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Robert W. Swenson
University of Utah

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STATUTORY ESTOPPEL BY DEED

ROBERT W. SWENSON†

The modern law of real property is notoriously deficient in the devices which it offers for protecting a purchaser of land from the financial loss which will result if he fails to receive a good title from his vendor. If the purchaser obtains a deed containing covenants for title, he may have an action for damages for breach of the covenants. In most jurisdictions, this merely amounts to restoration of the purchase price plus interest. If the covenant is the type which "runs with the land," the buyer may have the option to sue a remote covenantor in the chain of title. The protection afforded by the covenant is, of course, limited by the financial responsibility of the covenantor.

A purchaser of land also has the benefit of the recording act in the jurisdiction where the land is located. As a general proposition, deeds and instruments creating various types of incumbrances, if unrecorded, are of no effect against a subsequent bona fide purchaser of the land. These recording acts are frequently either worded or judicially construed in such a manner as to afford purchasers the very minimum protection. Title examination has come to involve an appraisal of a chain of title evidenced by the recorded conveyances and other instruments affecting the title. In most states, this appraisal is made by lawyers on the basis of an abstract of title prepared by a professional title searcher. Errors in reporting the true condition of the title may be made by the recorder or by the abstracter. And occasionally lawyers have been known to err in examining the abstract—a fact which is not startling in view of the voluminous nature of most abstracts of title. If these pitfalls have been successfully avoided, the purchaser must still be apprised of the fact that there are many claims or incumbrances which are not required to appear of record but which are nevertheless effective even against a purchaser who has no knowledge of them.¹

Since the above devices offer inadequate protection to purchasers of land, conveyancers in recent years have been turning to title insurance, title registration in some states, or the new

† Professor of Law, Drake University Law School.

1. PATTON, *TITLES* 138 n. 58 (1938), lists many such defects. See also Rood, *Registration of Land Titles*, 12 MICH. L. REV. 379, 389-393 (1914).

comprehensive statute of limitations. Title insurance is only as good as the coverage of the policy itself, and the desirability of title registration is still being disputed by the experts. The new all-inclusive statutes of limitations or "merchantable title statutes," as they are sometimes called, have not yet been completely tested in the courts.²

The buyer of land has another possible source of protection not mentioned above. It is available, however, only in the very rare case. Suppose X executes a deed conveying Blackacre to Y. The instrument contains either express or statutory implied covenants for title, or a recital by X that he is the owner. Actually X has no title. If he later acquires title, he will be estopped to deny that title passed by the deed. This principle is popularly called "estoppel by deed" or "estoppel to assert an after-acquired title." It is a subject which appears to intrigue the conveyances instructor and student alike.³ It is treated at length in texts and legal periodicals.⁴ Much of the writing on the subject has sought to clarify the exact manner in which the rule operates: does it give rise merely to a personal estoppel against the grantor and, as such, constitute an equitable concept, or is the after-acquired title to be regarded as actually passing to the grantee? That question may sound rather metaphysical but it has frequently, nevertheless, been regarded by the courts as decisive of certain types of cases. Specifically, it may influence the solutions to the following problems:

(1) Has the estoppel grantee the right to elect either to take the after-acquired title or to sue for damages on the covenants for title contained in the deed? The conveyee's decision will

2. Iowa has had a statute of this type since 1919. The present section appears in IOWA CODE § 614.17 (1946). For a good discussion of the history and recent popularity of such legislation, see Note, 33 MINN. L. REV. 54 (1948).

3. Almost all conveyances casebooks contain a chapter devoted to estoppel by deed. See KIRKWOOD, CASES ON CONVEYANCES c. 6 (2d ed. 1941); MARTIN, CASES ON CONVEYANCES c. 7 (1939). One of the best collections of cases is the AIGLER, CASES ON TITLES c. 7 (3d ed. 1942).

As far as the student is concerned, it appears to be a favorite pastime to coin names for the "doctrine," using phrases which are vocally descriptive of the speed with which the after-acquired title is supposed to pass to the grantee. A sort of legalistic onomatopoeia, if you like!

4. The standard work is RAWLE, COVENANTS FOR TITLE c. 11 (5th ed. 1887); see also BIGELOW, ESTOPPEL ch. 11 (6th ed. 1913); 4 TIFFANY, REAL PROPERTY §§ 1230-1234 (3d ed. 1939).

usually be predicated upon the change, if any, in the value of the land since the time of the original conveyance.

(2) Will the estoppel grantee prevail over a good faith purchaser or mortgagee from the grantor after the latter acquires title? What if the mortgage is a purchase-money mortgage?

(3) What are the rights of a creditor of the grantor who obtained a judgment (a) prior to the original conveyance; (b) between the time of the original conveyance and the later acquisition of title; or (c) after the title was acquired?

(4) If the grantor is married after the conveyance but before he acquires title, has the spouse an inchoate dower right?

(5) In an action of ejectment by the grantor against one who is wrongfully in possession, may the defendant defeat the action by showing that the estoppel grantee, not the plaintiff, is the true owner?

The above problems have met with a variety of solutions in the courts of the United States. It is not the purpose of this comment to review the decisions generally. Rather the discussion herein is limited to the effect of statutory restatements of the estoppel principle on these questions. Practically no attention has been given by the writers to these statutes. It is hoped that it may be helpful to classify these statutes and to observe the manner in which they have been interpreted by the courts. The purpose of this comment is to determine whether the statutes have made any conspicuous contribution to the general law of estoppel by deed and whether their influence has been as "pernicious" as some of the writers in the past have suggested.⁵

I. THE STATUTES AND THEIR HISTORY

Type One. The first statute in the United States on estoppel to assert an after-acquired title appears to have been the Missouri statute of 1825.⁶ At best, it was a clumsy job of drafting.

5. RAWLE, COVENANTS FOR TITLE § 248 (5th ed. 1887). The first edition in 1852 contained no reference to the statutes, and the third edition in 1860 contained only a brief summary of the statutes in Missouri and Arkansas (at p. 411). In the last edition, the statutes are vigorously attacked. This appears to have had little effect on the legislatures, although Rawle's theories on estoppel have had tremendous influence on the courts. The statutes are also criticized in BIGELOW, ESTOPPEL 449-450 n. 3 (6th ed. 1913), and specific suggestions for the revision of the Kansas statute are given.

6. 1 Mo. Laws (1825) Conveyances, § 6, p. 217. ". . . if any person shall sell and convey to another, by deed or conveyance, purporting to con-

The act applied to any deed "purporting to convey an estate in fee simple absolute" and executed by one who had no title. The Missouri Supreme Court construed this to mean that a deed containing no covenants for title may be the basis for estoppel, although a mere quitclaim or a special warranty deed was not within the purview of the statute.⁷ Since the statute specified the conveyance of an estate in "fee simple absolute," a lease of a term for years or a deed purporting to convey an estate less than fee simple, such as a life estate, would seem to be outside the statute.⁸ The statute further provided that the effect of the

vey an estate in fee simple absolute, in any tract of land, or real estate, lying and being in this state, not then being possessed of the legal estate or interest therein, at the time of the sale and conveyance, but after such sale and conveyance, the vendor shall become possessed of and confirmed in the legal estate to the land or real estate, so sold and conveyed, it shall be taken and held to be in trust, and for the use of the grantee or vendee, and the conveyance aforesaid shall be held and taken, and shall be valid as if the vendor or grantor had the legal estate or interest at the time of said sale or conveyance."

In *Norcum v. Gaty*, 19 Mo. 65, 70 (1853), the Court indicated that the statute was not based on any principle of the Spanish law.

7. *Boagy v. Shoab*, 13 Mo. 365 (1850); see also *Frink v. Darst*, 14 Ill. 304 (1853). By statute, the following covenants for title are implied from the use of the words "grant, bargain and sell" in all conveyances of an estate in fee simple: that the grantor is seised of an indefeasible estate in fee simple; that the land is free from incumbrances done or suffered by the grantor; for further assurances. MO REV. STAT. § 3407 (1939). The Missouri estoppel statute applies to deeds containing these statutory covenants. *Hume v. Hopkins*, 140 Mo. 65, 41 S. W. 784 (1897); *Fordyce v. Rapp*, 131 Mo. 354, 33 S. W. 57 (1895); *Foot v. Clark*, 102 Mo. 394, 14 S. W. 981; but see *Chauvin v. Wagner*, 18 Mo. 531, 553 (1853). The estoppel statute has no application to a quitclaim deed, containing no representation that the grantor has an estate of any particular quantum. *Valle v. Clemens*, 18 Mo. 486 (1853); *Gibson v. Chouteau*, 39 Mo. 536 (1866), *reversed on other grounds on rehearing*, 39 Mo. 585 (1867), *writ of error dismissed*, 8 Wall. 314 (U. S. 1869); cf. *Inlow v. Herron*, 306 Mo. 42, 267 S. W. 893 (1924). Nevertheless, if the grantor had an equitable title at the time he executed the quitclaim, a subsequently-acquired legal title inures to the benefit of the grantee. *Hafner v. St. Louis*, 161 Mo. 34, 61 S. W. 632 (1901); see *Reasor v. Marshall*, 221 S. W. 2d 111 (Mo. 1949); cf. *Callahan v. Davis*, 90 Mo. 78, 2 S. W. 216 (1886).

8. In *Geyer v. Girard*, 22 Mo. 159, 160 (1855), speaking of the 1835 act, it was said that the estoppel statute "relates only to estates conveyed in fee simple absolute, and in its terms to no other estates." In that case, a lessee of a term for years gave a trust deed, apparently containing covenants, to his lessor to secure a promissory note for \$100 which the lessee agreed to pay to the lessor in addition to the rent reserved in the lease. It was later discovered that the lessor had no title. When the lessee obtained a lease from the true owner, the original lessor sought to enforce his lien against the interest subsequently acquired by the lessee. The court simply held that the lien of the deed of trust was coextensive with the estate actually received by the lessee. Since the lessor had no title, the deed of trust did not attach to any after-acquired title of the lessee. The same rule is frequently applied to purchase-money mortgages where the

acquisition of title by the grantor after the conveyance was two-fold: (1) the title ". . . shall be taken and held to be in trust, and for the use of the grantee . . ."; and (2) the first conveyance "shall be valid as if the vendor or grantor had the legal estate . . . at the time of . . . conveyance." These two propositions seem inconsistent. The first might be construed to mean that the estoppel grantee acquires only an equitable right to compel a conveyance from his grantor after the latter acquires title. On the other hand, the phrase "for the use of the grantee" might lend itself to the construction that a passive use arises when the grantor acquires title. If the use is of the type that is executed by the Statute of Uses, the after-acquired legal title would actually pass to the grantee.⁹ This result would be in accord with the second proposition of the statute, for if the original conveyance is to be regarded as though the grantor had title at the time of its execution, the title itself must necessarily pass to the grantee. Another defect in the statute is that it is not certain whether it applies where the grantor has purported to convey in fee simple but later acquires an estate less than fee. Apparently the lesser estate will not pass to the grantee, at least under the statute.¹⁰

The Missouri act was borrowed by Illinois in 1827¹¹ and much

vendor has no title and the vendee subsequently acquired title from the true owner. The covenants in the mortgage given by the vendee will not raise an estoppel. *Nelson v. Dwiggin*, 111 Fla. 298, 149 So. 613 (1933); *contra*, *Clark v. Baker*, 14 Cal. 612 (1860); see also *Jackson v. Holt*, 192 Miss. 702, 6 S. 2d 915 (1942).

The *Geyer* case, *supra*, was not intended to apply to the situation where a lessor acquires title after giving a lease. The lessee is entitled to the benefit of the estoppel doctrine. If this result cannot be achieved under the statute, it should be reached as a matter of general law. See *Liberal Savings & Loan Co. v. Frankel Realty Co.*, 137 Ohio St. 489, 30 N. E. 2d 1012, 1016 (1940).

9. A few states have adopted the "trust theory" where there is no estoppel statute. See *Donohue v. Vosper*, 189 Mich. 78, 155 N. W. 407 (1915); *Rose v. Agee*, 128 Va. 502, 104 S. E. 827 (1920). For changes in the Virginia law, see note 41 *infra*.

It has been said that the trust which arises is either an implied or constructive trust and therefore not within the Statute of Uses. See Lawler, *Estoppel to Assert An After-Acquired Title in Pennsylvania*, 3 U. OF PITT. L. REV. 165, 178 (1937). If it is a statutory trust, as here, perhaps a different result should be reached.

10. *Simonton, Statutory Covenants for Title in Missouri*, 28 U. OF MO. BULL. L. SER. 3, 30 (1923).

11. Ill. Rev. Laws 1826-7, Conveyances 95-102; ILL. REV. STAT. ANN. c. 30, § 6 (Smith-Hurd 1934).

later by Colorado.¹² Both states still have the statute in this form on their books.

Type Two. Missouri legislators, not content with the initial form of their statutes, revised it in 1835.¹³ This revision has served as the model for Conveyances Acts in several other states. Under the revision, the statute still applied to deeds purporting to transfer a "fee simple absolute," but the two inconsistent statements as to the effect of later acquisition of title were clarified. The "trust theory" was eliminated, and in its place was substituted the rigid, mechanical concept of actual passage of title to the grantee, seemingly without exception. It was stated that the after-acquired title "shall immediately pass to the grantee," the conveyance still being regarded as though the grantor had title at the date of its execution. The new statute appeared again in the Revised Statutes of 1845 and 1855, with changes only in punctuation.¹⁴

The revised statute of Missouri was used by Arkansas in 1837 as the basis for its statute.¹⁵ Two significant changes were introduced. One was that the estoppel by deed principle applied to deeds purporting to convey land either in fee simple absolute or "any less estate." The second innovation was the insertion of a statement that an after-acquired equitable as well as legal title would pass to the grantee. No change was made in the theory that title actually passes to the grantee. The Arkansas statute remains today in the same form.¹⁶

The Missouri statute of 1835 appeared in the Conveyances Act of the Revised Statutes of the Territory of Iowa in 1843.¹⁷ It was identical to the Missouri provision except that, in a separate section, the term "real estate" was defined as "embracing chattels real." The statute probably, therefore, applied to leases of

12. COLO. STAT. ANN. c. 40, § 5 (1935).

13. MO. REV. STAT. § 3 Conveyances (3d ed. 1841). The 1855 statute is quoted here because of clarification in punctuation: "If any person shall convey any real estate, by conveyance, purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid, as if such legal estate had been in the grantor at the time of the conveyance."

14. MO. REV. STAT. c. 32, § 3 (Jones, 1845); MO. REV. STAT. c. 32, § 3 (1855).

15. ARK. REV. STAT. c. 31, § 4 (1838) effective November 30, 1837.

16. ARK. STAT. § 50-404 (1947 Off. Ed.).

17. IOWA TERRITORY REV. STAT. c. 54, § 3 (1843) [1911 reprint].

terms for years. That is not free from doubt, however, since the principal statute refers to conveyances of real estate in fee simple, and it is hard to imagine what could be meant by a conveyance of a chattel real in fee simple. Iowa revised the statute in 1851, as will appear below. The 1835 Missouri act was adopted in 1850 in California,¹⁸ but was later changed with the adoption of the Civil Code in 1872. The Missouri act also appears in the current Nevada and Utah statutes.¹⁹ The Utah statute adds the phrase that the subsequently acquired title immediately passes to the grantee, "his heirs, successors or assigns."²⁰ This clarifies any doubt there might be as to whether the estoppel runs with the land.²¹

Type Three. In 1851, the early Iowa statute was revised, and its rewording eliminated some of the construction problems present in the earlier enactment. The estoppel doctrine was approached from a new point of view. The statute provided:

Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor to the extent of that which the deed purports to convey enures to the benefit of the grantee.²²

The statute wisely substitutes the phrase "purports to convey a greater interest" for the uncertain phrase "purports to convey in fee simple," found in the Missouri statute. The significant provision in the statute, however, relates to the manner in which the doctrine operates. The after-acquired interest, to the extent purported to be conveyed "enures" to the benefit of the grantee. This seems substantially different from the Missouri version of title "immediately passing" to the grantee. The Iowa approach seems to be no more than a restatement of the rule as it exists under the general American common law. The word "inure" or "enure" does not necessarily imply passage of title to the grantee in all situations and without exception.²³ It leaves open the possibility of applying equitable principles where necessary. On one

18. CAL. STAT. c. 101 § 33 (1850).

19. NEV. COMP. LAWS § 1506 (1929); UTAH CODE ANN. § 78-1-9 (1943).

20. See also WASH. REV. STAT. ANN. § 10571 (Remington, 1931); CAL. CIV. CODE, Div. 2, Pt. 4, tit. 4 c. 2, Art. 2, § 1106 (Deering, 1949).

21. See *Johnson v. Johnson*, 170 Mo. 34, 70 S. W. 241 (1902).

22. IOWA CODE c. 78, § 1202 (1851) [1912 reprint].

23. The word "inure" is defined for another purpose in *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081 (1902), writ of error dismissed, 199 U. S. 600 (1905). The word "enure," used in the 1851 act, was changed to "inure" in the 1897 code. IOWA CODE c. 5, § 2915 (2d ed. (1897)).

occasion at least this interpretation was given the statute by the Iowa court.²⁴ In other cases, it has spoken of the statute as having the effect of passing title to the grantee.²⁵

The Iowa statute remained unchanged until 1897 when a sentence was added to the effect that the principle had no application where a spouse joined in the conveyance merely for the purpose of relinquishing dower or homestead rights and subsequently acquired in his or her own right an interest in the land.²⁶ This was in accord with early Iowa decisions and settled a matter which has received varied treatments in other jurisdictions.²⁷ No changes have been made in the Iowa statute since 1897.

The 1851 Iowa statute was adopted in Nebraska.²⁸ A new proviso was inserted that the title subsequently acquired would not inure to the grantee or his heirs or assigns, if the deed was either a quitclaim or special warranty.²⁹ The statute also provides that the original grantor is not estopped from acquiring the title at a judicial sale upon execution against the grantee or those claiming under him, or at a tax sale for taxes becoming due after the conveyance. Other jurisdictions have established, by judicial decision, the same exception where the grantor later acquires an original title at a judicial³⁰ or tax sale.³¹

24. See *Morgan v. Graham*, 35 Iowa 213 (1872), discussed in note 50 *infra*. In *Purcell v. Gann*, 113 Ark. 332, 168 S. W. 1102, 1105 (1914), it was said that the Arkansas statute "must be reasonably construed so as to effectuate its purposes" and not to "defeat the ends of justice."

25. See cases cited note 58 *infra*.

26. IOWA CODE, tit. xiv, c. 5, § 2915 (2d. 1897).

27. *Childs v. McChesney*, 20 Iowa 431 (1866); *O'Neil v. Vanderburg*, 25 Iowa 105 (1868). For other methods of treating the problem, see *State v. Kemmerer*, 15 S. D. 504, 90 N. W. 150 (1902) (on rehearing); *Weegens v. Karels*, 374 Ill. 273, 29 N. E. 2d 248 (1940); *Grasswick v. Miller*, 82 Mont. 364, 267 Pac. 299 (1928); *cf. Powell v. Bowen*, 279 Mo. 280, 214 S. W. 142 (1919); and *Brawford v. Wolfe*, 103 Mo. 391, 15 S. W. 426 (1891).

28. NEB. REV. STAT. § 76-209 (1943).

29. A similar result as to the special warranty deed was reached in *Boagy v. Shoab*, 13 Mo. 365 (1850). The exception in the case of the quitclaim (containing no covenants for title and no representation of ownership of an estate of a particular quantum) is usual. In Mississippi, however, it is expressly provided that a quitclaim and release "shall estop the grantor and his heirs from asserting a subsequently acquired title . . ." MISS. CODE § 846 (1942). This appears to be the only statute of this type. Compare statutes of the type referred to in note 37, *infra*.

30. *Rowell v. Rowell*, 119 Mont. 201, 174 P. 2d 223 (1946); *McCune v. McCune*, 23 Cal. App. 2d 295, 72 P. 2d 883 (1937); *Schultz v. Cities Service Oil Co.*, 149 Kan. 148, 86 P. 2d 533 (1939).

31. *Foster v. Johnson*, 89 Tex. 640, 36 S. W. 67 (1896); *Ervin v. Morris*,

Type Four. Missouri again revised its statute in 1866, which is its present form.³² The only significant change in the statute is the statement that the statute applies to conveyances of an "indefeasible estate in fee simple absolute." The word "indefeasible" was used in an earlier decision to indicate that the statute was not applicable to conveyances which would be formally sufficient to pass an estate in fee simple if the grantor had had title at the time.³³ The present Kansas statute is identical to this last revision of the Missouri statute.³⁴

Type Five. It will be remembered that California used the Missouri act of 1835 until the adoption of the Civil Code in 1872. In that year, a new statute, brief and to-the-point, appeared:

Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors.³⁵

This statute, like the earlier ones, seems to contemplate the actual passage of title to the grantee by operation of law. It has been borrowed by Idaho, North Dakota, South Dakota and Montana.³⁶ A subsequently acquired "claim of title" would seem to embrace estates less than fee simple and equitable claims. Does the statute apply to grants purporting to transfer interests or estates less than fee simple? Like all the Missouri statutes, it is ambiguous in this respect.

26 Kan. 664 (1881); *cf.* Frank v. Caruthers, 108 Mo. 569, 18 S. W. 927 (1892); Porter v. Lafferty, 33 Iowa 254 (1871).

32. MO. GEN. STAT. c. 108, § 3 (1866).

33. Boagy v. Shoab, 13 Mo. 365 (1850). In most states, technical words of inheritance are not necessary to convey or create an estate in fee simple, and by statute such an estate is presumed to be created unless a contrary intent appears in the conveyance. In Texas, a deed sufficient to create a fee simple under such statutes will raise an estoppel. Lindsay v. Freeman, 83 Tex. 259, 18 S. W. 727 (1892); *cf.* Molina v. Ramirez, 15 Ariz. 249, 138 Pac. 17 (1914).

34. KAN. GEN. STAT. ANN. § 67-207 (1935).

35. CAL. CIV. CODE, Div. 2, Pt. 4, tit. 4 c. 2, Art. 2, § 1106 (Deering, 1949). See also § 2930 to the effect that an after-acquired title of a mortgagor "inures" to the mortgagee as security for the debt "in like manner as if acquired before the execution." The mortgage statute appeared for the first time in 1872. The 1850 statute was held to be applicable to mortgages as well as deeds in Clark v. Baker, 14 Cal. 612 (1860). The history of these statutes was recently traced in Barberi v. Rothchild, 7 Cal. App. 2d 537, 61 P. 2d 760 (1936), holding that the 1872 mortgage statute applies as well to trust deeds.

36. IDAHO CODE § 55-811 (1948; N. D. REV. CODE § 47-1015 (1943); S. D. CODE § 51.1414(4) 1939) (§ 51.1403 expressly states that the statutory form of quitclaim deed shall not extend to an after-acquired title); MONT. REV. CODES ANN. § 67-1609 (1947).

Miscellaneous Statutes. The Washington statute combines the principle of the Iowa statute that the after-acquired title shall "inure to the benefit" of the conveyee with a provision that the title so acquired shall "pass to and vest in" the conveyee.³⁷ It undoubtedly operates, as do the Missouri and California acts, to transfer the title to the conveyee. The Oklahoma statute provides that "all rights" subsequently acquired "shall accrue to the benefit" of the grantee or mortgagee and be "covered" by the mortgage or deed.³⁸ The Georgia statute merely provides that the "maker of a deed" is "estopped from denying his right to sell and convey" when he later acquires title.³⁹ Ohio appears to be the only state having a special statute making it criminal to convey, with intent to defraud, land which the grantor does not own either in law or equity.⁴⁰

Of all the statutes considered above, the Virginia statute, adopted in 1919, is the most comprehensive.⁴¹ It was apparently passed for the very purpose of clarifying the Virginia law as to the manner in which the doctrine operates. The title subsequently acquired is said to vest in the grantee as though the grantor had had title at the time of the original conveyance. This overrules the "trust theory" adopted in earlier decisions of the Virginia court.⁴² Moreover, the statute is expressly made applicable only as between "the parties." The most confusing feature of the statute is that it purports to apply to deeds of *personal* as well as real property, provided the property is described with "reasonable certainty." This appears to be the only statute applicable to chattels, and the broad scope of the statute is likely to cause considerable litigation in the future.

37. WASH. REV. STAT. ANN. § 10571 (Remington, 1931). Section 10554 provides that the statutory form of quitclaim does not extend to an after-acquired title "unless words are added expressing such intention." See also MINN. STAT. ANN. § 507.07 (1947).

38. OKLA. STAT. ANN. tit. 16, § 17 (1936).

39. GA. CODE § 29-111 (1933). Section 38-115 contains an unusual provision that a party claiming an estoppel "must not only be ignorant of the true title, but also of any convenient means of acquiring such knowledge." When both grantor and grantee have equal knowledge, there is no estoppel. Apparently this estoppel statute is intended to apply to estoppel by deed as well as estoppel in pais.

40. OHIO GEN. CODE ANN. § 13125 (Page, 1937).

41. VA. CODE § 5202 (1919); VA. CODE § 5202 (1942) and reviser's note following statute.

42. See note 9 *supra*.

II. THE EFFECT OF THE STATUTES

In appraising the statutes, it should be observed at the outset that most jurisdictions do not appear to regard their statutes as completely replacing the general law on estoppel by deed.⁴³ The statutes generally are broader than the common law rules as to the type of deed which may be the basis for an estoppel.⁴⁴ They are narrower than the common law rules when, for example, it is stated that an estoppel arises only when there is a conveyance in fee simple.⁴⁵ Where the statute is more confined than the general law, that should not necessarily preclude the application of estoppel principles in a proper case. This construction of the statutes is entirely desirable, since most of them are not thoughtfully drafted. Admittedly, it minimizes the effect of the statutes. Occasionally, the statutes have had the desirable effect of making certain types of future interests, inalienable under the common law, transferable at least by way of estoppel.⁴⁶

The principal vice of the statute seems to be that it has encouraged many courts to disregard intervening equities simply because the statutory mandate that the title "immediately passes" to the grantee when acquired by the grantor is thought to be without exception. Practically all the statutes discussed above lend themselves to the construction that the after-acquired title actually passes to the estoppel grantee. That theory has also been adopted in some states without a statute.⁴⁷ The undesirable effect of this interpretation of the statute is best illustrated by

43. See *Barberi v. Rothchild*, 7 Cal. App. 2d 537, 61 P. 2d 760 (1936); *Simonton, Statutory Covenants for Title in Missouri*, 28 U. OF MO. BULL. L. SER. 3, 30 (1923).

44. *Field, J.*, in *Clark v. Baker*, 14 Cal. 612, 626-627 (1860): "By the common law there were only two classes of conveyances which were held to operate upon the after-acquired title—those by feoffment, by fine, or by common recovery—and this from their solemnity and publicity, and those by indenture of lease from the implied covenants arising upon such indentures. No other forms of conveyance, in the absence of covenants of warranty, had any effect in transferring the title subsequently acquired."

The Court then held that the estoppel by deed statute of 1850 changed the common law rule as to deeds operating under that Statute of Uses. That section gives to such deeds "an operation equivalent to the most expressive covenant of warranty." 14 Cal. at 630.

45. See note 8 *supra*, as to estates for years.

46. There are many Illinois decisions. For recent cases, see *Pure Oil Co. v. Miller-McFarland Drilling Co.*, 376 Ill. 486, 34 N. E. 2d 854 (1941); *Brown v. Hall*, 385 Ill. 260, 52 N. E. 2d 781 (1944); *Citizens Nat'l. Bank of Alton v. Glassbrenner*, 377 Ill. 270, 36 N. E. 2d 364 (1941).

47. See note 51 *infra*.

the problems referred to in the introduction to this comment. These are now considered.

Right of election. Must the estoppel grantee accept the after-acquired title or may he elect to sue on the covenants which may be present in the deed? Since both the covenants and the estoppel principle are designed to protect the grantee, he should be entitled to elect his remedy, even though he may benefit thereby because of any change in the value of the land. The leading case is *Resser v. Carney*,⁴⁸ in which the Minnesota court held that the acquisition of title by the grantor after the grantee has commenced an action on the covenants did not defeat the action. The same result should obtain where title is acquired prior to instituting the action. Missouri and Illinois, under the estoppel statutes, have held otherwise, however.⁴⁹

The subsequent purchaser. If the statutory theory that title passes immediately upon acquisition were strictly followed, the estoppel grantee would in all cases prevail over subsequent purchasers without actual notice from the grantor after the latter acquires title. The reason is that the estoppel grantor would have no title to convey to the subsequent purchaser. On the face of it, that seems to be an undesirable result. Clearly the correct interpretation of the estoppel statute is that it does not represent an absolute rule subject to no qualifications. A frequent exception is made where there is a subsequent purchase-money mortgage.⁵⁰ Why should another exception not be made in favor of the bona

48. 52 Minn. 397, 54 N. W. 89 (1893).

49. *King v. Gilson's Adm'x*, 32 Ill. 348 (1863); *Reese v. Smith*, 12 Mo. 344 (1849). In the *Reese* case, the wife who later acquired title had joined in the conveyance with her husband, but under Missouri law she was not bound by the covenants for title. The court reasoned that since she was not bound by the covenants, her after-acquired title would not pass to the grantee. Hence she had no defense in a law action brought against the husband's estate on the covenants. She was permitted, however, to bring an equity action to compel grantee to take a conveyance of the title acquired by her after the grantee's action had commenced, and to enjoin the grantee from collecting his judgment on the covenants. The court also stated that if the husband had acquired the title, it would have passed to the grantee in mitigation of damages.

50. *Wendler v. Lambeth*, 163 Mo. 428, 63 S. W. 684 (1901); *Morgan v. Graham*, 35 Iowa 213 (1872). In the *Morgan* case, the court regarded this as an exception to the estoppel statute. Ordinarily, title passes immediately to the estoppel grantee, but this "rule must be reasonably construed, so as to effectuate, and not so as to defeat the purposes of justice. . . ." It was regarded as reasonable that the title should inure to the grantee subject to all the "conditions and equities which attach to it in the hands of the grantor." 35 Iowa at 216. Moreover, so long as the estoppel grantee has not changed his position in reliance upon the after-acquired title, it is

vide purchaser? Although there has not been complete uniformity in the treatment of the problem in jurisdictions having estoppel statutes, these states are more inclined to favor the estoppel grantee. A few states apply the passage of title concept to give priority to the estoppel grantee in the absence of an estoppel statute.⁵¹

It is apparent that the estoppel statute conflicts here with the recording act. Conceivably the estoppel grantee may lose out solely on the basis of the recording act if he failed to record his conveyance, or he may prevail without recording if the subsequent conveyee had actual notice of the prior deed,⁵² was a mere donee,⁵³ or, for some reason, failed to qualify under the recording act.⁵⁴ If the estoppel deed is recorded, it becomes a question of constructive notice. Is the subsequent purchaser charged with a duty to inspect the records to determine whether his grantor has made any conveyances prior to acquiring title? Under the grantor-grantee system of indexing deeds and mortgages, used in most states, it would be difficult although not impossible to discover the prior deed. Accordingly, the better cases have reached the conclusion that there is no constructive notice, and the subsequent purchaser will prevail.⁵⁵ The estoppel statute has not deterred the Missouri court from holding that such re-

immaterial whether or not the purchase-money mortgage is executed simultaneously with the deed conveying title to the estoppel grantor.

51. *Ayer v. Philadelphia & Boston Face Brick Co.*, 159 Mass. 84, 34 N. E. 177 (1893); *McCusker v. McEvey*, 9 R. I. 523 (1870); *Jarvis v. Aikens*, 25 Vt. 635 (1853). These decisions indicate that the estoppel grantee prevails even if the subsequent purchaser is assumed to be bona fide.

52. *Hamblin v. Woolley*, 64 Ariz. 152, 167 P. 2d 100 (1946); *Merrill v. Clark*, 103 Cal. 367, 37 Pac. 238 (1894); *Ketchum v. Pleasant Valley Coal Co.*, 257 Fed. 274 (8th Cir. 1919); see *Barker v. Circle*, 60 Mo. 258, 264 (1875). In *Yamie v. Willmott*, 184 Okla. 382, 88 P. 2d 325 (1939), there was a reconveyance by the estoppel grantor to the true owner. Held, that the estoppel grantee prevails. The court did not clearly indicate, however, that the subsequent purchaser (the true owner) was without actual notice. From the facts, it seems likely that he had notice.

53. *Lindsay v. Freeman*, 83 Tex. 259, 18 S. W. 727 (1892).

54. In some jurisdictions, the subsequent purchaser is required to record before the prior grantee in order to obtain the protection of the recording act.

55. The following cases are from jurisdiction where there are no estoppel by deed statutes. *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670 (1903); *Richardson v. Atlantic Coast Lumber Corp.*, 93 S. C. 254, 75 S. E. 371 (1912); *Builders Sash & Door Co. v. Joyner*, 182 N. C. 518, 109 S. E. 259 (1921); *Breen v. Morehead*, 104 Tex. 254, 136 S. W. 1047 (1911); *Heffron v. Flanigan*, 37 Mich. 274 (1877). A number of these cases emphasize that the first grantee was negligent in not checking the record to determine whether his grantor had title. For cases *contra*, see note 51 *supra*.

corded deeds are not "in the line of title' as that term is used by conveyancers and searchers."⁵⁶ These decisions appear to be in accord with the prevailing practice of title searchers.⁵⁷ The contrary cases are influenced by the wording of the estoppel statute to the effect that the title later acquired passes immediately or by operation of law to the grantee.⁵⁸ In 1941 Idaho passed a statute making the recording of a conveyance, executed by one who has no title, constructive notice from the time the estoppel grantor's deed from the true owner is recorded.⁵⁹ This statute seems undesirable. It is noteworthy that the Idaho legislature apparently did not feel that the estoppel statute accomplished this purpose of itself. In states where there is an official tract index, it would be simple to find the prior deed, and the estoppel grantee might very well be favored on that ground.⁶⁰

56. *Ford v. Unity Church Soc. of St. Joseph*, 120 Mo. 498, 25 S. W. 394, 398 (1894). Also *Dodd v. Williams*, 3 Mo. App. 278 (1877); *Ellsberry v. Duval-Percival Trust Co.*, 220 Mo. App. 239, 282 S. W. 1054 (1926); *cf. Organ v. Bunnell*, 184 S. W. 102 (Mo. 1916). See also *Final Report of Title Standards Committee*, 3 J. Mo. BAR 225 (1947), as to proposed title standard where the abstract reveals a deed by one who has no record interest and who is not in possession. Proposed Title Standard 4 states that the deed may be disregarded if the instrument has been of record at least ten years. This title standard would not appear to be applicable to the situation under consideration since the estoppel grantor has a record interest.

57. See PATTON, TITLES § 42 (1938) as to methods of using name indices; see also Johnson, Title Examination in Massachusetts, CASNER AND LEACH, CASES ON PROPERTY 886, 903 (1st stan. ed. 1950), where it is stated that it is not the practice to examine the index prior to the time an owner acquired title, even though the estoppel grantee prevails in Massachusetts. See note 51 *supra*.

58. See particularly *Bernardy v. Colonial & U. S. Mtg. Co., Ltd.*, 17 S. D. 637, 98 N. W. 166 (1904) where it was felt that the policy of the estoppel statute would be defeated if the subsequent purchaser were to prevail. When the case came up the second time, the decision was reaffirmed. 20 S. D. 193, 105 N. W. 737 (1905). *Accord*: *Tilton v. Flormann*, 22 S. D. 324, 117 N. W. 377 (1908) (the estoppel grantee was actually in possession although the court made no point of that fact); *Osceola Land Co. v. Chicago Mill & Lumber Co.*, 84 Ark. 1, 103 S. W. 609 (1907); see *Colonial & U. S. Mtg. Co. v. Lee*, 95 Ark. 253, 129 S. W. 84 (1910). In Iowa, the early cases favor the estoppel grantee with little discussion of the problem. *Warburton v. Mattox*, *Morris* 367 (Iowa 1844); *Van Orman v. McGregor*, 23 Iowa 300 (1867); *but see Higgins v. Dennis*, 104 Iowa 605, 610, 74 N. W. 9 (1898).

59. Idaho Laws 1941 c. 119, § 1; IDAHO CODE § 55-811 (1948). The estoppel statute in § 55-605 is identical to the present California Act. The Idaho statute was apparently designed to change the rule in *Jackson v. Lee*, 47 Idaho 589, 277 Pac. 548 (1929) that a deed recorded by one who was at the time a stranger to the title is not constructive notice.

60. *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434 (1899). In the case of *Bernardy v. Colonial & U. S. Mtg. Co., Ltd.*, 17 S. D. 637, 98 N. W. 166 (1904), the court buttressed its holding by stating that the South Dakota statutes require a "numerical index to be kept of both city and farm prop-

A subsequent mortgagee, who is not a purchase-money mortgagee, is in the same position under most recording acts as the subsequent purchaser.

Judgment creditors. In some jurisdictions, a judgment creditor is protected under the recording act as a bona fide purchaser. Where that is the case, the creditor's good faith will determine the question of priority over an estoppel grantee.⁶¹

In other jurisdictions, it may be necessary to observe when the creditor recovered and docketed his judgment. It is assumed that the judgment may create a lien on after-acquired property. If there is a single judgment recovered prior to the purported conveyance by the judgment debtor, there is authority from Kansas that the estoppel grantee takes the after-acquired title subject to the judgment lien.⁶² Other states reach a different result on the theory that when the judgment debtor acquires title he is a "mere conduit" through whom the title passes to the grantee.⁶³ As the Montana court put it: ". . . under the doctrine of instantaneous seizin there is no moment of time when the lien of the judgment could have attached; it is as though the title had passed direct from his grantor to his grantee."⁶⁴ A similar result was reached in Oklahoma, although the court observed that this result was "independent of the question of fraud."⁶⁵ There is some basis for preferring the creditor in cases such as the Kansas decision where the judgment debtor conveyed land which he expected to inherit from his mother.⁶⁶ There seems to be little justification for deciding these cases on the fictitious notion of "shooting title" or "instantaneous seizin." It is noteworthy that these cases arose in jurisdictions having estoppel statutes, and that different results have been reached despite the statutes.

There is less reason to prefer the creditor where the judgment

erty. Under such a system, abstracts will necessarily show all the conveyances made of the property." *Id.* at 649, 98 N. W. at 170.

61. *Gallagher v. Stern*, 250 Pa. 292, 95 Atl. 518 (1915), discussed in *Lawler, Estoppel to Assert An After-Acquired Title in Pennsylvania*, 3 U. OF PITT. L. REV. 165 (1937); 29 HARV. L. REV. 457 (1916).

62. *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945 (1908); Note, 22 HARV. L. REV. 136, 137 (1908).

63. *Watkins v. Wassell*, 15 Ark. 73 (1854); *Johannes v. Dwire*, 94 Mont. 590, 23 P. 2d 971 (1933); *Brown v. Barker*, 35 Okla. 498, 130 Pac. 155 (1912).

64. *Johannes v. Dwire*, 94 Mont. 590, 594, 23 P. 2d 971, 972 (1933).

65. *Brown v. Barker*, 35 Okla. 498, 501, 130 Pac. 155, 156 (1912).

66. *Bliss v. Brown*, 78 Kan. 467, 98 Pac. 945 (1908).

lien is acquired between the time of the estoppel conveyance and the acquisition of title. Priority should be given to the estoppel grantee.⁶⁷ In the rare case where the conveyance is designed to defraud the creditor and the grantee is aware of that fact, a different result might well be reached. If the judgment is not recovered until after the acquisition of title by the estoppel grantor, the judgment creditor is not preferred⁶⁸ unless he enjoys the protection of a purchaser under the recording act.⁶⁹

Other "privies" of the grantor. If the estoppel grantee dies after acquiring title, his heirs are bound by the estoppel. A different result would, of course, be reached if the heir himself acquired the title from an independent source.⁷⁰ If the estoppel grantor is unmarried at the time of the conveyance, but marries prior to acquisition of title, the spouse acquires no inchoate dower right. This would seem to follow whether the after-acquired title is regarded as passing to the grantee or as held merely for his benefit. Even under the later theory, the general rule that there is no dower in the land held in trust would seem to apply.⁷¹ A more serious question arises where the grantor is married at the time of the original conveyance. If she joins in the conveyance, she is estopped to assert a dower right.⁷² On the other hand, if she does not join, perhaps she should not be deprived of dower, since the conveyance may have been in anticipation of acquiring title and for the very purpose of defeating her dower claim.

Strangers to the transaction claiming benefit of the estoppel. In a few jurisdictions, the passage of title concept has assumed some importance in connection with the question whether persons who were not parties or their privies to the conveyance may take advantage of the estoppel. Thus, if the estoppel grantor sues an adverse possessor in ejectment, the defendant may defeat the action by showing that the title has passed to the estoppel grantee.⁷³ In a different type of case, Missouri has regarded the estoppel as being invocable only by the grantee or his privies.⁷⁴

67. *Lamprey v. Pike*, 28 Fed. 30 (C. C. D. Minn. 1886); *Clark v. Daniels*, 77 Mich. 26, 43 N. W. 854 (1889); but see *Leslie v. Harrison Natl. Bank*, 97 Kan. 22, 154 Pac. 209 (1916).

68. *Rice v. Kelso*, 57 Iowa 115, 7 N. W. 3 (1880), 10 N. W. 335 (1881).

69. See note 61 *supra*.

70. *Wilson v. Godfrey*, 145 Iowa 696, 124 N. W. 875 (1910).

71. See PATTON, TITLES § 337 (1938).

72. *McDaniel v. Large*, 55 Iowa 312, 7 N. W. 632 (1880).

73. *Perkins v. Coleman*, 90 Ky. 611, 14 S. W. 640 (1890).

74. *Pullen v. Hart*, 293 Mo. 61, 238 S. W. 437 (1921); see also *Jordan v. Chambers*, 226 Pa. 573, 75 Atl. 956 (1910).

CONCLUSION

The estoppel by deed statutes have contributed little of value to the general law on the subject. They have fostered an approach to the rule that is undesirable because it is rigid and mechanical. The salutary policies behind estoppel by deed and the recording acts are lost when the "shooting title" concept is applied to defeat the subsequent bona fide purchaser or mortgagee from the estoppel grantor. The purpose of estoppel by deed is defeated when the estoppel grantee is denied the right of election. Under modern title examination practices, if anyone is at fault in the subsequent purchaser situation, it is the first grantee.

The statutes are objectionable for another reason. In general, they are drafted in such a manner as to create rather embarrassing construction problems for the courts. To avoid an unjust application of the statute, many courts have had to ignore what appears to be the plain meaning of the language. In short, most courts have not taken the statutes very seriously. The Iowa-Nebraska type of statute is the most thoughtfully drafted. If the statutes are to be retained at all, they should be amended to include the following features if they are not present.

The statute should apply to any conveyance in which the grantor purports to own and to convey an estate of a particular quantum, whether in fee or less. The statute should apply to an after-acquired estate which is less in quantum than the estate which the grantor purported to convey. If the after-acquired interest is greater than the estate purported to be conveyed, it should be indicated that the estoppel principle is coextensive with the original conveyance and subject to all its terms and restrictions. The later acquired title, whether legal or equitable, should inure to the benefit of the grantee, his heirs or assigns. Any reference to the title "immediately passing" or passing "by operation of law" should be eliminated. The statute should expressly save from its application the bona fide purchaser and right of election situations. Recording prior to acquisition of title should not constitute constructive notice. The estoppel grantee should be permitted to protect himself by re-recording his conveyance after the title has been acquired by his grantor. The right of a spouse joining in the conveyance solely for the purpose of re-

linquishing dower should be specifically defined. The statute should have no application to personal property.

When these changes are made, the statute could not be regarded as objectionable. It might well be maintained, however, that the statute is then unnecessary!

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CONTRIBUTORS TO THIS ISSUE

HARRY P. WARNER—Attorney, Washington, D. C.; Associated with firm of Segal, Smith & Hennessey, Washington, D. C.; Author of Radio and Television Law; Contributor to many legal periodicals.

A. J. THOMAS, JR.—Assistant Professor of Law, Southern Methodist University School of Law; B.S. 1939, Agricultural and Mechanical College of Texas; LL.B. 1943, University of Texas; LL.M. 1947, University of Michigan; Member of the Texas Bar; Three years with United States Foreign Service as American Vice Consul.

ROBERT W. SWENSON—Professor of Law, Drake University Law School; B.S.L. 1940, LL.B. 1942, University of Minnesota; Legal Department, Columbia Broadcasting System, Inc., 1942-1943; Practiced with Law Firm of Davis Polk Wardwell Sunderland & Kiendl, New York, 1943-1946; Contributor to many legal periodicals.