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Equity -- 1960 Tennessee Survey

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EQUITY—1960 TENNESSEE SURVEY

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While no decisions involving momentous developments in equity jurisprudence have been handed down during the past year, the Tennessee Chancery Courts have on several occasions demonstrated a tendency to free themselves from artificial restrictions on the operation of traditional equitable remedies. Illustrating this inclination are cases which resulted in decrees removing a cloud on title, granting partial specific performance of a land sale contract, awarding punitive damages, and granting injunctive relief against a county's perpetration of a nuisance. Another series of cases contributed some clarifying rulings regarding the scope of the right to jury trial in chancery proceedings.

I. BILL TO REMOVE CLOUD ON TITLE

Perhaps the most noteworthy case is one which is significant, not because the decision laid down any new rule of law, but because the court evidenced a healthy attitude of keeping equitable procedures and remedies flexible enough to provide relief whenever a party is in need of the aid of equity to protect his rights. This case, *Patterson v. I. T. Moss Tie Co.*,[1] arose out of a simple boundary dispute, and the bill was filed under Code sections 16-606 and -607 for the purpose of establishing the boundary line. The complaint was treated as a bill quia timet to remove a cloud on title, and the liberal nature of the Tennessee concept of such bills was thus demonstrated in the decision. The main question as to the propriety of such a bill in this situation arose from the fact that plaintiffs, though previously owners of the land in question, had, prior to the dispute regarding the boundary, conveyed it by warranty deed to a third party who took and continued to hold possession. Defendant therefore contended that the bill could

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1. 330 S.W.2d 344 (Tenn. App. W.S. 1959).

not be maintained because: (1) complainants were not the owners of legal title and were not in possession of the disputed property; (2) any fear as to complainants' liability on their covenants of warranty was purely speculative; and (3) no cloud existed on the title to the land because defendant had not made any formal claim to it, but rather had merely caused a new survey to be made, which would place the boundary line well over on the property complainants' deed purported to convey to the third party. The chancellor, rejecting all three contentions, overruled defendant's demurrer and granted the relief requested and the court of appeals affirmed.

Little difficulty was encountered with the third contention, since the rule in Tennessee,[2] as in other jurisdictions,[3] is that a party may invoke the jurisdiction of equity to prevent the creation of a cloud on title, on the same grounds on which he may petition for the removal of an existing cloud on title. The second ground for the demurrer was more substantial, since traditionally equity will not interfere to give relief, especially in a controversy over title to land, unless complainant can show an urgent threat of irreparable injury.[4] However, the court adopted the view that "bills quia timet lie where a person has reasonable fears of being subjected to future inconvenience, probable or even possible to happen by neglect, inadvertence or culpability of another, in which case the court will quiet his apprehensions by removing the cause."[5] Although the disputed boundary might be settled without litigation, yet "complainants' right to invoke the aid of a Court of Equity for the purpose of avoiding possible future liability under their covenant of warranty, is not dependent on the form which such future possible liability may take."[6] And although complainants might wait and raise a successful defense when sued on their warranty, they ought to be allowed to defend the title of their vendee "by an aggressive anticipatory action," if they choose to do so.[7]

Defendant's first argument presented the most formidable obstacle

2. Jones v. Nixon, 102 Tenn. 95, 98-99, 50 S.W. 740, 741 (1899): "Strictly speaking, the present bill is not brought to remove a cloud from title, but it is intended, rather, to prevent the consummation of a proceeding that would, unhindered, result in obscuring that title. The difference is not one of controlling importance, however, for the jurisdiction of courts of equity to grant the desired relief is as well established in the one case as in the other, and the principles authorizing the prevention of clouds are, generally, the same as those applied in removing clouds."

3. Bishop v. Moorman, 98 Ind. 1, 49 Am. Rep. 731 (1884); King v. Townshend, 141 N.Y. 358, 36 N.E. 513 (1894); See cases cited in Jones v. Nixon, *supra* note 2; CLARK, EQUITY § 332 (1954).

4. See WALSH, EQUITY §§ 28, 31 (1930).

5. 330 S.W.2d at 349, quoting 2 GIBSON, SUITS IN CHANCERY § 1089 (5th ed. 1956).

6. 330 S.W.2d at 351.

7. 330 S.W.2d at 350.

to granting relief because it was based on the oft-declared proposition that equity will not take jurisdiction to remove a cloud on title unless the complainant is owner of legal title to and is in possession of the land in question.[8] However, these requirements are traditional ones which were originally imposed at a time when the equity courts were necessarily cautious not to infringe on the jurisdiction of the common law courts, and were designed to prevent persons from coming into equity to settle controversies cognizable at law in the form of ejectment actions. Thus, if a complainant was not in possession of the land, his course should be to pursue his ejectment remedy against the party claiming an adverse interest in the property. If the complainant was already in possession, of course he could not maintain an ejectment action, and so his remedy at law might be inadequate. The legal title requirement apparently arose as an incident to the possession factor: a complainant who was out of possession attempted to demonstrate that his remedy at law was inadequate because he had only equitable title to the property, and so had no standing to sue in a law court. The answer was that he should first perfect his interest by obtaining legal title, and then bring an ejectment action.

Even under a system in which a sharp division existed between the common law and equity courts, there were two obvious faults in this line of reasoning—both of which are illustrated by the situation in the *Patterson* case. First, a party, even though out of possession, may still not have an adequate remedy in ejectment, because his interest may be non-possessory in nature, or because possession may be in some third party rather than in the person whose claims are clouding the title. Second, a party with a less-than-legal-title interest in the land may not have the right to obtain legal title, but may nevertheless have a real interest needing protection. In the *Patterson* case complainants had no right to possession since their vendees were rightfully in possession; and their interest in avoiding liability under their warranty of course gave them no basis for obtaining legal title. In Tennessee, where the early distinction between common law and equity has been so largely erased and where the chancery courts have concurrent jurisdiction with the law courts over so many types of cases, it would be particularly anomalous for equity to deny relief on the basis of a rule which originated in an era of hostility between the two branches of jurisprudence and existed to prevent encroachment by equity on the jurisdiction of the common law courts.

Because the requirement of possession denied equitable relief to all holders of non-possessory interests, and the requirement of legal

8. Frost v. Spitley, 121 U.S. 552 (1887); see CLARK, EQUITY § 330 (1954); MCCLINTOCK, EQUITY § 194 (2d ed. 1948).

title resulted in equity's refusing to protect the very interests which it alone recognized as existent, some very unfortunate results were produced by adherence to this traditional view. Consequently, courts in a number of states have rejected these factors as prerequisites to equity's jurisdiction to remove cloud on title.[9] Tennessee has maintained an especially enlightened point of view in this respect for over a century. As long ago as 1859, in *Almony v. Hicks,* the Tennessee Supreme Court declared that a bill to remove cloud on title "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."[10] Sixty years ago, this rule was applied in *Jones v. Nixon,*[11] where, as in the *Patterson* case, a vendor of land sought a bill to remove cloud because a third party's claim to the property created the fear of a suit by the vendees on the covenants of warranty. Recognizing that many jurisdictions refuse relief unless the complainant is in possession and that ordinarily a person not holding legal title has no standing to seek this form of relief, the court nevertheless declared that an exception should be made "in favor of the vendor of land with warranty of title, his obligation to protect the title of his vendee being deemed a sufficient interest in the subject-matter to authorize his timely interposition and warrant the aid of a Court of Equity."[12] The current decision in the *Patterson* case is thus based on sound Tennessee authority as well as on good reason.

Further, it may be commended as carrying the tendency to grant quia timet relief liberally at least a short step further than the earlier cases. Here there was somewhat less of an urgent threat to complainants' interest than was involved in the *Jones* case.[13] Also, in the *Patterson* case the court extended the rule that legal title is not

9. See CLARK, EQUITY § 330 (1930); MCCLINTOCK, EQUITY § 194 (2d ed. 1948); WALSH, EQUITY § 117 (1930).

10. 40 Tenn. 39, 42 (1859). There, defendant claimed under a deed from complainant's ancestor, which deed was valid on its face and would embarrass complainant's ownership as long as it remained outstanding. Therefore, equity took jurisdiction in order to cancel the deed, an element of relief which a law court could not provide. However, it may still be proper, in states maintaining the division between law and equity, to refuse to allow a party to use a bill to remove cloud as a substitute for an ejectment action. See Chandler v. Graham, 123 Mich. 327, 82 N.W. 814 (1900).

11. *Supra* note 2.

12. 102 Tenn. at 102, 50 S.W. at 741-42. The view that relief can be granted even when defendant is in possession of the disputed property was approved in Stearns Coal & Lumber Co. v. Patton, 134 Tenn. 556, 184 S.W. 855 (1916).

13. In Jones v. Nixon, *supra* note 2, by some mistake the land in question had been sold under a chancery court decree as part of the assets of an estate to which it did not belong. Though the sale had not yet been confirmed by the court, the purchaser's claim obviously constituted a present burden on the title which complainant had conveyed to his grantee. In the *Patterson* case, the lumber company apparently had not yet made any positive claim to the disputed territory.

a prerequisite for relief to a suit brought under a statute conferring jurisdiction over boundary dispute cases on chancery courts, even though the statute prescribes that the complainant must "prove clearly that he is the true owner of the lands described in his bill."[14] By treating the complaint as a bill quia timet, the court was able to base complainants' qualification to sue on the more flexible tests adhered to by Teunessee equity courts.

II. Partial Specific Performance With Compensation

In *Hall v. Snipes*,[15] the court, perhaps in dictum, shed some further light on the law in Tennessee regarding the remedy of partial specific performance with compensation. Defendant Snipes had contracted to purchase certain Mississippi property from Hall for $140,000 cash and certain Tennessee property owned by defendant. The contract stated that it was contingent on part of the Tennessee property being rezoned for commercial use, and when it became apparent that this rezoning could not be accomplished by the time set for the consummation of the contract, defendant first asked plaintiff to waive the condition, but then without waiting for a reply defendant attempted to cancel the contract on the ground of impossibility of performance. Nevertheless, plaintiff promptly declared his waiver of the rezoning condition, and demanded that the contract be performed. Defendant instead purchased from a third party other Mississippi property for which he had previously been negotiating, conveying the Tennessee property as part of the consideration for this purchase. Plaintiff sued for damages or specific performance but the chancery court held that defendant's cancellation of the contract was validly made, and so dismissed the suit.

The court of appeals reversed, ruling that the rezoning provision was inserted in the contract for plaintiff's benefit, and that he had a right to waive the condition and had effectively done so. Therefore, defendant was held to have breached the contract, and the case was remanded "for the purpose of ascertaining the amount of damages recoverable by complainants and/or for such other relief as they may be entitled to have granted to them."[16] The latter reference was apparently made in recognition of the possibility that plaintiff might seek partial specific performance with compensation at the retrial, and the court of appeals observed that plaintiff's right to sue for

14. Tenn. Code Ann. § 16-607 (1956).

15. 330 S.W.2d 381 (Tenn. App. W.S. 1959). Under the title of *Richardson v. Snipes*, the broker's action against Snipes for his commission was consolidated with the vendor's action for damages or specific performance. That phase of the litigation presented no equity aspects, and will not be discussed here.

16. 330 S.W.2d at 391.

breach of contract "is, in our opinion, completely analogous to and entirely in harmony with the well-settled rule that where a contract is entered into for the sale of land and the seller is unable to convey all of the land contracted for, the buyer may, nevertheless, enforce specific performance for that portion which the seller can convey, together with compensation for that portion which the seller cannot convey."[17]

While the result reached is certainly acceptable, the statement relating the specific performance remedy to the damages right of action is somewhat puzzling. Once the validity of plaintiff's waiver of the condition was established, the case clearly became one in which defendant had been bound by a valid contract which he breached by refusing to go through with the land sale. The right of action for damages was quite independent of the alternative remedy of partial specific performance, and the two remedies are "entirely in harmony" only in the sense that plaintiff could choose to pursue either one which suited his purposes better. And the right to damages hardly can be "completely analogous" to the remedy of partial specific performance with compensation. In enforcing the former right, plaintiff's theory is that, defendant having repudiated a binding contract, neither party shall perform his obligations under the contract but defendant shall be required to compensate plaintiff for the loss of the advantage he would have received from the fulfillment of the agreement. In pursuing the latter remedy, plaintiff's theory is that defendant shall be required to perform to the extent he is still able to fulfil his obligations, and in return plaintiff shall perform his own obligations except to the extent that he is entitled to be excused from performance because of defendant's inability to perform fully. Thus, the one approach is that the original duties of both parties to carry out their contract obligations are at an end, while the other approach is that the obligations of both parties to perform are still existent and such performance is sought to be obtained.

The intimation that plaintiff may still seek specific performance on remand indicates the commendably liberal view of the Tennessee courts in regard to the granting of partial specific performance with compensation. It is to be noted that the contract originally called for an exchange of tracts of land. Since defendant could no longer convey the Tennessee property to complainant, enforcement of the partial specific performance remedy would result in defendant's being required to pay plaintiff the $140,000 cash part of the purchase price, while complainant would be required to convey to defendant a portion of the Mississippi property which bears the same ratio to the whole

17. 330 S.W.2d at 388.

tract as defendant's payment of the $140,000 bears to the whole of defendant's promised performance. In order to administer such relief, the court would be faced with the dual difficulties of (1) evaluating the Tennessee property in order to ascertain what portion of defendant's total promised performance was represented by the obligation to convey this tract, and (2) determining how much and what part of the Mississippi tract plaintiff should be allowed to retain as a means of reducing his performance in the same proportion that defendant's performance has become impossible. The difficulty of making such evaluations of land tracts, and the consequent possibility that enforcing performances differing from those originally contracted for will cause hardship to defendant, have made courts somewhat reluctant to decree partial specific performance with compensation in land exchange contracts.[18]

No Tennessee case has been found in which partial specific performance of a land exchange contract has actually been decreed, but more than a century ago the Tennessee court declared the vendee's general right to partial specific performance in unqualified terms.[19] Further a later decision went so far as to grant such relief to a *vendor* who was unable to convey part of the land promised, as against a vendee who attempted to abrogate the entire contract because he could not obtain all of the land for which he contracted.[20] Since the vendor is the defaulting party, courts are generally inclined to refuse to grant him a form of relief which forces the non-defaulting party to accept less than he contracted for, thereby imposing on him a contract to which he never assented.[21] However in the *Vernon* case, the Tennessee court found that the vendor's inability to convey related to only an insignificant part of the land called for by the contract, and that a proportionate deduction from the purchase price would fully compensate the vendee for the loss of that part. Therefore, partial specific performance with compensation was decreed under the rule that:

> When a vendor is unable, from any cause not involving bad faith on his part, to convey each and every parcel of the land contracted to be

18. See Waldeck v. Hedden, 89 Cal. App. 485, 265 Pac. 340, 343-44 (1928); Ryan v. Evans, 195 Ind. 570, 145 N.E. 6, 9 (1925); Williams v. Pearman, 164 S.W. 43 at 44-45 (Tex. Civ. App. 1914); McCLINTOCK, EQUITY § 177 (2d ed. 1948); 3 WIS. L. REV. 173 (1925) (better view said to be that such relief should be granted in land-exchange contracts on same basis as in land-for-money contracts).

19. Collins v. Smith, 38 Tenn. 251, 255 (1858): "It is settled as a general rule, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase-money, for any deficiency in the title of the estate."

20. Charles B. James' Land & Inv. Co. v. Vernon, 129 Tenn. 637, 168 S.W. 156 (1914).

21. CLARK, EQUITY § 121 (1954); 4 POMEROY, EQUITY JURISPRUDENCE § 1407 (5th ed. 1941).

> sold, and it is apparent that the part which cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, in such case the vendor may insist on performance with compensation to the purchaser, or a proportionate abatement from the agreed price, if that has not been paid.[22]

III. PUNITIVE DAMAGES IN CHANCERY CASES

The question of the power of Tennessee equity courts to award punitive damages, an issue discussed in last year's Survey,[23] was further explored in *Kneeland v. Bruce*.[24] This was a suit in chancery in which a person who formerly owned a tract of land charged that defendants, by fraudulent conspiracy, had caused her unwittingly to mortgage her property and then to lose it through foreclosure of the mortgage. Plaintiff sought, and the jury awarded, both compensatory and punitive damages. On appeal, the Court of Appeals for the Western Section treated the case as one for damages for fraud and deceit, over which the chancery court had jurisdiction under Tennessee Code section 16-602. In response to defendants' argument that this was not a proper case for an award of punitive damages, the court relied on two 1958 decisions, *Bryson v. Bramlett*[25] and *McDonald v. Stone*,[26] and concluded: "The Chancery Courts of this State have ample jurisdiction to award exemplary or punitive damages in proper cases, and the case at bar was a proper one for the application of that jurisdiction."[27]

This broad declaration can only be accepted with a cautionary reservation. The *McDonald* case, decided by the same section of the court of appeals, did indeed involve an award of punitive damages in a chancery court. However, the cause of action was for ejectment, and thus the chancery court was deciding a common law case and was proceeding according to the damages rules long followed by the law courts.[28] The *Bryson* case, decided by the Tennessee Supreme Court, was an action by a borrower to recover usurious interest paid to his lender—also a common law cause of action. The court of appeals opinion contained no discussion of chancery's power to award

22. Charles B. James' Land & Inv. Co. v. Vernon, *supra* note 20 at 644-45, 168 S.W. at 157, quoting 36 CYC. 738 (1910). See also DE FUNIAK, MODERN EQUITY 195 (2d ed. 1956); POMEROY, *op. cit. supra* note 21, § 1407; WALSH, *op. cit. supra* note 4, § 76.

23. Smedley, *Equity—1959 Tennessee Survey*, 12 VAND. L. REV. 1191 (1959).

24. 336 S.W.2d 319 (Tenn. App. W.S. 1960).

25. 321 S.W.2d 555 (Tenn. 1958).

26. 321 S.W.2d 845 (Tenn. App. W.S. 1958).

27. Kneeland v. Bruce, 336 S.W.2d 319, 325 (Tenn. App. W.S. 1960).

28. Note 26 *supra*. The complainant also asked for removal of a cloud on complainant's title, but defendants freely admitted that they had no claim or pretense of ownership of the property in question, and the case seems to have developed entirely as one for ejectment and damages.

punitive damages, and the cases cited by the supreme court to demonstrate the existence of this power in Tennessee did not include any instances in which traditional equitable relief was sought.[29] Since the *Kneeland* case also involved a legal cause of action, the Tennessee courts have yet to decide whether in Tennessee, contrary to the majority view,[30] a punitive damages award is proper in a traditional equity case. However, since on three occasions in the past three years the upper courts have recognized the power of chancery courts to grant such damages, without any qualification being stated in regard to the nature of the cause of action, it appears that the "proper cases" referred to in the rule of the *Kneeland* decision are intended to include those falling within the inherent jurisdiction of equity.

IV. Injunction Against County's Perpetration of a Nuisance

With the decision in *Jones v. Knox County*,[31] the Tennessee Supreme Court appears to have restored, after a lapse of exactly one year, the rule that a county may be enjoined from perpetrating a nuisance, even though the wrong is being committed by the county while acting in its governmental capacity. A property owner sued to restrain the county and its board of education from maintaining a nuisance in the form of a sewage treatment plant at a public school, which plant was allegedly so operated as to emit noxious odors, attract flies, and discharge filth into an open ditch near plaintiff's home. The chancellor overruled defendants' demurrer and granted a temporary injunction, and the supreme court affirmed, observing that the decision was in accord with the general rule and specific Tennessee cases, including *Pearce v. Gibson County*.[32] The decision in *Buckholtz v. Hamilton County*,[33] in which a county was held immune from liability for injuries caused by a nuisance, was said to have no application in the instant case because it involved a tort action for damages.

Both the reasoning and result appearing to be sound and satisfactory, this case would pass without further comment if it were not for the remarkable contrast it presents to a decision handed down by the same court just a year earlier, the same justice writing both opinions. In *Wright v. Roane County*,[34] it was held that equity could not enjoin a county from maintaining a nuisance caused by a faulty drainage system set up in the construction of a highway. In both cases, the

29. See Smedley, *supra* note 23, at 1195-96.
30. *Id.* at 1192-95.
31. 327 S.W.2d 473 (Tenn. 1959).
32. 107 Tenn. 224, 64 S.W. 33 (1901).
33. 180 Tenn. 263, 174 S.W.2d 455 (1943).
34. 315 S.W.2d 97 (Tenn. 1958).

county was acting in a governmental capacity in maintaining the alleged nuisance, and in both cases a private property owner injured by the alleged wrong was the complainant, and in both cases injunctive relief only was sought. Yet, in the earlier case, the court denied the injunction, discussing the *Buckholtz* case at length as authority for the holding, and ignoring the *Pearce* case altogether, while in the later case the injunction was granted on the authority of the *Pearce* case, and the *Buckholtz* case was ruled to be inapplicable. Inasmuch as the *Wright* decision was not referred to in the *Jones* opinion, one can only wonder what differences the court found in the two cases which justified the different results.

It has been previously observed by this writer that the *Wright* opinion was somewhat indefinite as to the exact basis of the holding in the case.[35] The *Jones* case, unfortunately, does nothing to resolve that uncertainty, but it may be approved as a welcome indication that the court did not actually intend to immunize counties from all responsibility to property owners in regard to tortious actions committed in carrying out governmental functions.

V. RIGHT TO JURY TRIAL IN CHANCERY CASES

Several recent cases dealt with the question of the jury trial right in equity, and by the decision in *Moore v. Mitchell,* the most recent of this group, the supreme court declared that it was attempting "to put the matter at rest . . . ."[36] The current uncertainties regarding the scope of the jury trial right in chancery court proceedings arose out of the ambiguous language of Code section 21-1011, enacted in 1932. Prior to that date, either party was entitled to demand a jury trial on any issue of fact in any chancery case.[37] In the 1932 Code, the scope of the right to jury trial was modified by excepting "cases involving complicated accounting, as to such accounting, and those elsewhere excepted by law or by provision of this Code. . . ." The Tennessee Supreme Court soon took note of the effect of these qualifications, observing in *Hunt v. Hunt*: "So it is not every case in chancery in which a jury can be demanded and . . . the chancellor has a much broader latitude in withdrawing issues from a jury than the circuit judge does in directing a verdict."[38] The opinion then went on: "A case involving a parol trust is not a proper case in which to submit

35. Smedley, *supra* note 23, at 1198.
36. 329 S.W.2d 821, 823 (Tenn. 1959).
37. Tenn. Acts 1846, c. 122, § 14. This act was repealed by Tenn. Pub. Acts 1919, ch. 90, § 1 and 2, but was reinstated by Tenn. Pub. Acts 1921, ch. 10, § 1. See Note, *Jury Trial in Chancery Court in Tennessee,* 7 VAND. L. REV. 393, 395 (1954).
38. Hunt v. Hunt, 169 Tenn. 1, 10, 80 S.W.2d 666, 669 (1935).

to a jury the issue of the creation of the trust unless there is clear and convincing evidence in favor of the proponent. The chancellor merely withdraws the issue and has no occasion to charge at all with respect to the fact."[39]

Some uncertainty as to the true import of this decision in regard to the right to jury trial in equity was manifested in several later cases.[40] Finally, in *Doughty v. Grills*,[41] the court of appeals reached the conclusion that *Hunt v. Hunt* held "that cases of purely equitable cognizance falling under the inherent jurisdiction of the chancery court . . . are within the exception to Code Section [21-1011] providing for juries in chancery,—that is, they are among the cases 'elsewhere excepted by law or by provisions of this Code. . . .' "[42] Since the supreme court denied certiorari, this decision stood unreversed, but its interpretation of section 21-1011 has been vigorously questioned.[43] After prolonged silence, the supreme court has now used *Moore v. Mitchell* to clarify the situation. It explained that *Hunt v. Hunt* did not set down the rule attributed to it in the *Doughty* case; rather, the *Hunt* case held that while the right to a jury trial exists in cases of inherent equity jurisdiction, if equity traditionally requires a certain quantum of proof to establish the claim, complainant must offer such proof before he is entitled to have a verdict in his favor. The holding of the *Doughty* case regarding the meaning of the exception in section 21-1011 was therefore expressly overruled, and the jury trial exception was declared to include only cases "which are expressly excepted by the provisions of the Code, and those statutory exceptions not found in the Code; and such as by their very nature must necessarily be deemed inappropriate and not a proper case to be submitted to a jury such as . . . (a contempt proceeding for violation of an injunction), unless in such case express provision for a jury trial is made by statute; or cases of such a complicated and intricate nature involving mixed questions of law and fact not suitable for solution by a jury such as laches or estoppel."[44]

Though it may be argued that this decision does not give effect to the literal words of the exception clauses of section 21-1011, the view adopted very probably is consistent with the actual intention of the legislature. For if the exceptions were held to cover all cases of

39. 169 Tenn. at 11, 80 S.W.2d at 669, 670.
40. Greenwood v. Maxey, 190 Tenn. 599 at 611, 231 S.W.2d 315 at 320 (1950); Davis v. Mitchell, 27 Tenn. App. 182 at 196, 178 S.W.2d 889 at 895 (1943).
41. 37 Tenn. App. 63, 260 S.W.2d 379 (E.S. 1952).
42. 37 Tenn. App. at 81, 260 S.W.2d at 386.
43. Note, 23 TENN. L. REV. 230 (1954); Note, 7 VAND. L. REV. 393 (1954); 7 VAND. L. REV. 299 (1954).
44. Moore v. Mitchell, *supra* note 36, at 824, citing 1 GIBSON, SUITS IN CHANCERY §§ 578, 582 (5th ed. 1955).

inherent equity jurisdiction, the apparent purpose of the section to confer a broad right to jury trial in chancery cases would be largely nullified.[45]

While the *Moore* decision may serve to clear away the main element of confusion created by the *Hunt* and *Doughty* cases, it is obvious that some room for flexible application of the exception clauses of section 21-1011 still exists. Thus, the chancellors must still determine whether each case "by [its] very nature must necessarily be deemed inappropriate and not a proper case to be submitted to a jury," or is of "a complicated and intricate nature involving mixed questions of law and fact not suitable for solution by a jury. . . ." These rather indefinite guides obviously leave wide discretion in the chancellors to be exercised in the individual cases.

Three other recent Tennessee cases, though decided previous to *Moore v. Mitchell,* provide some help in determining the scope and effect of the jury trial right in equity. In *Town of Alamo v. Forcum-James Co.,*[46] complainant sued the town to recover the balance due on a contract for construction of a sewage disposal system. At defendant's request a jury was impanelled, but at the close of the evidence the chancellor sustained plaintiff's motion to dismiss the jury on the ground that the issues were too complicated, and involved too many questions of law and mixed questions of law and fact to be decided by a jury. In a rehearing opinion, the supreme court sustained the ruling that this was not a proper case for a jury trial because: (1) some issues required interpretation of written documents; and (2) some issues of fact depended upon there first being a proper construction of the contract. A passage from 1 Gibson, *Suits in Chancery*[47] was quoted as properly indicating that no jury trial should be allowed in equity where: (1) a controlling question of law arises; or (2) the case turns on a point of law alone ("such as the meaning of an instrument, or the legal consequences of facts that are conceded"); or (3) the questions of fact are so intermixed with questions of law that the former cannot be considered separately by a jury; or (4) disputes of fact are so intricate that no clearly defined and determinative questions can be framed for presentation to a jury. In *Henry v. Southern Fire & Cas. Co.,*[48] on the other hand, the chancellor's withdrawal of the issues was held to be error. Complainants brought suit on a liability insurance policy to require the insurer to repay complainants the amount they had paid to a third party in settlement of claims for damages for injuries sustained in an accident caused by the operation of a trailer truck. Defendant contended that the policy did not cover

45. See Note, 7 VAND. L. REV. 393 at 401-04 (1954).
46. 327 S.W.2d 47 (Tenn. 1959).
47. Section 548a (4th ed. 1937).
48. 330 S.W.2d 18 (Tenn. App. W.S. 1959).

the operation of such trucks, but complainants argued that defendant's agent had represented that such liability was included when he issued the policy. The agent denied making the representation. The court of appeals ruled that the credibility of the agent as defendant's witness (and ultimately the question of what representation was made to complainants as to the scope of the policy's coverage) should have been submitted to the jury. The general rule was laid down that: "If there is any material evidence to sustain a decree on an issue of fact, which is cognizable or triable at law, the chancellor must submit such issue to the jury, and the finding of the jury has the same force and effect as in a court of law."[49]

McDade v. McDade,[50] coming before the courts prior to the *Moore* decision, was fraught with several issues regarding the right to jury trial, but the court of appeals neatly avoided the necessity of ruling on them. Complainants brought suit in the chancery court to collect certain sums alleged to be due under a very complex contract of sale, and defendants filed a cross-bill for rescission of the contract on the grounds that it was induced by fraud, duress and misrepresentation, and that one of defendants was mentally incompetent to enter the contract. The chancellor refused defendants' demand for a jury trial on the issues of fraudulent inducement and of gross inadequacy of the consideration for the contract. Subsequently, he impanelled an advisory jury, but ultimately withdrew the two mentioned issues from this jury. Since the original bill was based on a common law cause of action, it could be argued that the demand for jury trial should have been granted; but since the cross-bill sought traditional equitable relief, it was arguable that under the *Doughty* case rule (still in effect at that time), defendants had no right to jury trial, at least on the purely equitable issues. Further, since the disputed issues of fact were of bewildering complexity, it may be contended that even under the *Moore* case rule, the chancellor could properly have withdrawn the issues from the jury. At any rate, defendants, in appealling a partially adverse judgment, contended that they had not been accorded their right to jury trial. The appellate court, without deciding whether they had been entitled to a jury trial, ruled that since defendants had made no assignments of error regarding the denial of their demand for a jury, the chancellor's action became final and was not subject to review on appeal. The court went on to call attention to the fact that traditional equity procedure remains in effect to the extent that even where the parties have no right to a jury trial or do not invoke such right as exists, the chancellor may still empanel an advisory jury on his own motion; and he then has full discretion

49. 330 S.W.2d at 29.
50. 325 S.W.2d 575 (Tenn. App. E.S. 1958).

as to what issues to submit to his jury and what issues he shall himself decide.

It is to be noted that even under the *Moore* case rule, an advisory jury may still be employed by the chancellor in a case in which the right to jury trial does not exist. However, such a body may seldom prove to be useful, since it would not be proper to refer a question of law to a jury, and since if the case is of such a "complicated and intricate nature" as to preclude the right to jury trial, it would seem doubtful that an advisory jury would often be capable of passing on the issues.

VI. JURISDICTION TO INVESTIGATE CHARGES OF UNETHICAL CONDUCT

Acting to resolve a controversy in a situation which has created widespread public interest in Tennessee, the supreme court ruled that the chancery courts have inherent jurisdiction to investigate charges of unethical and unlawful practice of law.[51] The Chattanooga Bar Association, through its Board of Governors, had filed an original bill in the Hamilton County Chancery Court asking for an investigation of numerous alleged unethical and unlawful practices by members of the local bar, including the fomenting of litigation, solicitation of employment, fee-splitting, representation of conflicting interests, failure to account for fiduciary funds, and obtaining statements and documents by duress and misrepresentation. No specific offenders were named, and no specific disciplinary action was sought. Rather, the petition was for a general investigation by use of Special Masters appointed by and acting under the direction of the court. However, the chancellor decided that he lacked jurisdiction to make such a broad inquiry into conduct of attorneys generally, there being no specific persons identified as offenders, and that any such action is within the exclusive power of the state supreme court.

The supreme court reversed and remanded the case to the chancery court for further proceedings under the petition. Inasmuch as the continuation of the offenses charged would reflect on the honor and integrity of all courts, it was declared that "the Chancellor *must* exercise his inherent authority to inquire as to who it is among many officers who are doing these dastardly things . . . ."[52] Supreme Court Rule 40,[53] which lodges authority in the Chief Justice to initiate investigations of charges of misconduct by attorneys, was held not to set up an exclusive remedy nor to deny "to trial courts their inherent authority to discipline members of the Bar, or to entertain a motion by any lawyer or any Bar Association, to investigate the unethical and unlawful practice of law."[54]

51. *Ex parte* Chattanooga Bar Ass'n, 330 S.W.2d 337 (Tenn. 1959).
52. 330 S.W.2d at 340. (Emphasis supplied.)
53. See 192 Tenn. 827.
54. 330 S.W.2d at 342.