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After-Acquired Title in Texas

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by

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PART TWO

IV. AFTER-ACQUIRED TITLE AND PARTICULAR SITUATIONS

A. *Marital Property*

AS discussed previously, the Texas courts have applied various rationales in support of the so-called after-acquired title doctrine.[1] These may be narrowed down to concepts of contract and estoppel by representation. In many situations the choice of rationales is not critical; this is not true, however, as to pre-1961 conveyances by a married woman (with husband) of her separate real property. Assume that the wife owned, at the time of her conveyance by general warranty deed, an undivided interest in Blackacre as her separate property and thereafter she acquires an additional interest by devise or descent. Should the after-acquired interest pass to the grantee? The Texas Supreme Court in the landmark case of *Wadkins v. Watson*[2] refused to apply the after-acquired title doctrine to a married woman's conveyance on dual grounds:

(1) The grantee's acquisition of after-acquired title is based upon the covenant of warranty which is not a type of contractual capacity allowed a married woman under Texas statutes; and,

(2) Texas statutes restrict conveyances of a married woman's separate property to the interest owned at the time of conveyance.

The insistence of the court on the covenant of warranty as the basis for passage of after-acquired title (either to raise an estoppel or as an enforceable contract right) is somewhat surprising in view of the fact that only a year earlier (1892) it apparently had accepted, in *Lindsey v. Freeman*,[3] estoppel by representation in the conveyance as the proper rationale in deed cases. It is felt that the result in *Wadkins* is not historically supportable on the warranty basis.

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* This is Part Two of an Article which was begun in 20 Sw. L.J. 97 (1966). See Part One for a comprehensive Table of Contents.

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[1] See cases collected in nn. 1-7, Part One, 20 Sw. L.J. 97 (1966).

[2] 86 Tex. 194, 24 S.W. 385 (1893).

[3] 83 Tex. 259, 1 S.W. 727 (1892); also see text Part One, *supra*, Section II(F), 20 Sw.L.J. 97, 116-23. Three years earlier the court had apparently recognized the estoppel rationale in the case of mortgages in Willis v. Smith, 72 Tex. 565 (1889).

However should a married woman be estopped by representations made in her conveyance?

Although under a disability to contract generally, the wife, when properly joined by her husband, was under no disability to convey her separate property.[4] In some jurisdictions where the married woman has not been under a common law or statutory disability to convey, she has been estopped by her representations;[5] however, the majority of the cases are to the contrary.[6] Since a covenant of warranty constitutes no part of a conveyance, it is difficult to perceive a basis for denying the estoppel, other than a pronounced paternalistic attitude by the courts.[7] Assuming good faith of both grantor and grantee, the courts, in the case of the married woman, seemingly have created an equity in favor of the utterer of the misrepresentation. The situation is distinguishable from the homestead conveyance, where it has been repeatedly held the wife cannot be estopped unless her statement is characterized as wilfully fraudulent,[8] and where strong public policy factors exist to prevent disruption of the marital unit.

The second ground of the *Wadkins* case was based on an 1846 statute, in effect at the time of the conveyance in 1856, which read in part as follows:

"AN ACT DEFINING THE MODE OF CONVEYING PROPERTY IN WHICH THE WIFE HAS AN INTEREST

Art. 1003. (174) [1] . . . [W]hen a husband and his wife have signed and sealed any deed or other writing purporting to be a conveyance of any estate or interest in any land, slave or slaves or other effects, the separate property of the wife . . . *such deed* or conveyance *shall pass all the right, title, and interest which the husband and wife or either of them, may have in or to the property therein conveyed.*[9]

[4] See discussion of the court as to the effect of statutory restrictions in Ballard v. Carmichael, 83 Tex. 355, 18 S.W. 734, 737 (1892). As to contractual capacity of married women generally, see McKnight, *Liability of Separate and Community Property for Obligations of Spouses to Strangers,* ch. 11, CREDITORS RIGHTS IN TEXAS (1963); SPEER, MARITAL RIGHTS IN TEXAS, ch. 20, & § 552, ch. 25 (1961).

[5] King v. Rea, 56 Ind. 1 (1877): Knight v. Thayer, 125 Mass. 25 (1878); Fowler v. Shearer, 7 Mass. 21 (1810). And in the following cases the estoppel resulted at least in part in statutory modification of the married woman's disabilities: Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408, 51 N.W. 379 (1892); Fitzgerald v. Allen, 126 Miss. 678, 89 So. 146 (1921); Zimmerman v. Robinson, 114 N.C. 39, 19 S.E. 102 (1894); Martin v. Yager, 30 N.D. 577, 153 N.W. 286 (1915); George v. Bradon, 214 Pa. 623, 64 A. 371 (1906).

[6] Prior v. Loeb, 119 Ala. 450, 24 So. 714 (1898); Menard v. Campbell, 180 Mich. 583, 147 N.W. 556 (1914); Bradford v. Wolfe, 103 Mo. 391, 15 S.W. 426 (1891); see also Sandwich Mfg. Co. v. Zellmer and cases following it, cited note 5 *supra,* as to the effect of statutes modifying married women's disabilities.

[7] See the discussion in SPEER, *op. cit. supra* note 4, at § 235.

[8] Parrish v. Hawes, 95 Tex. 185, 66 S.W. 209; Brown v. Federal Land Bank, 180 S.W. 2d 647 (Tex. Civ. App. 1944) *error ref.;* Sanders v. Life Ins. Co. of Virginia, 57 S.W.2d 327 (Tex. Civ. App. 1933); Thompson Sav. Bank v. Gregory, 59 S.W. 622 (Tex. Civ. App. 1900).

[9] Act of April 1846, effective June 22, 1846, Vol. 10, p. 156 (Emphasis added.).

The court construed the statute as applying only to the separate property of the wife owned at the time of the conveyance, emphasizing the italicized clause.

This article was repealed in the codification of 1879. The provisions of the Act of 1879 have been carried forward with minor changes into the codification of 1925 (as article 1299) and have only recently been repealed by the Act of 1963.[10] Article 1299 did not contain the italicized clause of the 1846 Act and should not compel the restrictive construction made in the *Wadkins* case. Therefore it is arguable that, upon repudiation of the covenant of warranty as the basis for after-acquired title in *Lindsey v. Freeman*[11] and repeal of restrictive statutory wording with the codification of 1879, the married woman should be bound as to after-acquired title by valid deeds of her separate property executed after 1879.

Following the enactments of 1961 and 1963,[12] resulting in the removal of the married woman's disability to contract as to her separate property, she will now be bound on her covenant of warranty and, whatever rationale is applied, her deeds will be amenable to the after-acquired title doctrine. However, a *caveat* remains, directed toward the second ground of the *Wadkins* decision. Although article 4614 now allows the wife the "sole management, control and disposi-

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[10] Art. 1299.

Conveyance of separate lands of wife.—The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized by law to take acknowledgements to deeds for the purpose of being recorded, and certified to in the mode pointed out in articles 6605 and 6608.

Article 1299 was originally enacted in the Acts of 1897, p. 41, G.L. Vol. 10, p. 1095 and was continually carried forward until repealed by the Acts of 1963. It is replaced by amended articles 6626 and 6614, which now read as follows:

Art. 4626.

A married woman shall have the same powers and capacity as if she were a feme sole, in her own name, to contract and be contracted with, sue and be sued, and all her separate property, her personal earnings and the revenues from her separate estate which is not exempt from execution under the laws of Texas shall thereafter be subject to her debts and be liable therefor, and her contracts and obligations shall be binding upon her. As amended Acts 1963, 58th Leg., p. 1188, Ch. 472, § 6.

Art. 4614.

Wife's separate property.—All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of lands thus acquired, shall be her separate property. The separate property of the wife shall not be subject to the debts contracted by the husband before or after marriage nor for the torts of the husband. During marriage the wife shall have the sole management, control, and disposition of her separate property, both real and personal. As amended Acts 1963, 58th Leg., p. 1188, ch. 472, § 1.

[11] 83 Tex. 259, 1 S.W. 727 (1892).

[12] TEX. REV. CIV. STAT. ANN., arts. 4614 and 4626 (1952), quoted note 10 *supra*.

tion of her *separate property*" (emphasis added), this wording is sufficiently similar to the 1846 statute, *i.e.*, "any estate or interest in any land, slave or slaves, or other effects, the *separate property of the wife*" (emphasis added) to suggest that a court might raise an implication from the words "separate property" as it did in *Wadkins:*

> The use of the words "separate property of the wife" restricts the operation of the act, and necessarily implies that the relation of the wife to the property must be such, at the time the conveyance is made, as to render it her separate estate; for it is that alone which the statute empowers her thus to convey.

Such an implication, however, should be rejected, as the tenor of the recent amendments to the statutes applying to the married woman's separate property is to place her, as to such property, in the same position as if she were a *femme sole.*

Passing to a consideration of the husband's property and powers, it should first be observed that the husband is not put under a disability, generally, to contract or to convey as a result of marriage. However, his powers are not as broad as at common law, where he, and not the wife, had the sole power to convey property that, prior to marriage, was property of the wife. Since the husband is under no contractual disability, his deeds as to conveyances of his separate and the non-homestead community property[13] will pass after-acquired title on either the estoppel or warranty theory.[14]

Whether a conveyance by the husband, without mention or joinder of the wife, will pass such an interest as to allow grantees to cut off the wife's interest either as bona fide purchasers or bind it under the after-acquired title doctrine is of great importance to the title examiner. For instance, is it necessary, where sufficient time has not passed to cure title by adverse possession, for the examiner to make inquiry as to the marital history of every male grantor in the chain of title, whether or not the presence of a wife is indicated from the record? Three possible situations may result, with the same apparent record title, depending upon whether the husband attempted a conveyance of (a) the separate property of the wife, (b) the non-homestead community property, or (c) the homestead community or separate property of the husband.

Clearly the husband has no right to convey the wife's separate

[13] Irion v. Mills, 41 Tex. 310 (1874); Wadkins v. Watson, 86 Tex. 194, 24 S.W. 385 (1893); Stallings v. Hullum, 33 S.W. 1034 (Tex. Civ. App. 1895), *former case,* 79 Tex. 421, 15 S.W. 677; Wooten v. Pennock, 114 S.W. 465 (Tex. Civ. App. 1908).

[14] TEX. REV. CIV. STAT. ANN. art. 4619, § 1 (1952); see also Young v. Magee, 196 S.W.2d 203, *aff'd,* 145 Tex. 485, 198 S.W.2d 883 (1946). Stramler v. Coe, 15 Tex. 211 (1855), Miller v. Miller, 285 S.W. 837 (Tex. Civ. App. 1926), *error dism.*

property.[15] With legal title in the wife's name, a later conveyance by the husband alone would indicate a hiatus in the chain of title and would be handled as such by the examiner. However, where the chain of title merely indicates a conveyance into and out of the grantor, John Doe, the situation is altered. The property may be John's separate property (where John is married or single), the non-homestead community or homestead community property of John and an undisclosed wife. In either of the latter two instances record legal title is in John, and the title of the undisclosed wife is equitable.

As to non-homestead community property, the conveyance may be supported upon two grounds: first, upon the ground of a valid conveyance by husband as community manager;[16] and, second, upon the bona fide purchaser doctrine, where a subsequent purchaser has paid value without actual or constructive notice (*e.g.*, unoccupied property) of the wife's one-half equitable interest.[17] Where the wife has previously died intestate, leaving children, the husband's power as community manager is terminated; however, the children's undisclosed equitable interest is also subject to being lost to a subsequent purchaser for value without notice.[18]

Notwithstanding non-disclosure of the existence of a wife, by record or otherwise, the examiner is confronted with the alternative possibility of undisclosed homestead. It is fundamental law in Texas that the husband, even as community manager, normally has no power to convey the homestead without the proper joinder and acknowledgement of his wife.[19] As the marital homestead may be established in any possessory interest in real property,[20] the examiner must consider the ever-present possibility that the homestead may have existed in the community property or the separate property of either spouse.

The attempted homestead conveyance by the husband alone is

[15] Vercelli v. Provenzano, 28 S.W.2d 216 (Tex. Civ. App. 1930); Coleman v. First Nat'l Bank, 43 S.W. 938, *aff'd*, 94 Tex. 605, 63 S.W. 867 (1901). This is not true, however, if record title appears to be in the husband and the property is presumably community, when a conveyance by husband to a bona fide purchaser for value without notice will cut off the wife's interest: Roswurm v. Sinclair Prairie Oil Co., 181 S.W.2d 736 (Tex. Civ. App. 1944) *error ref.*; Foster v. Christensen, 67 S.W.2d 246 (Tex. Civ. App. 1934).

[16] See statute and cases cited note 14 *supra*.

[17] Strong v. Strong, 128 Tex. 470, 98 S.W.2d 346 (1946); Patty v. Middleton, 82 Tex. 586, 17 S.W. 909 (1891); Stahl v. Westerman, 250 S.W.2d 325 (Tex. Civ. App. 1952); Buckalew v. Butcher-Arthur, Inc., 214 S.W. 2d 184 (Tex. Civ. App. 1948) *error ref. n.r.e.*; Ellett v. Mitcham, 145 S.W.2d 917 (Tex. Civ. App. 1940) *error dism, judgm. cor.*

[18] See Patty v. Middleton and Strong v. Strong, note 17 *supra*.

[19] TEX. REV. CIV. STAT. ANN., art. 4618 (1952), and see discussion and cases collected SPEER, MARITAL RIGHTS IN TEXAS, §§ 499, 500 (1961).

[20] Johnson v. Prosper State Bank, 125 S.W.2d 207 (Tex. Civ. App. 1939); Greenawalt v. Cunningham, 107 S.W.2d 1099 (Tex. Civ. App. 1937); First Nat'l Bank v. Dismukes, 241 S.W. 199 (Tex. Civ. App. 1922).

voidable at the instance of the wife,[21] and, if husband and wife remain in possession, no subsequent purchaser will take free of such rights so long as such possession continues. Consider, however, where the conveyance by husband was in 1902; can a purchaser today rely upon abandonment of the homestead where search shows no occupancy by anyone for 25 years? The answer is no.

It is well established that upon attempted conveyanc by the husband of his separate or community homestead property that abandonment of the homestead during lifetime of the husband and wife will remove the impediment to the husband's conveyance, and title will pass to the grantee as an after-acquired title.[22] Similarly, where the wife dies leaving the husband as her sole heir or devisee of Blackacre, upon acquisition by the husband of the wife's one-half interest, it will pass to his grantee as an after-acquired title.[23] However, where the wife dies intestate leaving children, or dies testate and the husband is not the devisee, the husband will not acquire the wife's interest, and, accordingly, it cannot pass under his deed. Since death terminated the marital relationship before an abandonment of the homestead, at no time prior to wife's death could husband convey wife's one-half interest as community manager. In this instance the interest of the wife will pass to her children or devisees free of the husband's attempted conveyance, leaving him liable on his warranty as to the wife's one-half interest.[24]

The result in the converse situation, where the husband alone conveys the homestead community property and predeceases the wife, leaving no children or devisees, is not well settled in Texas. Although the conveyance is not effective as to the wife's one-half interest, can the grantee assert a right to the husband's interest against the wife? Generally, the husband is held to be estopped by his deed; however, at least one case holds that such an attempted conveyance by the husband is void and not voidable as to the wife, use and possession alone not being the measure of her right to his half.[25] Unquestionably,

[21] Cleveland v. Mulner, 141 Tex. 120, 170 S.W.2d 472 (1943); Gulf Production Co. v. Continental Oil Co., 139 Tex. 183, 164 S.W.2d 488 (1942).

[22] Allison v. Shilling, 27 Tex. 450 (1864); Lewis v. Brown, 321 S.W.2d 313 (Tex. Civ. App. 1959) *error ref. n.r.e.;* Miller v. Southland Life Ins. Co., 68 S.W.2d 558 (Tex. Civ. App. 1934).

[23] Irion v. Mills, 41 Tex. 310 (1874).

[24] Marble v. Marble, 114 S.W. 871 (Tex. Civ. App. 1908); Colonial & U.S. Mortgage Co. v. Thetford, 66 S.W. 103 (Tex. Civ. App. 1901); *cf.*, Randolph v. Junker, 21 S.W. 551 (Tex. Civ. App. 1892). Where, however, the conveyance is made by the husband after the wife's death, to a bona fide purchaser for value, the equitable title passing from the wife to her heirs may be cut off; see cases cited note 17 *supra.*

[25] Stallings v. Hullum, 33 S.W. 1034 (Tex. Civ. App. 1895), *former case,* 79 Tex. 421, 15 S.W. 677; Colonial & U.S. Mortgage Co. v. Thetford, 66 S.W. 104 (Tex. Civ. App. 1901); Randolph v. Junker, 21 S.W. 551 (Tex. Civ. App. 1892).

the conveyance of the husband's interest is ineffective during the surviving spouse's lifetime where she asserts her right to a probate homestead in the property. However, upon her death all vestige of homestead protection ceases, and there would seem to be no reason then to deny the effectiveness of the husband's deed as to his one-half interest. The situation differs from that in which the wife predeceases the husband leaving heirs or devisees as to her one-half interest, for there the husband never acquires the power to convey her interest, as community manager, free of the homestead. Here, on the contrary, the husband is vested with his interest and the corresponding power to convey except where disabled by statute.

A sharp distinction must be drawn between attempted conveyances and attempted mortgages of the homestead by the husband. It is settled that a lien on the homestead must be validly made at the outset or it is void and may not be reformed.[26] Accordingly, abandonment of the homestead during the lifetime of the marital partners will not validate the prior attempted mortgage.[27]

B. *Lienholders And Creditors*

1. *Mortgagees and After-Acquired Property* In considering application of the after-acquired title doctrine to voluntary and involuntary liens, at least three areas of inquiry are presented: (1) the passage of an after acquired title under a voluntary lien instrument, such as a mortgage or deed of trust, where no specific after acquired title clause is present in the instrument, (2) the rights and priorities of creditors affixing liens upon a grantor's property during the interim period between the execution of a deed capable of carrying after acquired property and the acquisition of title by the grantor, and (3) the problems of reacquisition of property by voluntary lienors following foreclosure of a superior lien, vis-à-vis junior lien-holders.

(1) It is apparent that after-acquired title will pass under mortgages and deeds of trust in the same manner as deeds, although few cases in point are found in Texas.[28] Even these few seem to be divided as to the basis upon which after-acquired title will be held to pass.

It has been the author's observation that most draftsmen are careful to limit deeds to the interests actually intended to pass thereunder.

[26] TEX. CONST. art. XVI, § 50.

[27] See discussion in Stallings v. Hullum, 33 S.W. 1034 (Tex. Civ. App. 1895).

[28] Anderson v. Casey-Swasey Co., 103 Tex. 466, 129 S.W. 349 (1909); Clark v. Gountt, 138 Tex. 558, 161 S.W.2d 270 (1942); Ackerman v. Smiley, 37 Tex. 211 (1872); Galloway v .Moeser, 82 S.W.2d 1067 (Tex. Civ. App. 1935); Shamburger Lumber Co., Inc. v. Bredthauer, 62 S.W.2d 603 (Tex. Civ. App. 1933); Masterson v. Burnett, 66 S.W. 90 (Tex. Civ. App. 1901); Taylor v. Huck, 65 Tex. 238 (1885).

This is not true in the drafting of mortgages and deeds of trust. Where O is receiving by deed an undivided fractional interest in Blackacre and contemporaneously executing a purchase money deed of trust, if the deed of trust is not limited to the interest passing under the deed, any interest later acquired by O will pass under the deed of trust to the mortgagee, contrary to the probable intent of O.

An interesting question arises where O after executing a deed of trust containing an express often acquired property clause, conveys an undivided interest to *A*, with *A* expressly assuming the obligation of the outstanding note and burden of the deed of trust lien. Such assumption has an estoppel effect and has been held not only to validate a void pre-existing lien on the grantor's homestead,[29] but also to remove the bar of usury from the prior assumed obligation.[30] If, at the time of the conveyance, *A* owns or later acquires a portion of the outstanding interest, will it accrue to the mortgagee under the terms of the assumed deed of trust? Although such a result has occurred when the deed of trust contained an express after-acquired property clause, cases in other jurisdictions generally deny such an unbargained-for windfall in absence of statute or express intention in the instrument.[31]

However, there is a difference between the mortgage containing an express after-acquired property clause that property other than that particularly described in the mortgage instrument, if acquired, will be bound by the mortgage, and the mortgage purporting to describe all interests in Blackacre. As to the former, during the period the mortgage is outstanding, Greenacre, not described specifically in the mortgage, upon acquisition by O would be bound by an equitable lien in the mortgagee's favor. *A*, later acquiring the specific property, Blackacre, and expressly assuming the debt and lien thereon, very probably would not intend to include by way of equitable lien all future property that he might acquire during the pendency of the indebtedness on Blackacre. The denial of *A* as being bound by the express clause has been justified in other jurisdictions on the basis that the covenant does not run with the land and no privity of estate exists between *A*, O and mortgagee.

It is much harder to justify this result as to the very property described in O's mortgage to the Bank and O's deed to *A*, *i.e.*, Blackacre. When *A* later acquires an outstanding undivided interest in Blackacre, on what ground can he now avoid the express representa-

[29] Rivas v.Reile, 172 S.W.2d 700 (Tex. Civ. App. 1943).

[30] Warren v. Higginbotham-Bartlett Co., 75 S.W.2d 487 (Tex. Civ. App. 1937).

[31] See discussion and cases collected in 3 GLENN, MORTGAGES, §§ 428-429 (1943) and OSBORN, MORTGAGES 104-05 (1951). No Texas cases were found.

tions as to specific property contained in the deed and mortgage? In Texas such result might follow by treating the representations of the deed of trust as then binding *A* by estoppel; or, upon third party beneficiary contract principles, which have been applied to extend personal liability to *A* on the obligation,[32] to likewise bind *A* as to the scope of the lien under the deed of trust.

2. *Creditors Of The Grantor* Another virtually unlitigated area of Texas law concerns the rights and priorities of creditors affixing liens before the after-acquired title passes to the debtor. Consider, for example, the following sequence of events: (1) *O*, without title, conveys Blackacre to *A* by warranty deed which *A* records. (2) *C* records an abstract of judgment against *O* in the county in which Blackacre is situated. (3) *O* then obtains title by deed from *X*. May *A* prevail against *O*? No Texas cases are found in point.

If, in fact, recordation of the deed by *A* constitutes notice to *C*, *C*, of course, will lose.[33] However, as pointed out previously, it is seriously doubted that notice should be imputed from a conveyance made prior to the time grantor receives title.[34] Where, however, apparent record title to the after-acquired interest is in *O* (*e.g.*, *O* later acquires by conveyance from a prior adverse possessor) the deed to *A* is within *C*'s scope of search and, if recorded, will give priority to *A*'s claim.

In the event that the deed to *A* is either unrecorded or treated as being outside the scope of search of *C*, priority between *A* and *C* will depend upon the nature of the interest *A* holds under the deed and the interaction of the recording statutes.

If *A*'s right is based on the concept of an enforceable contract right similar in nature to an equitable right of specific performance, it should likewise be treated as an interest outside the scope of the recording statutes,[35] relegating *C* to his common law position of being unable to catch apparent but unowned interests of *O*.[36] Where *A*'s right is based on estoppel by deed, if treated as a sufficiently substantial pre-existing equity, *A* may prevail on the basis of an equity existing outside the recording acts. On the other hand, if *A*'s right as an

[32] Edwards v. Beals, 271 S.W. 887 (Tex. Comm. App. 1925); Allen v. Traylor, 212 S.W. 945 (Tex. Comm. App. 1919).

[33] See Hale v. Hollen, 36 S.W. 288, *aff'd.*, 90 Tex. 427, 39 S.W. 287 (1896).

[34] *Supra*, Part One, Section III (B), 20 Sw. L.J. 97, 128-33 (1966).

[35] Johnson v. Darr, 114 Tex. 516, 272 S.W. 1098 (1925); however, upon an equitable conversion it appears that grantee's interest is treated as being within the recording acts. See Wright v. Lassiter, 71 Tex. 641 (1888); Rule v. Richards, 159 S.W. 386 (Tex. Civ. App. 1913), r.o.g. 207 S.W. 912 (Tex. Comm. App.) (1919); Holford v. Patterson, 240 S.W. 341 (Tex. Civ. App. 1922), *aff'd*, 113 Tex. 410, 257 S.W. 213 (1923); Simmons v. Eakin, 54 S.W.2d 1045 (Tex. Civ. App. 1932).

[36] See discussion, *supra*, Part One, Section III (A), 20 Sw. L.J. 97, 126-28 (1966).

interest in the land is treated merely as having derivative existence through O, it would seem that C's lien would intercept title to Blackacre in the conduit through O, prior to reaching A.

However mechanical this latter interceptive approach may seem, it finds foundation in cases where conveyances with purchase money liens reserved are made at a time when there exists a general lien, *e.g.*, abstract of judgment, against the grantee.[37] Obviously, if the purchase money lien is in the nature of a vendor's lien or equitable purchase money lien, title comes to the grantee burdened with the lien which, of course, is superior to the *pre-existing* abstract of judgment lien.[38] This result has been extended to the lien of a deed of trust executed contemporaneously with the deed by the grantee to one other than the grantor, in face of the argument that title has to pass through the grantee before the deed of trust lien would be effective.[39] However, a showing of "privity" has been required between mortgagee and the vendor. This seems to be no more than requiring a sufficient connection between mortgagee and vendor so that mortgagee may be considered to have succeeded to the vendor's rights either by way of assignment or subrogation. In the absence of such connection, however, it has been held that the abstract of judgment will intercept the title of the grantee before the deed of trust lien attaches.[40]

Whether the interception approach will be applied will depend upon the definition of O's interest after he acquires title from X. Texas case authority is virtually non-existent. In the early case of *Ackerman v. Smiley*,[41] the court stated that the vendor would hold the title "in trust" for the vendee and not subject to vendor's creditors. In the *Ackerman* case, O (who had previously conveyed Brownacre by deed to A) purchased Brownacre from X at an execution sale; and O's creditors maintained that the deed should be made to O rather than to A, so their liens might attach. In denying this result, the court emphasized the trustee concept and maintained that when O purchased Blackacre it was as "trustee" for A.

The situation is apparently analogized to that of a purchase money resulting trust, consideration being paid by A with title later being acquired by O.[42] As such, the equitable interest of A would be outside the scope of the recording statutes and, hence, not caught by C's

[37] See Masterson v. Burnett, 66 S.W. 90 (Tex. Civ. App. 1901), *error ref.*, and cases cited therein at p. 93.

[38] First Nat'l Bank of Chicago v. Southwestern Lumber Co., 75 F.2d 814 (5th Cir. 1935).

[39] Masterson v. Burnett, 66 S.W. 90 (Tex. Civ. App. 1901) *error ref.*

[40] *Supra* note 39.

[41] 37 Tex. 211 (1872).

[42] However, in the true purchase money resulting trust situation payment of the consideration by X and passage of title to O must occur as part of the same transaction.

intervening lien.[43] Since, in the above example, *C* is a general lien creditor and has given up nothing for the lien on Blackacre, the result that *A* prevail over *C* does not seem unduly harsh. It may be argued that, as it was within *A*'s discretion to have protected himself by requiring recordation of *O*'s title prior to purchase, she should suffer the loss. The choice presented is between a volunteer and a careless purchaser for value. It would seem that value paid by *A* would create a superior equity, however feeble, in his favor as against *C*.[44]

Although outside the scope of this Article, passing mention should be made of the estoppel effect of voluntary mortgages, where different lien priorities may exist. For instance, *O*, owning Blackacre, executes separate deeds of trust on Blackacre to *A*, *B* and *C*, in that order. Upon due recordation this becomes the order of priority. Upon default by *O* and a trustee's sale by *A*, all interest in Blackacre will pass to the purchaser *X*, terminating any prior equity of redemption of *B*, *C* or *O*, with *B* and *C* being limited to a share in the proceeds, if any, received over and above the balance due on the indebtedness to *A* and reasonable costs of sale.

In some instances, however, *O* has either bought in at the trustee's sale or reacquired Blackacre from *X*. Contrary to *O*'s contention that he now stands in the shoes of *A* or *X*, free of the leins of *B* and *C*, the reacquisition is treated as a later acquired title inuring to the benefit of *B* and *C* under their respective deeds of trust, the result being to effectively promote the lien position of the junior lienholders.[45]

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[43] Johnson v. Darr, 114 Tex. 516, 272 S.W. 1098 (1925), and see discussion, Part One, *supra*, Section III (A), 20 Sw. L.J. 87, 126-28 (1966).

[44] A related problem occurs where *O*, upon acquiring title, executes a deed of trust for value to Bank; Bank will prevail if (1) the prior deed to *A* is unrecorded or outside Bank's scope of search and (2) the lien interest of Bank under the deed of trust qualifies as such legal interest as to cut off prior equities.

Texas is a lien theory state as to mortgages with all possessory rights remaining in the mortgagor prior to foreclosure, subject only to the lien of the mortgagee. It is commonly said that the legal title remains in the mortgagor. [See, *e.g.*, Duty v. Graham, 12 Tex. 427 (1854); Willis v. Moore, 59 Tex. 628 (1883)]. If so, is the lien interest of the mortgagee sufficient to cut off prior equitable interests? Cases assume so, without discussion, apparently treating the lien as a sufficiently legal interest to cut off prior equities, and have considered such lien holders as purchasers for value under the recording acts. Turner v. Cochran, 94 Tex. 480, 61 S.W. 923 (1901); *but cf.*, McKeen v. Sultenfuss, 61 Tex. 325 (1884).

[45] Slaughter v. Morris, 291 S.W. 961 (Tex. Civ. App. 1926). However, not all reacquisitions by a vendor inure to his vendees, where vendor acquires title from a source hostile to the vendee: Foster v. Johnson, 89 Tex. 640, 36 S.W. 67 (1896) (acquisition through tax foreclosure sale); Horne v. Smith, 79 Tex. 310, 15 S.W. 240 (1891) (acquisition by adverse possession); Robinson v. Douhitt, 64 Tex. 101 (1885); Pitman v. Henry, 50 Tex. 357 (1878); Smith v. Mentes, 11 Tex. 24 (1853); Houston Oil Co. v. Reese-Corriher Lumber Co., 181 S.W. 745 (Tex. Civ. App. 1916) (from state following forfeiture); *but cf.*

C. *Mineral Conveyances And Oil And Gas Leases—Duhig And Progeny*

By applying the doctrine of after-acquired title to a case involving a breach of warranty in a convyance of minerals, the Texas courts have begotten a strange, if not unique, offspring. In *Duhig v. Peavy-Moore Lumber Co.*,[46] O conveyed all of Blackacre to *A* by general warranty deed, at a time when an undivided one-half interest in the minerals was outstanding. The deed retained to the grantor "an undivided one-half interest in and to all mineral rights or minerals of whatever description in the land." In subsequent litigation between O and *A* as to mineral ownership O contended that the reservation in his deed to *A* was in addition to the prior outstanding interest, and not as protection on his warranty to *A*. *A*, of course, took subject to the prior outstanding interest as it was reserved in a deed constituting a link in the chain of title through which he claimed,[47] and to have given effect to O's contention would have resulted in a breach of warranty for which *A* could have had redress by return of a proportionate part of his consideration.

However, the court refused to allow O to breach his warranty "by assertion of title in contraction or breach of warranty." As the deed on its face purported to convey the surface and one-half of the minerals in Blackacre, it was held that O was "estopped" to assert any title to the reserved interest until the title of *A* be made whole. The court indicated that if the reserved interest was not sufficient to make up the breach, the grantee would acquire the entire reserved interest of the grantor together with a cause of action for breach of warranty for the deficiency.

The result may be logical, but the court's rationale for the case is not. For example, if O purports to convey Blackacre to *A* by deed, conveying the surface and an undivided one-half mineral interest, at a time when O owns only the surface estate, it would seem unquestionable that any after-acquired title by O in the minerals up to an

Breen v. Morehead, 126 S.W. 650 (Tex. Civ. App. 1910), *aff'd*, 104 Tex. 254, 136 S.W. 1047 (1911); Dillard v. Cochran, 153 S.W. 662 (Tex. Civ. App. 1913) (by adverse possession); Morris v. Housley, 34 S.W. 659 (Tex. Civ. App. 1896).

[46] 135 Tex. 508, 144 S.W.2d 878 (1938). For other cases following *Duhig* see: Fantham v. Goodrich, 150 Tex. 601, 244 S.W.2d 510 (1951), 1 OIL & GAS REP. 153; Miles v. Martin, 159 Tex. 336, 321 S.W.2d 62 (1959), 10 OIL & GAS REP. 580; Peck v. Lankford, 157 Tex. 335, 302 S.W.2d 645 (1957), 7 OIL & GAS REP. 628; Continental Oil Co. v. Doomas, 386 S.W.2d 610 (Tex. Civ. App. 1964) *error granted*, 22 OIL & GAS REP. 394; Fleming v. Miller, 149 Tex. 368, 233 S.W.2d 571 (1950); Irels v. Schuette, 222 S.W.2d 1008 (Tex. Civ. App. 1949); Howell v. Liles, 246 S.W.2d 260 (Tex. Civ. App. 1951), 1 OIL & GAS REP. 506.

[47] Steed v. Crossland, 252 S.W.2d 784 (Tex. Civ. App. 1952), *error ref.*; Rogers v. White, 194 S.W. 1001 (Tex. Civ. App. 1917); Matthews v. Rains County, 206 S.W. 2d 852 (Tex. Civ. App. 1947), *error ref. n.r.e.*

undivided one-half interest would inure to *A*, whether or not the deed contained a warranty clause. The court, although stating that the case is one of "estoppel," plainly bases its rationale upon the probability of breach of warranty. Manifestly this is incorrect; as the remedy for breach of warranty is recovery of damages based upon consideration paid. Furthermore, estoppel as applied to an after-acquired title is not properly based on a breach of warranty, but on what the grantor purported to convey, *i.e.*, the grantor is estopped to later claim a title which he has previously solemnly purported to convey to his grantee. Whether or not a breach of warranty occurred is immaterial.

In *Duhig*, in order to determine what *O* purported to convey, it is necessary to determine the effect of the recital following the granting clause, *i.e.*, ". . . and being the same tract of land formerly owned by the Talbot-Duhig Lumber Company, and after the dissolution of said company, *conveyed* to W. J. Duhig by B. M. Talbot." In the former conveyance to Talbot an undivided one-half interest was reserved. The effect of a reference to a prior conveyance is somewhat uncertain. Nevertheless, where the court finds that the purpose of the reference was to limit the deed to the interest passed in a former deed, the effect will be to reduce the interest the granting clause purports to convey.[48] If the recital in *Duhig* were given such effect, the deed to *A* would purport to convey only that interest conveyed by the deed referred to, less the reservation by *O* in the deed to *A*, or, the surface and none of the minerals.

It is the author's opinion that the reservation in the *Duhig* deed should have been construed as limiting the grant and not merely indicating the source of title. In other cases, references using the word "conveyed" have generally been construed as having such a modifying effect.[49] If the court desired to eliminate the reservation to *O*, a much better basis than perversion of both the breach of warranty and after-acquired title concepts would have been repugnancy of the reservation clause to the granting clause. The latter clause, as modified, purported to convey the surface and one-half of the min-

[48] Stallings v. Slaughter, 159 S.W.2d 562 (Tex. Civ. App. 1941), *error ref. want. merit;* Spangler v. Spangler, 42 S.W. 2d 826 (Tex. Civ. App. 1931); Wilson v. Wilson, 118 S.W. 2d 403 (Tex. Civ. App. 1938).

[49] *Cf.*, King v. First Nat'l Bank, 144 Tex. 583, 192 S.W.2d 260 (1946); Harris v. Windsor, 156 Tex. 324, 294 S.W.2d 798 (1956), 6 OIL & GAS REP. 1234; Sharp v. Fowler, 151 Tex. 490, 252 S.W.2d 153 (1952), 1 OIL & GAS REP. 1835; Hooks v.Neil, 21 S.W.2d 532 (Tex. Civ. App. 1929) *error ref.* However, note the inconsistency of the court in Texas Co. v. Parks, 247 S.W.2d 179 (Tex. Civ. App. 1952) *error ref. n.r.e.*, 1 OIL & GAS REP. 2007, dealing with the operation of the proportionate reduction clause as to royalties and delay rentals in a partial interest lease.

erals, and the further reservation by a grantor of the entire mineral estate granted should be treated as void.[50] This would clearly be true if the deed granted only "an undivided one-half interest in the minerals" and subsequently reserved to the grantor "an undivided one-half interest in the minerals." This is, in effect, the grant in *Duhig*, and the addition of the surface estate to the grant should not affect the result.

The first limitation of the *Duhig* doctrine occurred in *Benge v. Scharbauer*,[51] which also concerned a landowner's conveyance of the minerals. At a time when an undivided 1/4th interest was outstanding, O conveyed all of Blackacre to A by warranty deed, reserving an undivided 3/8th interest in the minerals, conveying to A the right to lease, and also providing that "said leases shall provide for the payment of 3/8th of all the bonuses, rentals and royalties to the grantors." It was held that the deed purported to convey title to all the minerals under Blackacre, less the undivided 3/8thths reserved to O, or an undivided 5/8ths mineral interest. As O, at the time of conveyance, owned only an undivided 3/4ths mineral interest, by applying the *Duhig* rationale O's reservation was reduced to an undivided 1/8th. However, the court continued:

> The fractional part of the bonuses, rentals and royalties that one is to receive under a mineral lease usually or normally is the same as his fractional mineral interest, but we cannot say that it must always be the same. The parties owning the mineral interest may make it different if they intend to do so, and plainly and in a formal way express that intention. Here that intention is expressed by clear language in the deed that leases executed b ythe grantee under the power given shall provide for the payment of 3/8ths of all bonuses, rentals and royalties to the grantors. The provision is not an agreement that the parties to the deed shall participate in the bonuses, rentals and royalties in proportion to their ownership of mineral interests. It is rather a contractual provision that the grantors shall receive a specified part of the bonuses, rentals and royalties; namely, 3/8ths. . . .
>
> The warranty extends to what the deed purports to grant; namely, the surface and the 5/8ths interest in the minerals, and the application of the rule in the Duhig case assures the grantee of title to what the deed purports to grant him. But the warranty does not extend to the provision in the deed as to the interest in bonuses, rentals and royalties. The deed does not purport to convey the right given by that provision.[52]

The case has been severely criticized on the basis that the only meaningful ownership of a mineral right is ownership of the eco-

[50] Hester v. Weaver, 252 S.W.2d 214 (Tex. Civ. App. 1952) *error ref.*; Montgomery v. Ebony Hills Improvement Co., 229 S.W.2d 830 (Tex. Civ. App. 1950).

[51] 152 Tex. 447, 259 S.W. 2d 166 (1953).

[52] Note 51, *supra* at 169.

nomic benefits accruing thereto; that if a 3/8th interest had been outstanding, O would own none of the title but would be entitled to receive 3/8ths of the bonus, delay rentals and royalties.[53] Doubtless the parties may contract to share economic benefits of production in a proportion differing from that of their nominal "title" or power to lease. However, from the facts of *Benge*, it is doubtful that the parties actually intended to share title and benefits in differing proportions. Where the only evidence of objective intent is the fraction reserved in the conveyance (which in each clause was 3/8ths) it is hard to perceive how the court determined that the intent of the parties differed as to title on the one hand and as to bonus, rentals and royalties on the other. In order to justify the result in *Benge* it would seem that more specific contractual language should be required.

A further restriction of *Duhig* occurred within the context of a full interest oil and gas lease taken from the owner of a partial mineral interest, wtih the proportionate reduction clause either stricken from the lease, or, by recital, made inapplicable to the reserved royalty interest. Three cases were involved: *Gibson v. Turner*,[54] *McMahon v. Christman*,[55] and *Turner v. Gresham*.[56]

In this connection, assume that O, who owns an undivided 3/16ths interest in the minerals, gives a full interest lease, reserving a 1/8th royalty. The problem, of course, is the amount of royalty to which O is entitled. Were a proportionate reduction clause present in the lease, O would receive only 3/16ths x 1/8th, or a 3/128ths royalty.[57] In *Gibson*,[58] the lessee asserted that due to the over-conveyance of O, the *Duhig* rationale should be applied in the manner of an ersatz proportionate reduction clause to take away from O sufficient reserved royalty to reduce O's royalty interest from a full 1/8th to 3/128ths. The court refused to apply *Duhig*, primarily on the ground that as the lessee owned substantially all of the remaining mineral interest in the tract, there was no possibility of ouster; consequently,

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[53] WILLIAMS & MEYERS, OIL & GAS § 315 (1964).

[54] 156 Tex. 289, 294 S.W.2d 781 (1956), 6 OIL & GAS REP. 1212.

[55] 157 Tex. 403, 303 S.W.2d 341 (1957), 7 OIL & GAS REP. 610.

[56] 382 S.W.2d 791 (1963), 21 OIL & GAS REP. 171.

[57] The purpose of such clauses is to enable lessee to pay royalties and delay rentals in proportion to the interest actually owned by lessor where a subsequent failure of title occurs, or where lessee intentionally takes a full interest lease on lessor's partial interest. A common clause reads as follows:

"Without impairment of lessee's rights under the warranty in event of failure of title, it is agreed that if Lessor owns an interest in the oil, gas and other minerals or, in or under said land less than the entire fee simple estate, then the rentals and royalties to be paid lessor shall be reduced in the proportion that his interest bears to the whole and undivided fee."

[58] 156 Tex. 289, 294 S.W.2d 781 (1956).

no breach of warranty existed upon which *Duhig* could be applied;[59] and further held the language used to reserve the 1/8th royalty (in production from "said land.") indicated it was reserved from the entire interest in the land and not merely from the undivided interest conveyed. The dissent in *Gibson* correctly indicates that, as the true basis of the estoppel is the representations in the grant, the question of eviction is immaterial and that if *Duhig* were applied, it would relieve O of *all* his reserved royalty. This, of course, would fall short of making the lessee whole.

Substantially the same fact situation existed in *McMahon*,[60] the major difference being that a breach of warranty, with possibility of eviction, did exist because the lessee did not own substantially all of the remaining minerals. The court flatly refused to apply *Duhig* to the reserved landowner's royalty, stating:

> In Benge v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166, 169, we declined to extend the Duhig rule to transfer to a grantee any part of a 3/8ths royalty provided for in a deed while at the same time giving effect to the rule to transfer to the grantee a part of a 3/8ths interest in the mineral fee also reserved in the deed. We now decline to extnd the rule to oil, gas and minral leases.[61]

This statement seems to be a misconstruction of *Benge*. There the major premise was that parties may contract for the sharing of bonus, royalties and rentals in different proportions from ownership of the nominal title to a mineral interest. The above statement may be supported only inferentially by the court's observations in *Benge* that the warranty clause does not apply to reserved interests, which thought was somewhat expanded upon in *Gibson*.

Furthermore, in *McMahon*, the court, as a matter of law, limited the warranty of the lessor to the undivided interest leased, and took judicial notice of the fact that it is common practice of oil and gas lessees to take full interest leases on undivided interests as a device to acquire all additional, unknown or later acquired interests of the lessor:

> What did the parties intend? No doubt they intended that the covenant of warranty should have some operative effect or they would not have included it in the lease. No doubt they also intended it in the lease. No doubt they also intended that petitioners as lessors should have title to and enjoy the fruits of the reserved royalty. The parties

[59] However, the operation of the proportionate reduction clause is not so limited. Also, the right to reduce payments under such clause does not relieve lessor from breach of warranty due to overconveyance. Reeves v. Republic Production Co., 177 S.W.2d 1011 (Tex. Civ. App. 1944) *error ref.*

[60] 157 Tex. 403, 303 S.W.2d 341 (1957).

[61] 303 S.W.2d at 346.

> were bargaining with respect to an interest of an undivided 16/96ths and not with respect to the whole of the minerals in the 240 acres of land. Respondents knew, moreover, as did petitioners, that they themselves and third persons owned all interests in the minerals over and above the 16/96ths interest. Respondents paid a cash bonus on a 16/96ths interest; they paid no bonus on a greater interest. There was no occasion for respondents to exact from petitioners or for petitioners to furnish a warranty of title to any interest greater than the 11/96ths interest which they undertook to convey. It is evident that the parties intended the covenant of warranty to extend only to the 11/96th interest in the minerals, title to which passed to respondents under the lease, and we so hold on this record as a matter of law. So holding reserves the reserved royalty and preserves the warranty for its intended purpose. There has been no breach of warranty as we have interpreted it and the waranty cannot, therefore, be used by respondents as a vehicle for obtaining or for cutting down the royalty reserved to petitioners in the lease.[62]

The third case of *Gresham v. Turner*[63] reached a strange result, in view of *McMahon,* and it is disappointing that it was not appealed. O leased a 1/80th interest to *A* and reserved a 1/8th (or 10/80ths) royalty interest. In this case the court *reduced* the royalty reserved on the ground that the phrase "said land" in the royalty clause meant the undivided interest leased, and that O could not reserve a royalty larger than the interest leased. The case is certainly inconsistent with a growing body of law, including *Gibson,* interpreting the phrase "said land"[64] as describing the entire fee interest in land described rather than the undivided interest conveyed; it also conflicts with the line of cases based on *Greene v. White*[65] which indicates that a grantee owning title who accepts a deed from one without title, the deed containing a reservation back to the grantor, may be estopped by the deed recital to deny the reserved interest.

It seems obvious that beginning with *Gibson* (and perhaps *Benge* by hindsight) the court decided to limit *Duhig* to its facts and to relegate the parties to traditional remedies for damages in the event of breach of warranty, at least in the field of oil and gas leases.

It appears that *Duhig* will retain some vitality in connection with conveyances and reservations of the minerals by the landowner. However, a logical extension of the reasoning that the warranty

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[62] *Id.* at 347.

[63] 382 S.W.2d 791 (1963).

[64] See cases collected note 49, *supra,* and note 83, Part I, 20 Sw. L.J. 97 (1966).

[65] 137 Tex. 361, 153 S.W.2d 575, 136 A.L.R. 626 (1941). See also Adams v. Duncan, 147 Tex. 332, 215 S.W.2d 599 (1948), Newsom v. Newsom, 378 S.W.2d 842 (Tex. 1964), 21 OIL & GAS REP. 81; Lambe v. Glasscock, 360 S.W.2d 169 (Tex. Civ. App. 1962) *error ref. n.r.e.* The scope of Greene v. White has not been precisely delineated. See discussion notes in OIL & GAS REP. following the *Newsom* and *Lambe* cases *supra.*

clause does not apply to any reserved interests would also have the effect of overruling *Duhig* as to landowners' conveyances containing a mineral reservation. A comparison reading of the *Duhig* and *McMahon* decisions clearly indicates the shifting of judicial gears to a warranty basis of after-acquired title as a device to limit what is considered an unfavorable extension of the *Duhig* rule, rather than following the estoppel approach as laid down in *Lindsey v. Freeman*, whereby the warranty clause would have no limiting effect.

The degree of predictability as to future cases does not seem high. The court may take one of several approaches:

(1) overrule *Duhig* completely;

(2) limit *Duhig* to its facts and not apply it to landowners' conveyances with royalty reservations; or

(3) apply *Duhig* to all landowners' conveyances except oil and gas leases.

Due to the close analogy made by the courts between *Duhig* and after-acquired title cases, a limitation of *Duhig* on the basis of an inoperative warranty clause would seem to raise a question as to the application of after-acquired title to conveyances without warranty.[66] On the other hand, an application of the court's interpretation that *Duhig* will not be applied to reserved royalty interests would lead to the result in (2) above, limiting *Duhig* strictly to its facts. The tenor of *McMahon* is strongly to this effect.

If the third approach is used, *i.e.*, that *Duhig* will be applied to landowners' conveyances with reserved royalty interests, there will remain the problem of application. Assume that O conveys Blackacre to *A* at a time when an undivided one-eighth mineral interest is outstanding, O reserving in the conveyance a 1/16th royalty interest. If *Duhig* is applied, to what extent should O's reservation be defeated? Justice Garfield, from his dissent in *Gibson*,[67] indicated he would take it all. However, it can be argued that O's interest should only be reduced by the amount of royalty attributable to the outstanding mineral interest, *viz.*, 1/8th of 1/8th or 1/64th.

A partial answer may be forthcoming in the case of *Continental Oil Co. v. Doomas*,[68] where both the conveyance and the reservation were of a royalty interest. The court of civil appeals reformed the deed to provide that grantee would receive all royalty interest in

[66] However, this area may be quite small, if not non-existent, due to the ability of the courts to find implied warranties in most deeds. See the language in Lindsey v. Freeman and Wadsen v. Watson. It may well extend to all cases except quitclaim deeds, which, of course, will not pass after-acquired title. Generally the basis of the implied covenant is statutory from the use of the word "grant."

[67] 156 Tex. 289, 294 S.W.2d 781, at 793.

[68] 386 S.W.2d 610 (Tex. Civ. App. 1964), 22 OIL & GAS REP. 394.

excess of 1/8th of production and that the purported reservation of royalty by grantor was void in so far as it would conflict with such intent. The case is currently on appeal to the Texas Supreme Court.

It may be that the courts should limit *Duhig* strictly to its facts and relegate the parties to damages in other situations. However, return of consideration may be a far cry from the value of the interest lost. An enlightened application of estoppel by deed would seem a desirable alternative remedy.

D. *Grantors In A Representative Capacity*

It has been repeatedly held in Texas that a grantor executing a deed in a representative capacity will be personally bound by the recitals contained therein.[69] The cases have concerned deeds by administrators,[70] guardians,[71] trustees,[72] attroneys in fact,[73] and corporate officers.[74]

It is enlightening to observe the shift in rationale of these cases with cases involving deeds of married women and with the *Duhig* progeny, where passage of after-acquired title or of an estoppel by deed would result only from liability on the warranty clause. In the case of the grantor in a representative capacity, warranty liability (which rarely exists as to such conveyances) has been clearly rejected as a ground upon which to acquire the individual title of the grantor. Although some cases indicate the result may be bottomed upon an estoppel in pais, the court, in the case of *Surtees v. Hobson*,[75] firmly placed the rationale on estoppel by representations contained in the deed, with the result that a lessee in a guardian's lease, which lease purported to lease the entire land for oil and gas purposes, also picked up the grantor's life interest in the land. It was held that lessee's prior knowledge of the outstanding interest was immaterial:

> The agreed facts disclose that, prior to the acceptance of the lease Hobson was advised by his attorney that the title of the children was subject to a life estate in one-third of the land in favor of appellant. For this and other reasons it is asserted an estoppel in pais has not arisen against appellant, nor has he waived his rights. The proper disposition of this action is not controlled by the law of waiver or the doctrine of

[69] See notes 70-76 *infra*.

[70] Corzine v. Williams, 85 Tex. 499, 22 S.W. 399 (1893); Millican v. McNeill, 102 Tex. 189, 114 S.W. 106 (1908); Tomlinson v. Drought, 127 S.W. 262 (Tex. Civ. App. 1910); Rutherford v. McGee, 241 S.W. 629 (Tex. Civ. App. 1922).

[71] Surtees v. Hobson, 13 S.W.2d 345 (Tex. Comm. App. 1929).

[72] Crump v. Sanders, 173 S.W. 559 (Tex. Civ. App. 1915).

[73] Merchants Nat'l Bank v. Eustis, 28 S.W. 227 (Tex. Civ. App. 1894).

[74] Carothers v. Alexander, 74 Tex. 309, 12 S.W. 4 (1889).

[75] 13 S.W.2d 345 (Tex. Comm. App. 1929).

estoppel in pais. The doctrine of estoppel by deed is essentially different from an estoppel in pais and founded upon a different theory. Corzine v. Williams, 85 Tex. 499, 22 S.W. 399. Estoppel by deed precludes the competent parties to a valid sealed instrument and their privies to deny its force and effect by any evidence of inferior solemnity. They cannot allege any title or right in derogation of the deed nor deny the truth of any material fact asserted in it. Bigelow on Estoppel (6th Ed.) 362; 21 C.J. 1066; Corzine v. Williams, supra.

Whatever may be the rule in other jurisdictions, it is settled in this state that, where one in a representative capacity undertakes to convey land as the property of the estate which he represents, he is by his deed estopped from thereafter asserting against his grantee and those in privity with the latter an interest owned by him individually in the land. And this is true without regard to a covenant of warranty contained in the deed.[76]

E. *Grantees From Persons Without Title*

1. *Greene v. White* From time to time in Texas the question has arisen whether the grantee as well as the grantor may be estopped by deed representations so that after-acquired title might be applied in reverse. For example, *A* inherits title to Blackacre from an adverse possessor after acceptance of a deed from *O*, the apparent record owner, describing Blackacre. *O*'s deed reserves an undivided one-half interest in the minerals to the grantor. Is *A* now estopped to deny that *O* owns this mineral interest? Such result was suggested in the case of *Greene v. White*[77] but denied on the grounds that the property was the marital homestead of the grantees and that the reservation back did not qualify as a valid conveyance of the homestead under the Texas Constitution and statutes.

The principle was applied in the later case of *Adams v. Duncan*[78], where the prior deed with reservation was first asserted by the grantee in a suit against an adverse possessor (the actual owner) which suit was settled by conveyances between the parties. In a later suit by the original grantor, grantee claimed the title acquired by conveyance from the adverse possessor. The court held the grantee bound by the first deed and reservation contained therein.

It is fundamental that one is bound by all recitals in instruments forming a link in the chain of title through which he claims, whether such instruments are recorded or not.[79] It seems harsh to penalize *A*

[76] 4 S.W. 245, *aff'd*, 13 S.W.2d 345 (Tex. Comm. App. 1929).

[77] 137 Tex. 361, 153 S.W.2d 575 (1941), 136 A.L.R. 626.

[78] 147 Tex. 332, 215 S.W.2d 599 (1948).

[79] Greene v. White 137 Tex. 361, 153 S.W.2d 575 (1941); see Newsom v. Newsom, 378 S.W.2d 842 (Tex. 1964), 21 OIL & GAS REP. 81, where it was held reservation of life estate in a deed conveying an undivided one-half interest, related to entire fee, including undivided interest grantee had previously inherited from deceased mother.

with loss of title by estoppel by acceptance of a deed from one without title, and for which A may pay a consideration! If that rule be applied, a question remains with respect to those situations where the deed is executed and delivered by *O* and accepted by *A*, although *A* does not assert title through it.[80] Although seldom emphasized in the cases and usually presumed, it is the act of acceptance of the conveyance and not the subsequent assertion of rights thereunder by the grantee, that constitutes a completed transaction and creates a juridical relationship between grantor and grantee.[81] For example, upon acceptance, a grantee becomes personally liable under deed recitals of assumption of a prior indebtedness; a conveyance becomes sufficient to remove property from the estate of the grantor or to bind the grantee as trustee in a trust instrument where he may be removed only by court action.[82] Logically, no reason can be seen why a different result should occur in determining the point at which the grantee is bound by recitals in the deed, vis à vis the grantor; however, the requirement of assertion of the deed will have the effect of limiting the application of *Greene v. White* to those situations where it may be inequitable to allow A to change position.

2. *Adverse Possessors* Although application of the after-acquired title and estoppel by deed doctrines to the law of adverse possession has produced some interesting results,[83] remarks here will be limited to cases dealing with adverse possession of the mineral estate. Where *AP* enters and begins adverse possession of the surface of Blackacre, prior to a severance of the mineral estate, subsequent acts of the owner, short of actual physical ouster or judgment obtained in a trespass to try title suit, are insufficient to interrupt *AP*'s possession, which, when completed, will mature title to both the mineral and surface estates.[84] It is elementary that, if *AP* enters claiming only a surface estate, the

[80] See Lambe v. Glasscock, 360 S.W.2d 169 (Tex. Civ. App. 1962) *error ref. n.r.e.*, 17 OIL & GAS REP. 354, and discussion note at page 359 concluding that Greene v. White is limited to those situations where the instrument is "asserted" in the chain of title. To what extent must it be relied upon? Under this theory can any detrimental reliance such as building of improvements suffice? Will only asserting the deed in litigation be sufficient?

[81] Schneider v. Murphy, 183 F.2d 777, *cert. denied*, 340 U.S. 911.

[82] Chapman v. Crichet, 127 Tex. 590, 95 S.W.2d 360 (1936), assumption of prior indebtedness; Warren v. Higginbotham-Bartlett Co., 75 S.W.2d 487 (Tex. Civ. App. 1937) (estoppel to contest debt and lien); Republic Nat'l Bank & Trust Co. v. Bruce, 130 Tex. 136, 105 S.W.2d 882 (1937) (trustee).

[83] Strong v. Garrett, 148 Tex. 265, 224 S.W. 471 (1949), where the ultimate irony was the application of the after-acquired title doctrine. This is sometimes referred to as the "horse opera" case. Any deed executed during the period of occupancy prior to maturing of title may result in application of the after-acquired title doctrine, if the relation-back theory of title is applied.

[84] Broughton v. Humble Oil & Ref. Co., 105 S.W.2d 480 (Tex. Civ. App. 1937) *error ref.*; *cf.*, Stubbs v. Lowery's Heirs, 253 S.W.2d 312 (Tex. Civ. App. 1952) *error ref. n.r.e.*

title acquired will be limited to his claim.[85] Normally, such limitation of title will occur when *AP* is claiming through a deed, insufficient in itself to pass title.

Suppose, however, *AP* enters and begins adverse possession of Blackacre under the ten-year statute of limitations and some seven years later makes a conveyance of Blackacre to AP_2, with a reservation of all of the mineral estate. AP_2 then enters into posssesion and completes the ten-year possession period. No question arises as to the sufficiency of the tacking of possession, privity existing between *AP* and AP_2.[86] The question, rather, is to what interest does AP_2 mature title? Has he limited the claim to the surface by claiming through the deed from *AP*? The answer, apparently, is that the claim is not so limited.[87] Limitation to the entire fee having been begun by possession of *AP*, the only effect of the deed, a nullity as to title, was to establish privity between the adverse possessors for the tacking of possession periods of *AP* and AP_2. Upon completion of the possession period, the title acquired by AP_2 is treated as an after-acquired title, and, as against *AP*, AP_2 is estopped by the deed which he accepted to deny *AP*'s ownership of the minerals. However, where such deed is executed by *AP* to AP_2 before possession is begun by either, AP_2's claim at the time of original entry and his subsequent possession will be limited by the deed with the result that title to only the surface will be matured.[88] If, after execution and delivery of the deed, *AP*, instead of AP_2 had entered into possession of the surface, it would seem that no title would be matured, as *AP*'s acts of possession are not referable to the interest he claims, *i.e.*, the mineral estate.

V. Conclusion

It is submitted that the proper basis for the doctrine of after-acquired title is clearly stated in the above quotation from *Surtees v. Hobson*. It is to be hoped that future cases will demonstrate a clear delineation of rationale so that a consistent body of law may be developed in this area.

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[85] Thomas v. Southwestern Settlement & Dev. Co., 131 S.W.2d 31 Tex. Civ. App. 1939) *error dism. judgm. cor.*

[86] McAnally v. Texas Co., 124 Tex. 196, 76 S.W.2d 997 (1934).
Civ. App. 1947) *error ref. n.r.e.*

[87] Houston Oil Co. v. Moss, 155 Tex. 157, 284 S.W.2d 131 (1953); Clements v. Texas Co., 273 S.W. 993 (Tex. Civ. App. 1925); McLendon v. Comer, 200 S.W.2d 427 (Tex. Civ. App. 1947) *error ref. n.r.e.*

[88] Thomas v. Southwestern Settlement & Dev. Co., 132 Tex. 413, 123 S.W.2d 290 (1939); Schneider v. Murphy, 183 F.2d 777, *cert. denied*, 340 U.S. 911.

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