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THE DOCTRINE OF AFTER-ACQUIRED TITLE

INTRODUCTION

This Comment will discuss briefly some of the problems which can arise when one person attempts by a valid instrument to convey more title than he actually has and subsequently acquires the title which he had purported to convey. Historically, in such a case the grantor is estopped to assert his after-acquired title against his grantee.¹ It has been said that this result is achieved through estoppel by deed rather than by estoppel *in pais*;² and that, therefore, there is no necessity for an adjudication of the rights of the parties in such a case;³ and that there is no necessity for showing a change in position of the party asserting the estoppel.⁴

Tiffany states that there is no necessity of regarding the after-acquired title as actually passing to the grantee.⁵ However, there are numerous decisions and dicta in this country to the effect that the conveyance actually passes the grantor's after-acquired legal title to the grantee.⁶ There have been,⁷ and still are,⁸ a number of statutory provisions to this effect in various states. It should be remembered that a void deed (void in the sense of improper execution, lack of delivery, or insufficient description of the land) will not pass after-

¹ *Sturgeon v. Wingfield*, 15 Mees & W. 224, 153 Eng. Rep. 831 (Ex. 1846); *Doe d. Christmas v. Oliver*, 10 Barn. & C. 181, 109 Eng. Rep. 418 (K. B. 1829); 4 TIFFANY, REAL PROPERTY § 1230 (3d ed. 1939); III AMERICAN LAW OF PROPERTY § 15.19 (1952); 5 THOMPSON, REAL PROPERTY § 2602 (perm. ed. 1941).

² 4 TIFFANY, REAL PROPERTY § 1230 (3d ed. 1939).

³ III AMERICAN LAW OF PROPERTY § 15.18 (1952).

⁴ *Rutherford v. McGee*, 241 S.W. 629 (Tex. Civ. App. 1922); III AMERICAN LAW OF PROPERTY § 15.18 (1952).

⁵ 4 TIFFANY, REAL PROPERTY § 1230 (3d ed. 1939).

⁶ *Biber v. Martin*, 294 Ill. 488, 128 N.E. 518 (1920); and see RAWLE, COVENANTS FOR TITLE § 248 (5th ed. 1887), and the numerous cases therein collected, including, e.g., *Ackerman v. Smiley*, 37 Tex. 211 (1873), and *Watkins v. Wassell*, 15 Ark. 73 (1854).

⁷ RAWLE, COVENANTS FOR TITLE § 249 (5th ed. 1887), and the early statutes therein collected and discussed.

⁸ Arkansas, ARK. STAT. § 50-404 (1947); California, CAL. CIV. CODE § 1106 (Deering 1941); Colorado, COLO. REV. STAT. ANN. § 118-1-15 (1953); Idaho, IDAHO CODE ANN. § 55-605 (1947); Illinois, ILL. REV. STAT. c. 30, § 6 (1955); Iowa, IOWA CODE § 557.4 (1954); Kansas, KAN. GEN. STAT. ANN. § 67-207 (1949); Missouri, MO. REV. STAT. § 442.430 (1949); Montana, MONT. REV. CODES ANN. § 67-1609 (1947); Nebraska, NEB. REV. STAT. § 76-209 (1943); Nevada, NEV. COMP. LAWS § 1505 (1929); North Dakota, N. D. REV. CODE § 47-1015 (1943); Oklahoma, OKLA. STAT. tit. 16, § 17 (1951); Utah, UTAH CODE ANN. § 57-1-10 (1933); and Virginia, VA. CODE ANN. tit. 55, § 52 (1950).

acquired title.⁹ The instrument must be valid except for the fact that the grantor does not have as much title as he purports to convey.

LEGAL OR EQUITABLE?

There seems to be some question as to whether the passage of after-acquired title is achieved through legal or equitable doctrines. The doctrine of estoppel by deed is equitable in its origin.¹⁰ However, on the basis of decisions or dicta it must be considered to be the rule in most states that a conveyance which will create an estoppel to assert an after-acquired title will transfer not only the beneficial interest but also the legal title to the grantee or his successors.¹¹ Where there are statutes on the subject,¹² they are expressly to that effect.¹³ It is said that the title vests by operation of law, or by inurement (the grantor's after-acquired title inures to the benefit of the grantee) as soon as it is acquired by the grantor¹⁴ without the need of judicial assistance.¹⁵ This rule of property would appear to be legal in operation, rather than equitable.¹⁶ For purposes of this discussion the term *inurement* will be used to describe the passage of legal title, and the term *estoppel by deed* will be used to describe the equitable doctrine.

The question as to whether after-acquired title inures to the benefit of the grantee by virtue of legal or equitable principles may appear to be of theoretical interest only in those jurisdictions which have a blended system of law and equity; however, this is not so. It has importance in regard to whether judicial proceedings are necessary to pass the legal title, and it has importance in regard to whether the grantee has a right of electing to reject the after-acquired title in order to sue for breach of warranty. The problem will be discussed in more detail, *infra*.

⁹ *Kemery v. Zeigler*, 176 Ind. 660, 96 N.E. 950 (1912), and the many authorities cited therein. See also, BIGELOW, ESTOPPEL 338-341 (4th ed. 1886).

¹⁰ See III AMERICAN LAW OF PROPERTY § 15.23 (1952).

¹¹ *Id.* at § 15.21. And see, e. g., *Biwier v. Martin*, 294 Ill. 488, 128 N.E. 518, 522 (1920).

¹² See note 8 *supra*. See also Annot., 58 A.L.R. 367 (1929).

¹³ *Ibid.*

¹⁴ *Scott v. Cohen*, 115 F.2d 704 (5th Cir. 1940); *Weegens v. Karels*, 374 Ill. 273, 29 N.E.2d 248 (1940); *Crider v. Kentenia-Catron Corp.*, 214 Ky. 353, 283 S.W. 117 (1926); *St. Landry Oil and Gas Co. v. Neal*, 166 La. 799, 118 So. 24 (1928); *Sorrell v. Bradshaw*, 222 S.W. 1024, 1025 (Mo. 1920); *Armour Realty Co. v. Carboy*, 124 N.J.L. 205, 11 A.2d 243 (1940); *Caswell v. Llano Oil Co.*, 120 Tex. 139, 36 S.W.2d 208 (1931); *Baldwin v. Root*, 90 Tex. 546, 40 S.W. 3 (1897); III AMERICAN LAW OF PROPERTY § 15.21 (1952).

¹⁵ *Ibid.*

¹⁶ See III AMERICAN LAW OF PROPERTY § 15.23 (1952). And see the dictum in *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670, 672 (1903): "It may be said that such estoppel by deed is not an equitable doctrine, but it is a rule of the common law, based on the recitals or covenants of the deed."

The equitable doctrine of estoppel by deed and the legal doctrine of inurement can both be operative in the same jurisdiction. In Oklahoma, for example, one can find statements by the court that the doctrine is equitable in nature,¹⁷ as well as statutes¹⁸ and cases¹⁹ stating the rule of property that after-acquired legal title passes to the grantee by operation of law. The Oklahoma statute applies to pass legal title only when the grantor purported to convey a fee. The equitable doctrine is used when interests less than a fee have been purportedly conveyed. It would seem that when legal principles are operative by statute the equitable doctrine is not excluded; it can be relied on in situations which are not covered by the statute.

NECESSITY OF COVENANTS

In spite of statements of a contrary view,²⁰ it seems that covenants of warranty are not necessary for the passage of after-acquired title by estoppel by deed or by inurement.²¹ The majority view seems to be that if the conveyance purports to transfer some certain estate, the grantor is estopped, irrespective of the presence of covenants, to assert that an estate did not pass by virtue of his deed.²² It has also been stated that where a covenant of warranty is expressed in, or implied by, the deed, the grantee has a right to the title under the covenant, and the principle of estoppel need not be invoked to give him that right.²³ This would, it seems, also be true under statutory covenants of warranty²⁴ and under statutes which provide that a grantor's after-acquired title will pass automatically to the grantee where the deed purports to convey a certain interest or title.²⁵

POSSIBILITY OF ELECTION

Where *A*, having no title, purports to convey to *B* by general warranty deed, *B* can sue *A* for damages for the breach of warranty. But where *A* later acquires title, will such a suit for damages bar *B*

¹⁷ *Hanlon v. McLain*, 206 Okla. 227, 242 P.2d 732 (1952).

¹⁸ OKLA. STAT. tit. 16, § 17 (1951).

¹⁹ See *Born v. Bentley*, 207 Okla. 21, 246 P.2d 738 (1952).

²⁰ See 4 TIFFANY, REAL PROPERTY § 1232 (3d ed. 1939); Annot., 58 A.L.R. 380 (1929).

²¹ *Van Rensselaer v. Kearney*, 18 U.S. (11 How.) 631 (1850); *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727 (1892); 4 TIFFANY, REAL PROPERTY § 1232 (3d ed. 1939); III AMERICAN LAW OF PROPERTY § 15.19 (1952).

²² See note 21 *supra*.

²³ *Robinson v. Douthit*, 64 Tex. 101, 106 (1885); *Harrison v. Boring*, 44 Tex. 255, 261 (1875); and *Gould v. West*, 32 Tex. 339, 353 (1869).

²⁴ E.g., ARIZ. CODE ANN. § 71-408 (1939); FLA. STAT. § 689.03 (1953); IDAHO CODE ANN. § 55-612 (1947); MISS. CODE ANN. § 847 (1942); MO. REV. STAT. § 442.420 (1949); TEX. REV. CIV. STAT. ANN., art. 1297 (1945).

²⁵ See notes 7 and 8 *supra*.

from claiming *A*'s after-acquired title? Or will the doctrine operate, vesting *B* with *A*'s newly acquired title? If so, can *A* reduce the damages which he would be required to pay, or recover any damages which he had already paid for the breach of his warranty?

One view is that the after-acquired title passes to the grantee in spite of its prevention²⁶ or reduction²⁷ of recovery (possibly to the extent of making him liable for the repayment of recovered damages) for breach of the covenants of title. In the early case of *Sayre v. Sheffield Land, Iron & Coal Co.*,²⁸ the Supreme Court of Alabama in an action on breach of warranty, where defendant had no title when the deed was made but acquired title before suit was brought, held that plaintiff is entitled to only nominal damages, as the title acquired by defendant inures to plaintiff's benefit. It should be mentioned that these cases concern the fact situation where the defendant in the warranty suit acquires title before judgment. Few cases have been discovered where the grantor had paid a judgment for breach of warranty and then acquired title to the property in question.²⁹ They indicate that the grantee would be estopped to claim the grantor's after-acquired title after receiving damages for breach of the covenants. However, it is submitted that in situations of this nature the title examiner for the purchaser from the grantor who had paid the judgment and later acquired the title which he seeks to convey would be well advised to require a deed from the grantee who had recovered damages for the breach of warranty, if the title examiner learns of the prior deed and judgment. A deed would be necessary because the legal rule of inurement would automatically vest legal title to the property in the grantee, even though he had collected damages for the breach of warranty. Therefore, if that grantee would not convey his interest, the purchaser could probably not take good title from the grantor. In representing the grantor who is required to pay damages for breach of covenants

²⁶ *Powers v. Patten*, 71 Me. 583 (1880); *Baxter v. Bradbury*, 20 Me. 260 (1841); *Reese v. Smith*, 12 Mo. 344 (1849); *Knowles v. Kennedy*, 82 Pa. 445 (1877); *Farmer's Bank v. Glenn*, 68 N.C. 35 (1873). And see III AMERICAN LAW OF PROPERTY § 15.23 (1952); 7 THOMPSON, REAL PROPERTY § 3845 (perm. ed. 1941).

Compare the case of *King v. Gleason's Adm'x*, 32 Ill. 348 (1863), which says that the after-acquired title will inure to the benefit of the grantee even after suit for breach of covenants is commenced, if such title is acquired before damages are assessed against the grantor.

²⁷ *Cornell v. Jackson*, 3 Cush. 506 (Mass. 1849), where the defendant in a suit on the warranties acquired a portion of the warranted premises, that portion inured to the benefit of the plaintiff and reduced his damages *pro tanto*.

²⁸ 106 Ala. 440, 18 So. 101 (1895). *Accord*: *Reese v. Smith*, 12 Mo. 344 (1849).

²⁹ *Lost Creek Coal & Mineral Land Co. v. Hendon*, 215 Ala. 212, 110 So. 308 (1926); *Alger-Sullivan Lbr. Co. v. Union Trust Co.*, 207 Ala. 138, 92 So. 254 (1922); and *Campbell v. Martin*, 89 Vt. 214, 95 Atl. 494 (1915).

the attorney should consider the advisability of insisting that the same judgment which decrees damages would also cancel the deed and vest the grantee's claim to title in the grantor. In cases of partial failure of title, the grantee's claim to title could be revested in the grantor to the extent for which grantor is required to respond in damages.

On the other hand, it has been said that since both the legal rule of inurement and the equitable doctrine of estoppel by deed were developed for the benefit of the grantee, in those cases where the grantee has already asserted a claim for breach of covenant and the grantor then acquires the title called for by his deed, the grantee has an option either to accept the after-acquired title or to stand on his claim for damages.³⁰ Under this view it would seem that the grantee would be held to his election if he chose to take the judgment for damages on the covenant and was paid; consequently, the after-acquired title would not operate to his benefit in such a situation.³¹

It is submitted that the grantee would have an election under the equitable doctrine of estoppel by deed to accept the after-acquired title or to reject it and sue for breach of the covenants of title. Payment to the grantee would constitute such an election, and title acquired by the grantor after payment would not benefit the grantee. It is further submitted that under the legal rule of inurement the grantee would have no election and that the after-acquired title would vest in him by operation of law, even if the grantor had already paid a judgment for damages on the breach of warranty. This legal rule of property makes for security of title and prevents the creation of troublesome questions which would be raised for the title examiner by the use of any election on the part of the grantee. For example, most abstracts would not show whether the grantee had made a claim for breach of the covenants, even if a suit on the covenants had been actually filed, nor would they show what election the grantee made. Therefore, it is suggested that the preferable rule would be to allow no election, to apply the rule of property that the after-acquired title automatically passes to the grantee by operation of law and to give the grantor an equitable lien on the property and a right to recover damages paid before the doctrine operated. If the grantor acquired the title before judgment,

³⁰ *Burton v. Reeds*, 20 Ind. 87, 93 (1863); *Blanchard v. Ellis*, 1 Gray 195, 199 (Mass. 1854); *Resser v. Carney*, 52 Minn. 397, 54 N.W. 89 (1893); *Tucker v. Clarke*, 2 Sandf. Ch. 96 (N.Y. 1844); *Woods v. North*, 6 Humph. 309, 313 (Tenn. 1845); *McInnis v. Lyman*, 62 Wis. 191, 22 N.W. 405, 406 (1885); III AMERICAN LAW OF PROPERTY § 15.23 (1952); 4 TIFFANY, REAL PROPERTY § 1230 (3d ed. 1939).

³¹ Cases cited note 29 *supra*.

the operation of the legal doctrine would reduce or prevent the recovery of damages for the breach of warranty.

QUITCLAIMS

It is often said that the grantor in a quitclaim deed is not estopped to assert an after-acquired title.³² This, it seems, is not necessarily true in all cases. If the grantor sets forth on the face of the instrument, by recital or averment, that he owns or is possessed of a particular estate in the premises, the grantor and his privies with notice would be estopped to assert that the grantor acquired title after the time of his purported conveyance.³³

It should be remembered that the basic difference between a deed and a quitclaim is that a deed purports to convey title to land, but a quitclaim purports to transfer only the grantor's interest, not necessarily the land itself.³⁴ However, under the "four corners" rule of construction, *i.e.*, that an instrument will be construed by weighing each of its provisions in the light of all the other provisions contained therein, it cannot be dogmatically stated that the simple test which has just been stated conclusively brands an instrument as either a quitclaim on one hand or as a deed on the other.³⁵ Therefore, one should consider this possibility in applying the rule of thumb that quitclaims will not work an estoppel as to after-acquired title.

The doctrine of estoppel by warranty can be effective to make the grantor's after-acquired title jump to the grantee, even in a quitclaim deed. However, for this result to be achieved the warranty must extend to the estate which the grantor purportedly owned, not to the estate which was conveyed. An interesting example of the result where a grantor conveyed all her "right, title, and interest" (quitclaim) with covenants of warranty to defend "the title to the said property conveyed herein" is the case of *Clark v. Gauntt*.³⁶ In

³² *E.g.*, *Brown v. Harvey Coal Corp.*, 49 F.2d 434, 439 (E.D. Ky. 1931); *Quivey v. Baker*, 37 Cal. 465, 471 (1869); *Haskett v. Maxey*, 134 Ind. 182, 33 N.E. 358, 360 (1893); *French v. Bartel & Miller*, 164 Iowa 677, 146 N.W. 754, 755 (1914); and *Perrin v. Perrin*, 62 Tex. 477, 479 (1884). See also, 4 TIFFANY, REAL PROPERTY § 1231 (3d ed. 1939).

³³ See *Van Rensselaer v. Kearney*, 18 U.S. (11 How.) 631 (1850), and the authorities cited therein. See also the discussion and collection of cases at III AMERICAN LAW OF PROPERTY § 15.19 (1952).

³⁴ See *Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270 (1942); *Roswurm v. Sinclair Prairie Oil Co.*, 181 S.W.2d 736 (Tex. Civ. App. 1944) *error ref. w.o.m.*; *Cook v. Smith*, 107 Tex. 119, 174 S.W. 1094 (1915); *Annot.*, 3 A.L.R. 945 (1919).

³⁵ See *Trico Oil Co. v. Pelton*, 114 S.W.2d 1209 (Tex. Civ. App. 1938). Compare *Compton v. Trico Oil Co.*, 120 S.W.2d 534 (Tex. Civ. App. 1938) *error ref.* See also note 28 *supra*.

³⁶ 138 Tex. 558, 161 S.W.2d 270 (1942).

that case the Texas Supreme Court adopted the Commission's opinion which stated:

The rule as to after-acquired title does apply to mortgages as well as deeds. (citation of authorities) But it does not apply to the deed of trust executed by . . . (grantor), because by it she did not convey the lots or the entire interest in them but she granted and conveyed only the interest she then owned and she warranted the title only to the property that she conveyed . . .

The deed of trust . . . purports to convey the interest that . . . (grantor) owned at the time it was executed and not any greater interest or estate. As to the warranty, the general rule is that the covenant of general warranty extends only to what is granted or purported to be granted. (citation of authorities)³⁷

It would seem that if grantor had warranted title to the fee instead of to the "said property conveyed herein" she would have been estopped to assert her after-acquired title. Therefore, in executing quitclaim deeds one should be careful to make no recitals or averments that the grantor owns a certain interest in the land, and if covenants of warranty are used, they should extend only to the interest, if any, which is granted, and not to any certain interest in the land.

CASES WHERE DOCTRINE INAPPLICABLE

Since the doctrine applies only when the assertion of the after-acquired title would involve a denial that the conveyance passed the interest or estate which it purported to pass or convey, it does not apply where the grantor re-acquires the title from the grantee either by voluntary conveyance,³⁸ judicial sale or sale at execution,³⁹ adverse possession,⁴⁰ or tax sale.⁴¹ Nor, in certain cases, is the grantor estopped to assert that, while the legal title was by the conveyance vested in the grantee, the beneficial interest was vested in another.⁴²

An interesting exception to the rule that the doctrine of after-acquired title does not apply where the grantor re-acquires the title from the grantee by sale at execution is the Texas case of *Cherry*

³⁷ 138 Tex. at 561, 161 S.W.2d at 271.

³⁸ *Condit v. Bigalow*, 64 N.J. Eq. 504, 54 Atl. 160 (1903).

³⁹ *Erwin v. Morris*, 26 Kan. 664 (1881); *Rauch v. Dech*, 116 Pa. St. 157, 9 Atl. 180 (1887); *Goode v. Bryant*, 118 Va. 314, 87 S.E. 588 (1915).

⁴⁰ E. g., *Abbott v. Page*, 92 Ala. 571, 9 So. 332 (1891); *Harne v. Smith*, 79 Tex. 310, 15 S.W. 240, 242 (1891).

⁴¹ *Erwin v. Morris*, 26 Kan. 664 (1881); *Foster v. Johnson*, 89 Tex. 640, 36 S.W. 67 (1896).

⁴² *Harrold v. Morgan*, 66 Ga. 398 (1881); *Condit v. Bigalow*, 64 N.J. Eq. 504, 54 Atl. 160 (1903).

*v. Farmers Royalty Holding Co.*⁴³ In that case *A* conveyed fee title to *B*, reserving a vendor's lien. *A* assigned his lien to *C*. *B* executed deeds to a one-half mineral interest to *D* who conveyed the one-half mineral interest to Farmers Royalty. *C* foreclosed by judicial process and acquired full fee title. *C* conveyed the fee to *B* (who had made the mortgage and executed the mineral deed in question). *B* conveyed to Cherry. In holding that Cherry had constructive notice of Farmers Royalty's claim and that Farmers Royalty had good title to a one-half mineral interest, the Supreme Court of Texas per Chief Justice Hickman said:

... where a party claiming title through his predecessor under a warranty deed, fails because of the invalidity of a deed to his predecessor, the subsequent acquirement of title by the latter inures to the party's benefit *by virtue of the warranty* and may be the basis of a new action by him. (Emphasis added)⁴⁴

The court distinguished *Breen v. Moorehead*, discussed *infra*, and held under the chain of title doctrine that Cherry had constructive notice of Farmers Royalty's claim and was therefore not a bona fide purchaser for value.

It should also be noted that the result of this case was achieved under estoppel by warranty, and that the same result would not necessarily follow under estoppel by deed.

PURCHASE MONEY MORTGAGE

Assume in a hypothetical fact situation that *G* buys land from *E*, executing a purchase money mortgage on the land. *G* subsequently acquires better title to that same land from some other source. *E* forecloses his purchase money mortgage after *G*'s failure to pay the mortgage. *Query*: Does the mortgage bind the after-acquired title? There is a paucity of authority on this point, and it is split. The better view seems to be that the covenants in the purchase money mortgage operate only upon the estate acquired from the mortgagee-vendor and do not operate upon an after-acquired title from another source.⁴⁵

COTENANCY

Where cotenants convey to each other in order to effect a voluntary partition, the conveyances should be construed only as covering

⁴³ 138 Tex. 576, 160 S.W.2d 908 (1942).

⁴⁴ 138 Tex. at 580, 160 S.W.2d at 910.

⁴⁵ *Randall v. Lower*, 98 Ind. 255 (1884); and 4 TIFFANY, REAL PROPERTY § 1233 (1939). Cf. *Hitchcock v. Fortier*, 65 Ill. 239 (1872).

such interest as they all have (since they claim from a common source), and if one of them subsequently acquires a paramount title, he is not estopped to assert it against the others.⁴⁶ The reason for this exception to the doctrine of the passage of after-acquired title to the grantee seems to be that the purpose and effect of the cotenants' cross conveyances was not to transfer title to the land but merely to achieve a voluntary partition of such interests as the cotenants owned at the time of conveyance and to designate the share of each of the parties.⁴⁷

PERSONS BOUND BY DOCTRINE

Heirs of the grantor are precluded, to the same extent as was the grantor, from asserting that any estate acquired by the grantor after his conveyance but before his death did not inure to the benefit of the grantee.⁴⁸ However, it should be noted that the heirs of the grantor are not estopped to assert a title subsequently acquired by them from some source other than through their ancestor, the grantor.⁴⁹

It has been frequently said that an estoppel by deed binds not only parties but also privies.⁵⁰ There are a number of early cases which have strictly applied this rule by holding that a subsequent grantee is estopped to assert his grantor's after-acquired title against the grantor's prior grantee, without regard to whether the subsequent grantee had notice of the prior conveyance.⁵¹ The better view seems to be that the subsequent grantee for value is not bound by the doctrine unless he had either actual or constructive notice of the prior conveyance.⁵²

A literal application of the general principle that the estoppel

⁴⁶ *Doane v. Willicutt*, 5 Gray 328 (Mass. 1855); *Pendill v. Marquette County Agriculture Soc.*, 95 Mich. 491, 55 N.W. 384 (1893); *Rector v. Waugh*, 17 Mo. 1 (1852); and *Carson v. Carson*, 122 N.C. 645, 30 S.E. 4 (1898).

⁴⁷ *Chace v. Gregg*, 88 Tex. 552, 32 S.W. 520 (1895).

⁴⁸ *E. g.*, *French v. Spencer*, 62 U.S. (21 How.) 228 (1858); *DuBose v. Kell*, 90 S.C. 196, 71 S.E. 371 (1911).

⁴⁹ *E. g.*, *Ebey v. Adams*, 135 Ill. 80, 25 N.E. 1013 (1890); *Wm. D. Cleveland & Sons v. Smith*, 113 S.W. 547 (Tex. Civ. App. 1908), *rev'd on other grounds*, 119 S.W. 843 (1909). And see 4 TIFFANY, REAL PROPERTY § 1233 (3d ed. 1939).

⁵⁰ BIGELOW, ESTOPPEL 629 (6th ed. 1886); and 4 TIFFANY, REAL PROPERTY § 1234 (3d ed. 1939).

⁵¹ *E. g.*, *Powers v. Patten*, 71 Me. 583 (1880); *Ayer v. Philadelphia & Boston Face Brick Co.*, 159 Mass. 84, 34 N.E. 177 (1893); *Knight v. Thayer*, 125 Mass. 25 (1878); *White v. Patten*, 24 Pick. 324 (Mass. 1837).

⁵² *E. g.*, *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670 (1903); *Donahue v. Vosper*, 189 Mich. 78, 155 N.W. 407 (1915); *Ford v. Unity Church Soc.*, 120 Mo. 498, 25 S.W. 394 (1894); *Richardson v. Atlantic Coast Lumber Co.*, 93 S.C. 254, 75 S.E. 371 (1912); *Bernardy v. Colonial & United States Mtg. Co.*, 17 S.D. 637, 98 N.W. 166 (1904); and *Breen v. Moorehead*, 104 Tex. 254, 136 S.W. 1047 (1911).

binds all who are in privity with the grantor would include bona fide purchasers for value who claim through the grantor's after-acquired title.⁵³ A number of early cases adopted this view,⁵⁴ and other jurisdictions have reached the same result by virtue of the wording of the recording act⁵⁵ or because of the wording of statutory rules to be followed in the case of after-acquired title.⁵⁶

On the other hand, many jurisdictions follow the view that recordation made prior to the date that the grantor acquires title is outside the chain of title and does not afford constructive notice to a bona fide purchaser for value; therefore, the subsequent purchaser can get good title by virtue of the protection of the recording act, cutting off the earlier grantee's claim to title by inurement or by estoppel.⁵⁷

The Texas law is not clear on this point. *Breen v. Moorehead*⁵⁸ seemed to recognize and adopt the latter rule by saying:

A purchaser is not charged with notice of a conveyance which is of record, even though made by a person in the chain of title, unless it was made by such person after the time at which the records show him to have obtained the title; that is, the purchaser is not bound to search the records to determine whether any particular person in the chain of title, prior to obtaining the title, had done any acts which would affect the title.⁵⁹

However, the *Breen* case was distinguished in the *Cherry* case⁶⁰ and its authority was thereby considerably narrowed. For a discussion of the chain of title problem in Texas in regard to whether or not recordation gives constructive notice to a purchaser, see Olds, "The Scope of the Texas Recording Act,"⁶¹ and Williams, "Recordation Hiatus and Cure by Limitation."⁶²

⁵³ 4 TIFFANY, REAL PROPERTY § 1234 (3d ed. 1939); III AMERICAN LAW OF PROPERTY § 15.22 (1952).

⁵⁴ See note 51 *supra*.

⁵⁵ *Hitt v. Caney Fork Gulf Coal Co.*, 124 Tenn. 334, 139 S.W. 693 (1911).

⁵⁶ *Owen v. Brookport*, 208 Ill. 35, 69 N.E. 952 (1904); *Tilton v. Flormann*, 22 S.D. 324, 117 N.W. 377 (1908). Also see note 8 *supra*.

⁵⁷ *Rozell v. Chicago Mill & Lumber Co.*, 76 Ark. 525, 89 S.W. 469 (1905); *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670 (1903); *Donahue v. Vosper*, 189 Mich. 78, 155 N.W. 407 (1915), *aff'd*, 243 U.S. 59 (1917); *Ford v. Unity Church Soc.*, 120 Mo. 498, 25 S.W. 394 (1894); *Wack v. Collingswood Extension Realty Co.*, 114 N.J. Eq. 253, 168 Atl. 639 (1933); *Builders Sash & Door Co. v. Joyner*, 182 N.C. 518, 109 S.E. 259 (1921); *Bernardy v. Colonial & U.S. Mtg. Co.*, 17 S.D. 637, 98 N.W. 166 (1904); *Breen v. Moorehead*, 104 Tex. 254, 136 S.W. 1047 (1911). Also see 1 TIFFANY, REAL PROPERTY § 476 (3d ed. 1939), and 2 POMEROY, EQUITY JURISPRUDENCE § 658 (5th ed. 1941).

⁵⁸ 104 Tex. 254, 136 S.W. 1047 (1911).

⁵⁹ 104 Tex. at 257, 136 S.W. at 1048.

⁶⁰ 138 Tex. 576, 160 S.W.2d 908 (1942).

⁶¹ 8 Sw.L.J. 36 (1954).

⁶² 29 TEXAS L. REV. 1 (1950).

The subsequent grantee should not be estopped to assert title acquired by him from another source. This is similar to the situation where an heir of the grantor inherits the grantor's barred claim to after-acquired title and also acquires a paramount title from some other source.⁶³

RIGHTS OF INTERVENING JUDGMENT CREDITORS

Fact situation number one: *A* has no title. *A* attempts to convey to *B*. Judgment is rendered against *A*. *A* acquires title to the land which he purported to convey to *B*. *Query*: Does the after-acquired title pass to *B* free of, or subject to, the judgment lien? It has been held that *B* gets the title free of the judgment lien.⁶⁴

Fact situation number two: *A* has no title. Judgment is rendered against *A*. *A* attempts to convey to *B*. Then *A* acquires title to the land in question. *Query*: Does the after-acquired title pass to *B* free of, or subject to, the judgment lien? There is a split of authority. Some cases have held that *B*'s title is subject to the judgment lien;⁶⁵ others have held that it is free of the judgment lien.⁶⁶ The better view would seem to be that *B*'s title is subject to the judgment lien, for it does not seem that, by reason of the grantor's lack of title at the time of his purported conveyance, the grantee should profit at the expense of the judgment creditors.⁶⁷

DOCTRINE APPLIES TO LEASES

It is well settled that if a man makes a lease covering land in which he has no interest and later acquires an interest in the land, the lease will operate upon his interest as if it had been vested in him at the time of the lease.⁶⁸

DOCTRINE APPLIES TO CONTRACTS TO CONVEY

Where one contracts to convey land in which he has no interest but in which he later acquires an interest, specific performance of the contract may be enforced against him.⁶⁹ The legal doctrine of inurement would not be applicable, for he did not purport to convey an interest in the land.⁷⁰

⁶³ See note 49 *supra*. Also see THOMPSON, REAL PROPERTY § 2603 (1941).

⁶⁴ *Lamprey v. Pike*, 28 Fed. 30 (1886); *Brown v. Barker*, 35 Okla. 498, 130 Pac. 155 (1913); *Watkins v. Wassell*, 15 Ark. 73 (1854). *Contra*, *Leslie v. Harrison National Bank*, 97 Kan. 22, 154 Pac. 209 (1916).

⁶⁵ *E. g.*, *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945 (1908).

⁶⁶ *Watkins v. Wassell*, 15 Ark. 73 (1854).

⁶⁷ See 4 TIFFANY, REAL PROPERTY § 1234 (3d ed. 1939).

⁶⁸ 1 TIFFANY, LANDLORD AND TENANT § 76 (1910); CO.LITT. 45a, 47b.

⁶⁹ 4 POMEROY, EQUITY JURISPRUDENCE § 1405b, p. 1047 (5th ed. 1941), and authorities cited therein.

⁷⁰ See notes 1 and 22 *supra*.

DOCTRINE APPLIES TO OIL, GAS, AND MINERAL INTERESTS

Professor Kulp states the well settled rule that: "The doctrine of after-acquired title gives the lessee of a lease or the grantee of a mineral deed . . . the benefit of the after-acquired title of the lessor or grantor."⁷¹

A doctrine analogous to the after-acquired title doctrine has been developed in the field of oil and gas. This doctrine was first applied in the case of *Duhig v. Peavy-Moore Lumber Co.*⁷² and takes its name from that case. In that case the grantor Duhig owned the surface and one-half of the minerals. He conveyed the land to X, reserving one-half of the minerals. The Supreme Court of Texas adopted the Commissioner's opinion which in holding that "land" meant the "physical land" described and not the grantor's interest in the land said:

. . . The result is that the grantor has breached his warranty, but that he had and holds in virtue of the deed containing the warranties the very interest, one-half of the minerals, required to remedy the breach. Such state of facts at once suggests the rule as to after-acquired title . . .

In the instant case Duhig did not acquire title to the one-half interest in the minerals after he executed the deed containing the general warranty, but he retained or reserved it in that deed . . . If enforcement of the warranty is a fair and effectual remedy in case of after-acquired title, it is, we believe, equally fair and effectual and also appropriate here.⁷³

The opinion went on to hold that the covenant operates as an estoppel denying to the grantor and those claiming under him the right to set up his title against the grantee and those claiming under him.⁷⁴

SUMMARY

This discussion would indicate that:

1. The doctrine of after-acquired title was equitable in its origin.
2. The doctrine will not only estop the grantor but will transfer his legal title to the grantee in most American states.

⁷¹ II AMERICAN LAW OF PROPERTY § 10.15 (1952), citing *Greenshields v. Superior Oil Co.*, 204 Okla. 681, 233 P.2d 959 (1951); *Smith v. Bateman*, 230 S.W. 831 (Tex. Civ. App. 1921).

⁷² 135 Tex. 503, 144 S.W.2d 878 (1940).

⁷³ 135 Tex. at 507, 144 S.W.2d at 880.

⁷⁴ The doctrine of *Duhig v. Peavy-Moore Lumber Co.* has been considerably limited in the recent cases of *Harris v. Windsor*, —Tex.—, 294 S.W.2d 798, 6 Oil and Gas Rep. 1234 (1956); and *Gibson v. Turner*, —Tex.—, 294 S.W.2d 781, 6 Oil and Gas Rep. 1212 (1956), noted, 11 Sw. L. J. 249 (1957).

3. There are a number of statutes creating a legal rule of inurement.
4. Covenants are not necessary for the passage of after-acquired title by estoppel by deed or inurement, but when they are present title under the covenants may be asserted independently of estoppel by deed.
5. There is some question as to whether a grantee has the option to accept the after-acquired title or reject it and sue for damages for the breach of covenants.
6. Quitclaims will not ordinarily pass after-acquired title, but in certain extreme instances they may do so.
7. The doctrine does not apply where the grantor re-acquires title from the grantee or where the claim to after-acquired title is not inconsistent with the original grant.
8. Purchase money mortgages probably bind only the interest acquired from the vendor.
9. The doctrine does not apply to cross conveyances of cotenants which are made to achieve a voluntary partition of such interests as they own.
10. Heirs of the grantor are bound as to interests acquired through the grantor but not as to interests acquired from some source other than the grantor.
11. The doctrine binds parties with notice.
12. The recording acts may protect bona fide purchasers of value without notice.
13. The doctrine applies to leases.
14. The doctrine applies to oil, gas, and mineral interests.
15. The doctrine of *Dubig v. Peavy-Moore* is analogous to after-acquired title doctrine and can be used to bind interests which are owned at the time the grantor breaches his warranty.

Charles Robert Dickenson