*, 44 Cal. 29 (1872); *Reyes v. Middleton*, 36 Fla. 99, 17 So. 937, 29 L.R.A. 66, 51 Am. St. Rep. 17 (1895).

36. 4 POMEROY, *EQUITY JURISPRUDENCE* § 1399 (5th ed., Symons, 1941); WALSH, *EQUITY* 549 (1930); Howard, *Bills to Remove Cloud from Title*, 25 W. VA. L.Q. 4, 8 (1917).

37. See *Jones v. Nixon*, 102 Tenn. 95, 50 S.W. 740 (1899); *Anderson v. Talbot*, 48 Tenn. 407, 410 (1870); *Porter v. Jones*, 46 Tenn. 314, 318 (1869); *Almony v. Hicks*, 40 Tenn. 38, 42 (1859); *Jones v. Perry*, 18 Tenn. 59, 83 (1836); *Johnson v. Cooper*, 10 Tenn. 524, 530, 24 Am. Dec. 502, 508 (1831).

38. A combination of bases is suggested in *Stearns Coal Co. v. Patton*, 134 Tenn.

strument void on its face, the chancellor should order it to be cancelled, if he determines that the instrument actually makes title doubtful or hampers its marketability.<sup>39</sup> A sheriff's deed, for example, even though void on its face, would make the ordinary purchaser chary. A purported deed, on the other hand, by a person not in the chain of title would not appear on the record and, in the absence of peculiar circumstances, would not hamper the marketability of the title.

#### CONCLUSION

In the early days of the common law possession of real property was by far the most important incident of ownership. To protect possession the legal action of ejectment was developed, and *quia timet* relief was given in equity to prevent future disturbance of possession. In more recent times the *jus disponendi*, the right to sell a marketable title, has become increasingly important, so that today it requires full protection. The common law of many American states did not develop adequate protection for the *jus disponendi* and statutes became necessary. The Tennessee courts have met the need by the development of the bill to remove cloud as an extension of the *quia timet* principle.<sup>40</sup> A review of the Tennessee cases indicates that any alleged "cloud" will be removed, if the chancellor, in the exercise of sound discretion, finds as a fact that it would render the title doubtful to prospective purchasers. There is more doubt as to what interest the complainant must show to maintain the bill; but it is clear that possession is immaterial and legal title is not always necessary. The general tenor of the decisions would seem to warrant the conclusion that a showing of a substantial pecuniary interest in the marketability of the land would be sufficient.

HENRY D. BELL

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556, 570, 184 S.W. 855, 859 (1916): "This is an action to remove a cloud on title which affects the marketability of the land, or under which an adverse possession might be attempted and thus endanger the rights of complainant."

39. "[W]hile I assert the authority of the Court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the Court is not pretty strongly displayed. . . . the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate." Chancellor Kent in *Hamilton v. Cummings*, 1 Johns. Ch. 517, 523 (N.Y. 1815).

40. The bill is aided by a statute which dispenses with personal service of process upon nonresidents and unknown parties. TENN. CODE ANN. § 10431 (Williams, 1934).