

## Estoppel By Deed - Application Between Tenants By The Entirety - Day v. Truitt

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# Comments and Casenotes

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## Estoppel By Deed — Application Between Tenants By The Entirety

*Day v. Truitt*<sup>1</sup>

Complainant filed a bill in equity against her divorced husband, requesting an order requiring defendant to execute a quit claim deed to a tract of land previously held by complainant and defendant by the entirety. In substance, the bill of complaint alleged that complainant and defendant acquired the property on June 10, 1936 as tenants by the entirety; and, by a deed containing covenants of special warranty, seisen, right to convey, quiet enjoyment and against encumbrances excepting a certain mortgage, defendant during coverture conveyed the property in question to complainant on August 27, 1938, which deed was duly recorded. Complainant obtained a divorce *a vinculo matrimonii* from defendant on November 24, 1942. Complainant filed a motion for summary judgment and an affidavit in support thereof, setting forth substantially the same facts alleged in the bill of complaint, and defendant demurred to the bill of complaint. Complainant contended that either Article 50, § 10<sup>2</sup> authorized the direct conveyance of entirety property from one spouse to the other without the device of a straw man conveyance, or that defendant was barred by the doctrine of estoppel by deed from asserting an after-acquired title. The latter contention was based on the premise that the divorce terminated the tenancy by the entirety and rendered complainant and defendant tenants in common.<sup>3</sup> The Circuit Court of Prince George's County held that Article 50, § 10 was not applicable to a conveyance by one tenant by the entirety to the other during coverture; but, that when the parties were divorced and thereupon

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<sup>1</sup> Circuit Court, Prince George's Co., Equity No. B-6290, Book 82, Page 406 (1961).

<sup>2</sup> 5 Md. CODE (1957) Art. 50, § 10.

"A conveyance, release or sale may be made to or by two or more persons acting jointly and one or more, but less than all, of these persons acting either by himself or themselves or with other persons; and a contract may be made between such parties."

This section is a part of the Uniform Interparty Agreement Act and will be discussed *infra*, Part II.

<sup>3</sup> See *Meyers v. Loan & Sav. Ass'n.*, 139 Md. 607, 116 A. 453 (1922) and 2 TIFFANY, REAL PROPERTY (3d ed. 1939) § 436, p. 235.

became tenants in common, the doctrine of estoppel by deed operated to bar defendant from denying the effect of his deed to pass title to his interest in the former entirety property. The Court relied primarily on the *Kight*<sup>4</sup> case which held that where a lease of real estate is made by a person who has no present assignable interest therein, but who acquires an assignable interest during the term, the lease by the doctrine of estoppel inures to the benefit of the lessee by operation of law. Judge Marbury stated:

"While it is true that the Court of Appeals of this State has never sanctioned a direct conveyance between a husband and wife of property held by the entireties during the period of coverture, there is no reason to distinguish between the effect of such a conveyance after the dissolution of the marriage with respect to a third party [*Kight* case] as against the grantee in a deed from a husband to his wife [instant case]."<sup>5</sup>

#### I. ESTOPPEL BY DEED<sup>6</sup>

The doctrine of estoppel by deed or estoppel to assert an after-acquired title, as it is sometimes referred to, should not be confused with the doctrine of equitable estoppel which is also referred to as estoppel in *pais* or estoppel by misrepresentation. As to latter the Court of Appeals has said:

"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which may have otherwise existed, either of property, of contract or of remedy, against another person who has in good faith relied upon such conduct and has

<sup>4</sup> *Columbian Carbon Co. v. Kight*, 207 Md. 203, 114 A. 2d 28, 51 A.L.R. 2d 1232 (1955) noted in 16 Md. L. Rev. 73 (1956).

<sup>5</sup> *Supra*, n. 1, 410.

<sup>6</sup> A number of states have passed statutes in the area of estoppel by deed, many of these merely incorporate the principals to be discussed in this article, and others merely confuse an area which is already somewhat perplexing. Maryland passed a statute in this area on March 8, 1856, see Md. LAWS (1856) Ch. 154, § 5 (since repealed). "All title to real estate acquired by the grantor, subsequent to a conveyance purporting to be in fee simple, shall inure to the grantee." After discussing the statutes in the area, specifying objections to them and making several recommendations one writer has said: "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!" Swenson, *Statutory Estoppel By Deed*, 1950 W.U.L.Q. 361, 378. In light of the fact that the Maryland statute is no longer in effect and in view of the objections raised in the article by Mr. Swenson, statutory estoppel by deed will not be considered in this article.

been led thereby to change his position for the worse, and who on his part acquired some corresponding right either of property, of contract or of remedy".<sup>7</sup>

In estoppel in *pais* judicial assistance must be sought<sup>8</sup> since only an equity is created in the grantee and his privies,<sup>9</sup> whereas, in estoppel by deed the after-acquired title inures to the grantee by operation of law.<sup>10</sup>

Originally, the doctrine of estoppel by deed was based on the covenants of warranty running with the land; thus, when the covenantor subsequently acquired title, to prevent circuity of action, it inured to the grantee or his privies.<sup>11</sup> The Maryland Court of Appeals has recognized the doctrine of estoppel by deed based on the covenants of warranty as early as 1856.<sup>12</sup> The modern doctrine of estoppel by deed is no longer based on the covenants of warranty but is based on the representation of the grantor. The leading case in this area is *Van Rensselaer v. Kearney*,<sup>13</sup> in which the Supreme Court of the United States said:

"[W]hatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the

<sup>7</sup> *Fitch v. Double "U" Sales Corp.*, 212 Md. 324, 338, 129 A. 2d 93, (1957). See also, 2 Walsh, Commentaries On The Law of Real Property (1947) § 226, p. 524, where in reference to estoppel in *pais* is stated:

"That doctrine depends entirely on representations, express or implied, that the deed purports to convey a fee or other definite estate and that the grantor has such title, that the grantee has parted with value or otherwise has changed his position relying on such representations, and that justice demands that the grantor be estopped from denying their truth."

<sup>8</sup> *Fitch v. Double "U" Sales Corp.*, 212 Md. 324, 129 A. 2d 93 (1957); *Rodgers v. John*, 131 Md. 455, 102 A. 549 (1917).

<sup>9</sup> 2 Walsh, Commentaries On The Law of Real Property (1947) § 226, pp. 524, 525.

<sup>10</sup> American Law of Property (1952) § 15.21, p. 847. "It is said that the title vests by operation of law, or by inurement, as soon as it is acquired by the grantor, without the need of judicial assistance."

<sup>11</sup> 19 Am. Jur. 615, Estoppel, § 16:

"[A]t law covenants of warranty contained in a deed of conveyance of land run with the land, and if the covenantor subsequently acquires an outstanding paramount title, it inures by force of the covenant to him who claims under the deed of the covenantor."

<sup>12</sup> *Funk v. Newcomer*, 10 Md. 301, 316 (1856). "[A] grantor is estopped from denying the title of his grantee; a title acquired by the grantor, after he has conveyed, by warranty, land to which he had no title, inures to the grantee by estoppel." See also, Md. LAWS (1956) Ch. 154, § 5.

<sup>13</sup> 11 How. 297, 325, 13 L. Ed. 703 (1850).

deed purports to convey; or, what is the same thing, if the seizing or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance."

This view of estoppel by deed as based upon representation is similar to, and is often said to be merely the application of estoppel in *pais*;<sup>14</sup> however, the cases express the rule as actually passing the title to the grantee,<sup>15</sup> and is therefore properly classified as estoppel by deed. No Maryland Court of Appeals decision specifically adopting this position has been found, but dictum in *Columbian Carbon Co. v. Kight*,<sup>16</sup> supports the view. This expression of the doctrine represents the weight of authority today and only a few cases either directly or indirectly support the view that a covenant of warranty is essential to estop the grantor from asserting an after-acquired title.<sup>17</sup> Without the necessity of the covenants of warranty, it is evident that the doctrine of estoppel by deed has application to most conveyances.<sup>18</sup>

<sup>14</sup> 4 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 1235.

<sup>15</sup> Walsh, *op. cit. supra*, n. 9. § 226, fn. 16, pp. 528, 529. Referring to the representation line of cases:

"In many of these cases statements of the court seem to express the rule that title passes to the grantee and the privies of the grantor are also bound, but they emphasize the equity involved to prevent a fraud on the grantee, basing the decision on the false representation of the grantor, which is nothing more or less than equitable estoppel or estoppel in *pais*. These statements may well be construed as referring to a transfer of equitable title to the grantee and the privies of the grantor may well be construed as not including a subsequent innocent purchaser. Only in this way can these decisions make sense."

<sup>16</sup> 207 Md. 203, 210, 114 A. 2d 28, 51 A.L.R. 2d 1232 (1955) noted in 16 Md. L. Rev. 73 (1956). "The grantor who executes a deed purporting to convey land to which he has no title at all or to which he has a defective title at the time of conveyance will not be permitted, when he afterwards acquires a good title to the land, to claim in opposition to his deed. This principle is based upon the ancient doctrine that such a deed operates upon the after-acquired title by way of estoppel. It has been stated that the title vests by operation of law as by inurement as soon as it is acquired by the grantor, without the need of judicial aid, in order to prevent circuity of action."

<sup>17</sup> 19 Am. Jur. 617, Estoppel, § 18; 58 A.L.R. 345, 380 (1929); 144 A.L.R. 554 (1943).

<sup>18</sup> *E.g.*, see 3 American Law of Property (1952) § 15.19, p. 844 where in reference to the doctrine under the representation view, it was said:

"By virtue of this doctrine, though a quit claim deed will not ordinarily estop a grantor from asserting a later-acquired title or interest, it will have that effect by virtue of the statute or without a statute when the deed shows an intent that it should cover the interest subsequently acquired."

It should be noted that under either view, the doctrine of estoppel by deed is applicable in two situations: first, where the grantor has no interest in the property at the time of the deed but subsequently acquires title; and, secondly, where the grantor has an inalienable interest in the land at the time of the conveyance which later becomes alienable.<sup>19</sup> The Maryland Court of Appeals has applied the doctrine as based on the covenants of warranty to both situations. In *Poultney v. Emerson*,<sup>20</sup> applying the doctrine to a lease where the lessor had no interest at the time lease was executed the court said:

“It is a well-recognized rule that if a lease is made by one who has no present interest in the demised property, but acquires an interest during the term, the lease will operate upon his estate as if vested at the time of its execution.”

*Columbian Carbon Co. v. Kight*,<sup>21</sup> as quoted by the Court in the instant case, discussed the situation where the grantor has an inalienable interest at the time of the conveyance.

As previously indicated, the doctrine of estoppel by deed is said to pass the after-acquired title to the grantee or his privies, whereas, the doctrine of estoppel in *pais* requires judicial assistance. The distinction between these views is important in two situations: (1) where the dispute is between a grantee who takes a conveyance before his grantor has an interest in the property and a subsequent bona fide purchaser from the common grantor, and (2) where the grantee maintains an action against the grantor upon the covenants of title.<sup>22</sup>

In the first situation, if we apply the doctrine of estoppel by deed, the subsequent purchaser for value without actual notice would lose, provided the prior deed had been recorded.<sup>23</sup> To remedy the obvious conflict be-

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<sup>19</sup> 7 THOMPSON, REAL PROPERTY (Perm. Ed.) § 3845, p. 310:

“Where a grantor who has no title, whose title is defective, or whose estate is less than that which he assumes to pass, conveys by warranty or covenants of like import and subsequently acquires the title or estate which he purports to convey, or perfects his title, such after-acquired or perfected title will inure to the grantee, or to his benefit, by way of estoppel.”

<sup>20</sup> 117 Md. 655, 658, 84 A. 53 (1912).

<sup>21</sup> 207 Md. 203, 114 A. 2d 28, 51 A.L.R. 2d 1232 (1955) noted in 16 Md. L. Rev. 73 (1956).

<sup>22</sup> 2 Walsh, Commentaries On The Law of Real Property (1947) § 226, pp. 531-532 and 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1230, p. 640.

<sup>23</sup> 3 American Law of Property (1952) § 15.22, pp. 849-50; 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1234, pp. 652-653; 2 Walsh, Commentaries On The Law of Real Property (1947) § 226, pp. 529-530.

tween the doctrine of estoppel by deed and the chain of title theory of constructive notice, it is said that the record of the prior conveyance does constitute constructive notice to the subsequent grantee even though recorded before the grantor became the owner.<sup>24</sup> However, in the opinion of the treatise writers this view imposes: "[o]n every purchaser the very serious burden of searching the records for conveyances made not only by his vendor, but also by his vendor's predecessors in title, for an indefinite time back of the date of his or their acquisition of title."<sup>25</sup>

If the doctrine of estoppel in *pais* is applied in this situation, the conflict with the recording system does not arise as a subsequent purchaser for value without notice is protected.<sup>26</sup> This result would leave the prior grantee to bring suit for damages for breach of the covenants of title.<sup>27</sup>

As to the second situation, if we apply the doctrine of estoppel by deed, the grantee would be compelled to take the after-acquired estate.<sup>28</sup> Thus, the grantee is denied the right to exercise his right to recover damages for breach of covenant and must take the after-acquired estate in par-

<sup>24</sup> American Law of Property, *op. cit. supra*, n. 23, § 15.22, fn. 3, pp. 849-850. See also, Walsh, *op. cit. supra*, n. 23, § 221, p. 511, where in reference to this remedy he states:

"Courts so deciding have erred in two respects; first, in applying the obsolete doctrine of estoppel by deed at law, which does not properly apply at all to modern deeds, the courts holding in these cases that the legal title actually vests in the first purchaser through estoppel by deed, so that no title at all passes to the second purchaser, preventing the application of the doctrine of purchaser for value without notice, and secondly, in disregarding the fact that the first deed or mortgage, though recorded, does not appear in the chain of title, since the grantor or mortgagor was a stranger to the title when the prior instrument was executed and recorded."

<sup>25</sup> TIFFANY, *op. cit. supra*, n. 23, § 1234, p. 653. See also, American Law of Property, *loc. cit. supra*, n. 24.

<sup>26</sup> See Walsh, *op. cit. supra*, n. 23, § 226, p. 525 where in reference to estoppel in *pais* it is stated:

"This doctrine creates an equity only, not a transfer of the legal title when the grantor subsequently acquires title to the property, so that a subsequent purchaser of the legal title from the same grantor for value and without notice takes free of the equity."

<sup>27</sup> Bigelow, Estoppel (6th ed. 1913) 480.

"It is sufficient protection to one who has been so rash as to purchase before the grantor has a title, that he may call upon his grantor to make a further assurance upon acquiring title, or, if too late for this, that he may maintain an action upon the covenants of his deed."

<sup>28</sup> Walsh, *op. cit. supra*, n. 23, § 226, p. 530.

"The doctrine that the legal title actually passes to the grantee logically results in preventing or reducing the recovery by the grantee for breach of the covenants of title, and cases insisting on that doctrine so hold."

See also, Tiffany, *op. cit. supra*, n. 23, § 1230, p. 640 and American Law of Property, *op. cit. supra*, n. 23, § 15.23, p. 851.

tial or total satisfaction of his claim.<sup>29</sup> Were the doctrine of estoppel in *pais* applied in this situation, the grantee would have an option of accepting the after-acquired estate or of maintaining an action to recover damages for breach of covenant.<sup>30</sup>

## II. DIRECT CONVEYANCE

The Court in the instant case concluded that the Uniform Interparty Agreement Act<sup>31</sup> was not applicable to a conveyance by one tenant by the entireties to the other during coverture. This Act has been adopted by only four states.<sup>32</sup> Complainant contended that this act authorized a direct conveyance by one tenant by the entireties to the other during coverture and she cited a number of Pennsylvania cases so holding.<sup>33</sup> However, the Pennsylvania statute had been amended so as to contain a special section making it applicable to a conveyance by "either tenant by the entireties alone to the other without the other joining in the deed."<sup>34</sup> Irrespective of the fact that the Pennsylvania statute has an express provision, it has been argued that the Maryland statute would support such a construction.<sup>35</sup>

Notwithstanding the fact that the Uniform Interparty Agreement Act might not apply, the Court in the instant case could have upheld the direct conveyance on the theory

<sup>29</sup> *Ibid.*

<sup>30</sup> Walsh, *op. cit. supra*, n. 23, § 226, p. 530.

"The better considered cases hold that the grantor cannot bar or reduce the grantee's recovery by setting up the grantee's title by estoppel, since the estoppel arises for the benefit of the grantee in order to prevent the loss which otherwise would result from the grantor's misrepresentation, not for the benefit of the author of the fraud."

See also, American Law of Property, *op. cit. supra*, n. 23, § 15.23, pp. 851-852 and Tiffany, *op. cit. supra*, n. 23, § 1230, p. 640.

<sup>31</sup> 5 MD. CODE (1957) Article 50, § 10, *supra*, n. 2.

<sup>32</sup> 1927 — Nevada, N.R.S. 102.010-102.060; Pennsylvania, 69 P.S. §§ 541-546; 1929 — Utah, U.C.A. 1953, 15-3-1 to 15-3-4; 1931 — Maryland, 5 MD. CODE (1957) Art. 50, §§ 10-15.

<sup>33</sup> See *e.g.*, Tracy v. Tracy, 377 Pa. 420, 105 A. 2d 122 (1954).

<sup>34</sup> 69 P.S. § 541 (Perm. ed. 1931) as amended.

<sup>35</sup> Meyerberg, *Maryland Examines the Proposed Uniform Property Act*, 4 Md. L. Rev. 1, 39 (1939).

"It should be observed that there is nothing in either the existing Maryland Statute [referring to the Uniform Interparty Agreement Act] or the proposed Section 18 [referring to the Uniform Property Act] which affects any of the incidents of a tenancy by the entireties, except that they render unnecessary a resort to the fiction of a straw man where the spouses jointly determine that one of them shall enjoy the property in severalty."



of a *release*.<sup>36</sup> At common law a direct conveyance by one tenant by the entireties to the other was void due to the legal unity of husband and wife.<sup>37</sup> However, since the Married Women's Property Acts<sup>38</sup> authorize interspousal conveyances, it is generally held that one spouse can transfer his interest in an estate held by the entirety to the other spouse where the latter manifests her assent.<sup>39</sup> It has been stated that "[d]espite the nonjoinder of the wife as grantor, where she has manifested her assent to the conveyance by accepting or recording the deed, or by assuming to deal with the property as absolute owner,"<sup>40</sup> the transfer is generally upheld. In *Kenny v. Peregoy*,<sup>41</sup> the Court of Appeals permitted a husband, via a separation agreement and a deed executed pursuant thereto, to release to his wife his interest in land owned by the spouses by the entireties. The latter decision and the result normally reached, since the passage of the Married Women's Property Acts, in those states still retaining tenancies by the entireties, would support the conclusion that the Court could have upheld the direct conveyance on the theory of a release.

### III. CONCLUSION

The Court applied the doctrine of estoppel by deed, however the same result could have been obtained without resort to this doctrine which many treatise writers dislike. The equity court under the doctrine of estoppel is *pais* could have enforced the conveyance as an executory contract, since it was made for a valuable consideration. Also, the direct conveyance could have been permitted to prevail, either on the basis of the Uniform Interparty Agreement Act or on the theory of a release.

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<sup>36</sup> POWELL, REAL PROPERTY (1954) para. 623, p. 665.

"It is also generally possible today (contrary to the more rigid earlier rule) for one tenant by the entireties to *release* his interest to the other spouse without having both spouses join in the release." (Emphasis added.)

<sup>37</sup> 26 Am. Jur. 858-859, Husband and Wife, § 253.

<sup>38</sup> See e.g., 4 MD. CODE (1957) Art. 45, § 1.

<sup>39</sup> Powell, *op. cit. supra*, n. 35, para. 623, p. 665; 4 Thompson, Commentaries On The Modern Law of Real Property (1961) § 1792, p. 107.

<sup>40</sup> 8 A.L.R. 2d 634, 635 (1949).

<sup>41</sup> 196 Md. 630, 78 A. 2d 173 (1951).