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Advice of Counsel as a Defense to an Action for Malicious Prosecution

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Fry v. Wolf is stated and in the other case the rule laid down in *Aland v. Pyle* is used. The same result was obtained in both cases.

By way of summary, we can say that the rule in Pennsylvania is:

(1) That from the facts and circmustances the absence or presence of probable cause in an action for malicious prosecution is a question for the jury.

(2) That the jury having determined the absence or presence of probable cause from the facts and circumstances it remains as a matter of law for the court to hold that advice of counsel does or does not constitute a complete defense to an action for malicious prosecution.

Sidney Louis Krawitz.

PROTECTION OF THE GRANTEE UNDER ESTOPPEL BY DEED

The situation is this: When the grantor conveys a certain estate, while having no title, or a defective title, or an estate less than that which he assumed to convey, and subsequently acquires the title or estate which he purported to convey or perfects his title, what are the rights of the grantee?

At common law, to enable the grantee to take advantage of an after-acquired title of his grantor, the law required the deed of conveyance to contain a covenant of warranty.[1] This technical requirement is no longer present, and it is now held that other covenants may give rise to the estoppel. The weight of authority is in accord with the leading case of *Van Rensselaer v. Keanry*,[2] which held:

> "Whatever is the form or nature of the conveyance, if the grantor recites on the face of the instrument, express or implied, that he is seized of a particular estate which the deed purports to convey, it is sufficient to work an estoppel."

McGill v. Jordan[3] held, inter alia, "there is no magic in the use of the word warranty, and the true test is the intention of the parties."

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[1] 21 C. J. 1080.
[2] 11 How. 297 (1850) 13 L. ed. 703; L. R. A. 1918 B 731.
[3] Fed Cases, No. 8, 795a (1884).

A more recent wording of the doctrine is set forth in *Balch v. Arnold*[4]:—

> "Consider all provisions of the deed as well as the situation of the parties and if upon such consideration it appears that the intention of the parties was to pass a fee, or any definite estate in land, effect will be given to such intention, and the deed will operate by way of estoppel, so that any estate subsequently acquired by the grantor will inure to the grantee: and it is not material whether such intention appear in the granting clause, in the covenants, or elsewhere in the deed."

There are two theories on which the grantee is given title. One: to avoid circuity of action. This is permitting the title to inure to the grantee, rather than forcing him to sue for breach of the grantor's covenant. Two: to permit the title to inure on the theory that the grantor should not be permitted to impeach and nullify his solemn deed and act by alleging his own fraud and inequity, as for example by claiming and setting up a title against his grantee which could not possibly have existed but for his own fraudulent act and intent. This latter view comes very close to the generally accepted doctrine of estoppel by misrepresentation, rather than the technical estoppel by deed.[5]

The former theory is inconsistent with two general principles. The first: so far as the grantor himself is concerned, no warranties are necessary. The second: there are several instances in which the grantor would not be liable for damages on his breach of covenant, but the courts hold that the estoppel operates. Examples of this are where the grantor has been discharged in bankruptcy, or where the obligation is barred by the statute of limitations.[6]

Having noticed these propositions in general, let us turn to the "Pennsylvania rule,"

> "The courts do not apparently rest estoppel on covenants or recitals in the deed or mortgage, but take the broad ground that if one sells or mortgages land which he does not own, he cannot as against his grantee or mortgagee and those claiming under them, assert a subsequently acquired title or interest, the reason being a fraud on the grantee or mortgagee."[7]

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[4]7 Wyo. 17 (1899).

[5]Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655 (1903); Lindsay v. Freeman, 83 Tex. 259 at 263, 18 S. W. 727 (1892).

[6]Tiffany Real Property, 2nd ed., Vol. II, s 545, at page 2120.

[7]58 A. L. R. 380 et seq.

The earliest case in Pennsylvania seems to be *M'Williams v. Nisley*[8] where it was held that the grantor was estopped even though there was no covenant of warranty. A long line of Pennsylvania decisions are in accord with this early case.[9] The basis of the *M'Williams* case is a novel one. The court there held that since the grantor could have contracted to convey when the restraint was removed, and force would be given thereto, it should have the same result where the grantor makes an actual conveyance. Equity would have decreed specific performance of the contract to convey, therefore there is nothing to prevent equity from declaring the grantor a trustee of the after-acquired title, when he attempts an absolute conveyance of title which he does not own.

Later courts followed this rule, but not the reasoning. Cases following *M'Williams v. Nisley* are all decided on the general principle of estoppel, and all were in accord until the case of *Commonwealth v. Bierly*,[10] where the court stated: —

> "the rule that 'The grantor cannot set up a prior paramount title in himself against his own grantee' applies only to deeds containing covenants or warranties and the estoppel is enforced merely to avoid circuity of action."

This is a reversion to the old and badly considered theory of the common law.

The facts of this case were as follows: —One S claimed that certain tracts were vacant, when in truth warrants to them were outstanding in local owners. S filed application with the state for warrants to these tracts, as permitted under the vacant lands statutes. Warrants issued to S, who never took sufficient possession to constitute adverse possession. Later the Commonwealth acquired the particular tracts from the true owners for forestry purposes and S claimed that the Commonwealth having issued a warrant to him for land which they did not own, and which they later acquired, was estopped to set up title as against him.

The statement of the judge quoted supra, is merely dictum, the case being amply and justly decided on the other grounds.

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[8]2 S. & R. 507 (1816).

[9]Chew v. Barnet, 11 S. & R. 389 (1824); McCall v. Coover, 4 W. & S. 151 (1842); Tyson v. Passmore, 2 Pa. 122 (1845); Washabaugh v. Entrinken, 34 Pa. 74 (1859); Appeal of Boro. of Easton, 47 Pa. 255 (1864); Calder v. Chapman, 52 Pa. 359 (1866); Downingtown Building and Loan v. McCaughy, 1 Ches. Co. 504; Hirsch v. Tillman, 13 Pa. C. C. 251 (1891); Rauch v. Dech, 116 Pa. 157 (1887); Rushton v. Lippincott, 119 Pa. 12, at 23, (1888).

[10]37 Pa. Super. 496 (1908).

1. The Commonwealth was not a grantor and did not purport to vest S with any interest in land which had been previously warranted to others. The particular statute merely authorized a *survey* of *land not already appropriated.*

2. The Commonwealth asserted no fact upon which S was misled to his injury. On the contrary the warrant rested on his own application, in which he had taken oath that the land in question was vacant. S is barred by the fact that the act of the state was brought about by his own misrepresentation as to the vacancy.

The court quoted Coke's statement that

> "setting up of an estoppel by deed may be prevented by an estoppel in pais as against the grantee. An estoppel against an estoppel setteth the matter at large."[11]

3. The county court based its decision on the fact that estoppel would not work against the state, the superior court not overruling on this point.[12]

In view of the facts of the particular case, we feel that the dictum of the judge can be taken lightly, especially in view of the long line of authority contra. It is to be noted that the governmental immunity from suit would have exempted the Commonwealth from a suit for specific performance.

There have been a few cases since *Commonwealth v. Bierly,* but none have overruled it.[13] In all the later cases covenants of warranty are present, and although the possibility of a case where such are not present arising is slight, we feel that the court in its disposition of such a case would overrule this judicial dictum in *Commonwealth v. Bierly* and revert to the "Pennsylvania Rule."

Let us turn to another phase: whether legal title automatically passes to the grantee; whether equitable title automatically passes; or whether the privilege of asserting the estoppel is a personal privilege of the grantee, it being his choice whether to assert it or to sue for damages.

The case of *Knowles v. Kennedy*[14] states: —

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[11]11 Am. and Eng. Ency. (2nd. ed.) 392.

[12]Bartholomew v. Lehigh County, 148 Pa. 82; Comm. v. Phila. County, 157 Pa. 527; Evan's v. Erie County, 66 Pa. 222.

[13]Jordan v. Chambers, 226 Pa. 573 (1910); Waslee v. Rossman, 231 Pa. 219 (1911); Minick v. Marshall, 48 Pa. Super. 43 (1911).

[14]82 Pa. 445 (1876).

> "Where the grantor by deed of warranty had a title which at the time of conveyance was defective, but acquired title subsequently, this title inures to the grantee immediately by way of estoppel and he cannot elect to reject the title and recover the consideration paid, in an action on breach of covenant of warranty."

The case quotes no Pennsylvania authority, but merely the Maine case of *Baxter v. Bradbury*.[15] In the case, the grantor had but a life estate, and purported to convey the fee with a covenant of protection against any one claiming through himself, or his own grantor. The grantee was still in possession, but claimed a breach of covenant of seisin, and sought damages equal to three times the purchase price. The court held that he could not sue for substantial damages until eviction. The grantor to prevent nominal damages as well as the possibility of future damages, had bought in the outstanding title while the suit was in progress, and it was as to this title that the court made the statement. It amounts to mere dictum, not being the precise point in issue.

The weight of Pennsylvania decisions seems to be contrary to this case, holding that equitable title inures, but not the legal title.

The earliest case is *Chew v. Barnet*[16] where it was held that an after-acquired title inured to the grantee in equity only, so as to entitle him to call for a conveyance, but not so as to vest him with legal title. We must remember that the original basis of the decisions (that of the analogy to a contract to convey in the future) permitted this result and this result only.

But the basis adopted by Justice Gibson in this early case was forsaken by the later decisions, although the same result was reached. *Shaw v. Galbraith*[17] reached the same conclusion basing the result on avoidance of circuity of action, holding : —

> "Where title is subsequently acquired and there is a warranty in the deed, to avoid circuity of action, it operates as an estoppel. This is not because title passes by such grant, but the principle of avoiding circuity of action interposes and stops the grantor from impeaching his title to the soundness of which he must answer on the warranty."

All the recent cases hold that legal title is merely held in trust for the grantee.[18] The Jordan case stated :—

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[15]20 Me. 260.

[16]11 S. & R. 389 (1824).

[17]7 Pa. 111 (1847).

[18]Jordan v. Chambers, 226 Pa. 573 (1910); Waslee v. Rossman, 231 Pa. 219 (1911); Minick v. Marshall, 48 Pa. Super. 43 (1911).

> "It is not to be doubted that a vendee who undertakes to sell a full title for value, when he has less than a fee but afterwards acquires the fee holds it in trust for his vendee and will be decreed to convey it to his use,"quoting from *Clark v. Martin*.[19]

The case also states that:

> "Such acquisition inures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of the warrant, that he has the title in question,"

which conforms in the main to the wording of most of the Pennsylvania cases.[20]

Inure cannot mean that legal title passes automatically for it was stated expressly that it does not; therefore the only thing left to pass automatically is the equitable title. It is more than a mere personal right in the grantee; it is an absolute inurement of the equitable title, legal title being held in trust for him. The cases that hold the legal title actually and automatically passes carry this one step farther, and regard that as done which ought to be done, a rule but seldom applied in law, although often in equity.

It is to be noticed that these cases are based on the idea of avoidance of circuity of action, which seems clearly wrong in view of the non-necessity of a warranty upon which to sue, under the "Pennsylvania Rule." But whichever theory is adopted, there is no necessity of regarding the after-acquired title as actually being vested in the grantee, he being fully protected with an enforceable right in equity.

There is no important distinction in consequences whether legal title passes or whether equitable title passes. There are two situations in which such a distinction might become material. The first is that if legal title automatically passes, a subsequent purchaser from the grantor even if he be for value and without notice of the prior transfer would not get good title whereas if equitable title passed, the contra would result under the doctrine of secret equities. But in Pennsylvania the subsequent purchaser would be protected in either case. If legal title passes automatically, he would be protected under the recording system, for a purchaser need not trace back of the time when his grantor acquired

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[19]49 Pa. 299 (1865).

[20]Chew v. Barnet, 11 S. & R. 389 (1824); Skinner v. Stainer, 24 Pa. 123 (1854); Washabaugh v. Entriken, 34 Pa. 74 (1859); Clark v. Martin, 49 Pa. 299 (1865); Logan v. Neill, 128 Pa. 157 (1889).

legal title.[21] If equitable title inured, he would be protected against secret equities.

The second distinction might lie in the fact that the grantee might have the alternative of taking the title, or refusing it and suing for damages—but this is also immaterial for the equitable title inures, leaving the grantee no choice. This is just, for he is getting what he expected, he never contemplating having the choice of money or land.

The only logical theory if one wishes to be consistent is under the equitable principle that where one having no title or an imperfect one, purports to convey good title to another, and afterwards acquires that good title, he may be compelled to convey such title by equity under the specific performance theory. But there is no practical difference in the theories used.

We must note, too, that all these general rules apply equally to a mortgage, as was shown in *Hirsch v. Tillman*,[22]

> "A mortgage is a deed in form and for some purposes is treated as a conveyance, and the doctrine of estoppel by deed has been held to apply to cases of mortgages, estopping the mortgagor and his privies from setting up against the mortgagee an after-acquired title to the estate.

Millard Ullman.

THE FACTOR OF TIME IN SPECIFIC PERFORMANCE

The effects of the passage of time upon legal relationships in general are innumerable; and even when considering only the subject of specific performance, it is evident that almost endless variations of cases in which the time element is material present themselves. However, there are certain fundamental principles involved in this connection which are relatively few in number, and which this note proposes to consider. An attempt will be made to develop these conceptions in the light of the Pennsylvania cases, since they differ at times in this jurisdiction from the rules as they are generally applied.

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[21]Lightner v. Mooney, 10 W. 407 (1840); Caider v. Chapman, 52 Pa. 359 (1866).

[22]2 Pa. Dist. Reports 662; 13 Pa. C. C. 251 (1891); Appeal of Boro. of Easton, 47 Pa. 225 (1861); Hayes v. Leonard, 10 Pa. C. C. 648 (1891).