THE DOCTRINE OF ESTOPPEL IN AFTER-ACQUIRED TITLE.

A. MISTAKEN AS COMMON LAW DOCTRINE.

When a rule of law has become well settled by the doctrine of *stare decisis* it is second nature for courts to apply it to a particular state of facts, and seldom do we find in the opinions the underlying principles that have occasioned the need of the rule. Rather is it the tendency to give no other reason than that the law grew that way; and being justified on political, social and economic grounds, have by strict application added to the myriad of precedents. But such mechanic exercise is interrupted when we find courts applying either another rule, or refusing to apply the general rule to a similar state of facts. Thus a precedent is established which challenges the ingenuity and the learning of the courts who are so confronted with a rule on which there is conflict of opinion. So drawing from the learning of courts that have been so challenged, also from learned text writers on the subject, is the purpose of this article.

When in that period of history, civilization reached the point where it became necessary for the admission of property or the recognition of those things which by the laws of nature every man is entitled to—it necessarily followed that rules whereby each could assert his rights, must be devised. So the first of these natural modes of acquisition was "*Occupatio*" or the occupancy of those things, as the Roman lawyers called, *res nullius*"—things that have never had an owner.[1]

By the establishment of this rule man's independence became recognized; and his importance was more or less associated with his property rights. Naturally, then, those units in possession were established, and as occupancy was the only mark of rights, there was much abuse and injustice. So in

1. Maine's Ancient Law, page 238.

order to assure the rights of these natural owners it also became necessary to devise means for continuing possession. Thus came the common assurances of the Kingdom,—the legal evidences whereby every man was given his rights in controversies,—which either prevented or removed difficulties. Descents as the means provided for the distribution among the proper heirs, or the involuntary results in their favor, and the power of alienation or voluntary transfer of "property properly evidenced."

Descent, the vesting in the proper heirs the title of property when it is left in the hands by the death of the owner, is involuntary and the law acts for the absent party. The second by acts *inter vivos,* voluntary transfer—a meeting of the minds and a consideration. There has grown in the law what we might term a third mode of transferring property,—that is where title passes by operation of law between living persons which may be voluntary on one side and involuntary on the other as where one, who has no title at the time of making the conveyance but later acquires good title, now tries to take advantage of the principle that a man cannot sell or grant that which he hath not and render the conveyance of no effect. But the law holds that where parties have given expression to an apparent intention by solemn deeds, which the law recognizes as absolute, and behind such form one of the parties is guilty of deceit by not revealing the truth, they are estopped from now setting up the truth to defeat the lie.

"Estoppel," said Lord Coke,[2], "is where a man by his own acts or acceptances is precluded to say the truth, or falsehood is made to appear the truth." As paradoxical as these statements seem, their application carries out what has been well said, that justice is not always done by the truth.

The doctrine of estoppel by deed as applied in after-acquired title inuring to the benefit of the grantee and its complication and application is a subject about which there have been various conflicting opinions. The case of *McCuster v.*

2. Coke on Litt. 352a.

McEvey[3] presents a clear set of facts for the illustration of the application of the doctrine and a learned dissenting opinion.[4] In that case one having no title to certain land attempts to convey with warranty to A by deed duly recorded, and he afterwards acquires a good title and conveys the land to B. The purchaser of B is estopped to aver that the grantor was not seized at the time of his conveyance to A the first grantee. We shall examine the opinion of Judge Porter in this case, for the purpose of bringing out the force of the arguments against estoppel in after-acquired title. And to do this it will be necessary to point out some of the characteristics of the modes of conveyances to show that there is no sound basis in the law for the doctrine.

Feoffments, fines and common recoveries, leases, releases, bargain and sale, all grew out of the demands made by the increasing complexities that progressing civilization presented. It is not our purpose to examine each one in turn, but rather to point out how a doctrine is born to meet ends of justice that such modes could not reach.

As stated by Rawle,[5] "it must be carefully observed that there were only two classes of cases in which an estate thus actually passed by estoppel, and two only. The first was where the mode of assurance was a feoffment, a fine, or common recovery. Such was their high solemnity and high character that they always passed an actual estate, by right or by wrong, and as against feoffer or conusor and his heirs, not only divested them of what they then had, but of every estate which they might thereafter acquire. The second is where the assurances was by lease, under which it will be remembered, estate could take effect *in futuro;* and the estoppel seems to have been put upon the ground of such having been the contract between the parties, the same contract which on the part

3. 9 R. I. 528.

4. 10 R. I. 606.

5. Rawle, Covenants for Title, page 360; 5 Man. & Rye. 202; 10 Barn. & Cres. 181.

of the lessor implied a covenant for quiet enjoyment from the word 'demise' and on the part of the lessor implied covenant for payment of the rent from the words 'yielding and paying.' "

It will be observed in this connection that such assurances of the first class by which estoppel was allowed—that is feoffment, fine and common recovery—it did not depend on any covenants but by the open and notorious character and high order of the ceremony it was deemed best not to allow such to be afterwards made of no effect; and therefore passed all that the feoffer or conusor had or might ever after acquire. It was only by the doctrine of rebutter which sprang from the common law warranty, that by reason of such warranty a grantor and his heirs were precluded from setting up after-acquired title. And from Rawle's statements of the second assurances which actually passed title by operation of law, we see that the force depended upon the covenants for quiet enjoyment implied from the word "demise," and in this respect was similar to estoppel; and was originally founded upon the desire of the courts to prevent circuity of action. For it was said, if the heir were allowed to recover, the grantee could immediately bring action on his warranty to recover the land or restore its value; so the warranty was given effect by what was called rebutter. But such was not the narrow scope of estoppel: it did not depend on any warranty, the presence of which, as has been stated, operated by rebutter, but operated by matter of record, matter of deed or matter in pais, and was called a "conclusion;" "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."

Our concern here is by matter of deed, and quoting from Bigelow, "may be defined in a strict sense to be right based upon a preclusion against the competent parties to a valid in-

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6. Rawle, Covenants for Title, page 360; Bigelow, Estoppel, page 322 (4th ed.)

strument and their privies to deny its force and effect by evidence of inferior solemnity." And, as stated by Rawle, this was the ordinary and personal effect of an estoppel by deed.[6] But it had also a much higher operation which was, in certain and exceptional cases, actually to transfer and pass an estate, so that if a man conveyed to another land to which he had no title, any after-acquired title would inure to the latter by direct operation of law, and become vested in him in the same manner as if it had originally passed to him by the assurance.

We see that such application of the doctrine of estoppel was only allowed in cases of feoffment, fines and common recoveries. What about this doctrine under the later modes of conveyances that operated by virtue of the statute of uses, such as grant, release, bargain and sale? We find that at common law they never had the effect of passing any estate only that which the grantor actually had.[7] Modern conveyances which take effect by virtue of the statute of uses, deeds of bargain and sale, lease and release, pass no more than the grantor actually had and cannot work by estoppel any more than at common law. This is brought out with force and clarity of language in Judge Porter's opinion in *McCuster v. McEvey, supra.* He says:

"But this estoppel applied in the old law only to fines, common recovery, judgments and feoffments, which, as we have said, were of presumed notoriety, but not to any conveyances which originated under the statute of uses, such as grant, lease and release, bargain and sale."

Now, just wherein courts have tried to give the doctrine of estoppel any basis other than in equity, is our immediate inquiry. It is the theory of many courts and text authorities that there has been an unconscious application of the common law doctrine of rebutter which arose from the covenants of warranty applied to our present day conveyances; for, as said by Rawle, there is no authority in any of the English

7. Rawle, Cov. for Title, page 362; 2 Smith's Leading cases, p. 2109.

books to the effect that any mode of conveyance except feoffment, fine and common recovery actually had the force of passing after-acquired title and make estoppel.[8] However, we find courts searching for a sound basis to reason from, and make the estoppel depend on whether or not the deed contained a covenant; and if so, whether that covenant is one on which an action would lie by the grantee?[9] And when that was determined, estoppel was allowed to avoid circuity of action.[10] But to base estoppel on avoiding circuity of action cannot wholly be well founded; because we find that there are cases where estoppel is allowed even though there could not have been an action on the covenant of warranty.[11]

As said by the Court in *Hill v. West*,[12] these decisions may not seem by to be founded upon the reasons which are usually assigned why the covenants in a deed should operate by way of estoppel—that is, to prevent circuity of action; still they seem to us to be reasonable and such as tend to furtherances of justice; and when a married woman undertakes in conjunction with her husband to convey her land with covenants of warranty, it is sufficient to protect her from the payment of damages for breach of those covenants; for all purposes they should be operative." Here we see that the doctrine of estoppel does not rest upon avoiding circuity of action by the test of whether or not there is an action for damages on the covenant; as said in the case, "it is sufficient to protect her from paying the damages for breach of covenant." That is, the law does not allow an action against her for breach of covenants but does allow estoppel; and there are several other exceptions to the rule that there can be no estoppel where there is no action on the covenant.[13]

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8. Rawle, Covenants for Title, pages 364, 416; Doe v. Oliver; 2 Smith's Leading Cases, page 1991.

9. 143 Mass. 232.

10. Rawle, Cov. for Title, p. 397.

11. 1 Ore 328; 56 Ind. 1; 13 John. 463.

12. 8 Ohio 226.

13. Bigelow, Estoppel (4th ed.) 436.

But it has become well settled by a trend of decisions in this country, even though it is not a well-settled principle of the common law, that a general warranty in a conveyance will estop the grantor and his heirs from setting up an after-acquired title; and has the actual effect of transfering the estate, excepting the cases that make distinction on kinds of covenants, and on statutory covenants implied from the words grant, bargain and sell.[14] In Missouri[15] such covenants implied from grant, bargain and sell, do not operate as the ancient law of warranty to transfer an after-acquired title to the covenantee. It is, however, otherwise in Illinois.[16] But all the cases that have based the test of estoppel on the force of the covenant of warranty, and those that have held that only certain kinds of warranty are good to effect estoppel,[17] would seem to be of no effect according to the case of *Van Rensselear v. Kearney*,[18] for that case goes so far as to hold that estoppel will be allowed "although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been denying that he was seized of the particular estate at the time of the conveyance." Then it appears that a warranty in a deed being the determining element to effect estoppel has disappeared.[19]

It has been the object thus far to point out that the doctrine of estoppel by deed in after-acquired title has no sound basis in the old common law and does not naturally or logically, according to the purpose of those conveyances, follow; and that courts have more or less searched in vain beyond the instances of avoiding circuity of action (because such warranty en-

14. 18 Mo. 531; 10 Minn. 141.
15. 18 Mo. 531.
16. 32 Ill. 348; 24 Ill. 525.
17. 143 Mass. 232; 35 Minn. 509.
18. 11 Howd. 297.
19. Duchess of Kingston Case; 2 Smith's Leading Cases, page 2109 (9th ed.).

titled the grantee to action for damages) and have blindly applied a doctrine of equity through the medium of common law courts. And it naturally leads us to the question, does an estate actually pass by operation of law or is the grantor only precluded from setting it up, and in law is left to his action for damages; and that if his position has so been altered that damages would not suffice he should go into equity for a decree of specific performance.[20] Because, certainly such instruments of conveyance as are now in use did not nor do not possess the high character of passing title to any property after-acquired, when at the time of conveyance the grantor had no interest whatsoever. We find that there is no instance in the English books beyond those of feoffment, fine and common recovery that actually possessed the high power of actually transferring the title by operation of law, and therefore are lead to the conclusion, as said by Rawle, "the doctrine by which the after-acquired estate inures to the benefit of the grantee is purely equitable, and when enforced by courts of law is done so by administering equity through the medium of common law forms; namely, by treating as having been conveyed that which equity would decree to be conveyed, but that apart from this, the prior grantee has no right which can be enforced at law except by recovery in damages for breach of the covenants he has received."[21] As stated in the case of *Way v. Arnold,*[22] "this whole doctrine is most elaborately examined by Mr. Smith, page 454, in his leading cases and continued *infinitum.* And the conclusion of the whole matter is that where lands are sold by any of the modern conveyances, in which the grantor had nothing at the period of executing the deed, the title which he may subsequently acquire, does not pass to the grantee by estoppel; nor entitle him to recover in ejectment brought against a stranger. That a conveyance made under such circumstances, does not debar the warrantor

20. 1 Ves. 409; 4 Simons 505.
21. Rawle, Covenants for Title, page 402.
22. 18 Ga. (l. c.) 192.

or his heirs, from recovering under any right or title not vested in the grantor at the time of making the conveyance; that otherwise no estate would be safe from the fraudulent sale of an ancestor or the prodigality of a son, etc." Then, met by what is theoretically unanswerable, courts have fallen back on precedents which have no ground in the law, and as well said in *McCuster v. McEvey*,[23] "The doctrine of these cases, or the majority of them, however, has been impugned by the American annotator of Smith's Leading Cases and by Mr. Rawle, as based on a misconception of the English authorities and erroneous in principle, the warranty being, in their view, effectual only by way of estoppel or rebutter against the warrantor and his heirs, but inoperative on the after-acquired estate, and also as inconsistent, when applied to a bona fide purchaser for value without notice, which is against the spirit and the purpose of the recording acts of the several States. The argument in support of these views is certainly very strong, if not theoretically unanswerable; but the doctrine impugned has been so often and so fully recognized in the courts and repeated in the text books, that we feel bound, out of regard for the security of titles, to follow the precedents."

Considering then, as we must, when we follow the application of the doctrine of estoppel by the courts and its effect by the learned authorities, that it is equitable when it is given the effect of passing title in after-acquired estates, how do we account for its application in courts of law, unless it was unconsciously mistaken to be a common law doctrine? This doctrine can be wholly justified on the grounds of equity decreeing that done which ought to be done, because it might be said that equity is a panacea for legal difficulties. But the thing that so shocks us is that courts are not conscious that it is equitable, and not a common law doctrine, and apply it indiscriminately in actions at law.

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23. 19 R. I. 606.

B. OPPOSED TO SPIRIT OF RECORDING ACTS.

Another thing which might be termed an objection to the application of the doctrine of estoppel in after-acquired title, is that it is opposed to the purpose and spirit of the recording acts. In England they have no general recording system and this would be no objection on that ground there, but in this country we have the registry acts, which if given force and effect would seem to make the estoppel by deed unnecessary by charging with constructive notice all subsequent purchasers who were so negligent as not to take advantage of what the law has provided for their protection. By these acts all instruments that affect any real property in law or equity must be recorded, and are deemed to be constructive notice to all subsequent purchasers.[24] What else could be the purpose of these acts if it is not to provide a means of investigating the title of a pretending grantor. If he disregards it he is deemed to take with notice, that is, whatever the records show; and it seems the natural inference would be, that if the records show nothing, he is deemed according to the spirit of the acts, to have notice of the fact that his pretending grantee had nothing to sell; because it is not provided that all instruments affecting real property *must be recorded.* It is difficult to see under these statutes how a man who has bought an estate to which his grantor, at the time, had not title (for under the law such grantee is deemed to have notice that his grantor had nothing to sell), can inure to the benefit of the negligent grantee, and thus estop privies of the grantor from setting up the after-acquired title. As has been said, "It is agreed that misrepresentation will estop the misrepresenter in whatever department of the law the necessary conditions appear. Is it too much to say that he who assists the misrepresenter will also be estopped in whatever department of the law the necessary conditions appear."[25] In other words, does he who dis-

24. R. S. Mo. (1919), Secs. 2198, 2199.
25. 5 Columbia Law Review, 261.

regards the protection of the registry acts, and makes it possible for the misrepresenter to transfer that to which he has no title, become estopped when the grantor does afterwards acquire title?

In the case of *Way v. Arnold,*[26] one Pycheon having conveyed to the plaintiff a tract of land described it by a certain plan. Later Pycheon acquired an adjoining tract and conveyed it to the defendants. Plaintiff claimed that part of the second tract was included in the plan which described his tract; and that as soon as Pycheon acquired the second tract it inured to his benefit, and that the defendant is estopped from setting up the after-acquired title to defeat the plaintiff. But the Court said and so decided: "We are strongly inclined to the opinion that our registry acts, under the modern forms of conveyancing, are a virtual repeal of the doctrine of estoppel. At any rate, it is quite clear that notwithstanding Pycheon sold to the plaintiff with warranty and afterwards bought the second tract, this after-acquired interest did not feed the estoppel and pass the property in controversy immediately to the plaintiff."

In the Missouri case of *Dodd v. Williams,*[27] the Court deciding against the doctrine of estoppel in after-acquired title say, "That where one has no title, sells with warranty, his after-acquired title shall inure to his grantor so that not only the grantor and his heirs, but all grantees are estopped from claiming, irrespective of all questions of registry and notice, seems a most inequitable application of the doctrine of estoppel, and it is no wonder that in recent cases courts have shrunk from carrying the doctrine to such results."

JOSEPH C. LYONS, '24.

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26. 18 Ga. 192.
27. 3 Mo. App. 278.