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Phillip E. Norvell

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THE DOCTRINE OR AFTER-ACQUIRED TITLE IN MINERAL CONVEYANCING

Professor Phillip E. Norvell
THE DOCTRINE OF AFTER-ACQUIRED TITLE
AND MINERAL CONVEYANCING

By
Professor Phillip Norvell
University of Arkansas School of Law (Fayetteville)

I. The Common Law Doctrine of Estoppel by Deed

If a conveyance purports to transfer a certain estate, whether this appears from recitals, covenants, or any other part of the instrument, the grantor is estopped thereafter to assert that, by reason of his lack of title at the time, such an estate did not pass by the conveyance – to assert, in other words, that he acquired title after and not before the conveyance. 4 Tiffany Real Property § 1230 (3d ed. 1939).

II. The Modern Strands of the Common Law Doctrine

A. Estoppel by Misrepresentation (Estoppel in Pais).

The grantor, having induced a change of position on the part of the grantee, the payment of purchase money, by his representation that he has an estate of a certain character, is thereafter estopped to deny that the conveyance passed the estate which it purported to pass, but also that the conveyance actually passes, by way of estoppel, any estate or title which the grantor may after acquire in the land. Id.

B. Estoppel by Representation.

The grantor recites in a deed, typically without covenants of title, a fact that represents that the grantor then has an interest to convey. The grantor is estopped by the representation to assert the after-acquired title.
See, *Hagensick v. Castor*, 73 N.W. 932 (Neb. 1898), where a grantor recited in a quitclaim deed that the grantor "being one of the three heirs of George H. Ohler" quitclaimed and conveyed the land to the grantee. In fact, George H. Ohler, although missing, was not then dead. He died later and the court held that the after-acquired title passed under the deed because the recital represented that the grantor then had an interest to convey.

C. Covenants of Title and Avoiding Circuitry of Action.

Although generalizations are difficult to make in this area, the primary doctrine that typically applies in the US is the estoppel by deed based on covenants of title, particularly the covenant of warranty. 4 Tiffany Real Property § 1230 (3d ed. 1939). The doctrine is usually premised on the theory of avoiding circuitry of action, giving the after-acquired title to the grantee instead of relegating him to sue for damages on the grantor's covenant of warranty. Id. The other traditional covenants of title generally found in the warranty deed, the covenant of seisin, right to convey, quiet enjoyment and further assurances, have been used by courts in other jurisdictions as a basis for the applying the doctrine of after-acquired title. 6 American Law Property §15.19 (1952).

III. The Doctrine of After-Acquired Title in Arkansas


"If any person shall convey any real estate by deed purporting to convey it in fee simple absolute, or any less estate, and shall not at the time of the conveyance have the legal estate in the lands, but shall afterwards acquire it, then the legal or equitable estate afterwards acquired shall immediately pass to the grantee and the conveyance shall be valid as if the legal or equitable estate had been in the grantor at the time of the conveyance."

B. The Warranty Deed/Quitclaim Deed Distinction.

i. After-Acquired Title in Arkansas is based on the Covenant of Warranty.

The covenant of warranty is the basis for vesting the grantor's after-acquired title in the grantee.
Thus, the doctrine is inapplicable to quitclaim deeds. 

Holmes v. Countiss, 115 S.W.2d 553 (Ark. 1938) See also cases cited in Note, Estoppel to Assert an After Acquired Title in Arkansas, 17 Ark. L. Rev. 67, 71 n. 43.

ii. The covenant of warranty is implied by statute when the words “grant, bargain and sell” appear in the granting clause.

The Arkansas Statutory Short Form Warranty Deed, Ark Code Ann. § 18-12-102(b), implies the traditional covenants of title in a deed if the granting clause utilizes the words “grant, bargain and sell.” Such a deed will convey after-acquired title. However, because the statute is construed literally, the granting clause must contain the precise language “grant, bargain and sale.” See, Chavis v. Hill, 224 S.W.2d 808 (Ark. 1949), holding a deed that contained the language “grant, bargain, sell, convey and quit claim” in the granting clause did not convey after-acquired title because it failed to comport with the statute. But see, Graham v. Quarles, 176 S.W.2d 703, 705 (Ark. 1944) wherein the Arkansas Supreme Court held that a granting clause containing the language “grant, bargain, sell and convey” imported a covenant of warranty into the deed pursuant to the statute.

iii. Limitations on the warranty deed/quitclaim deed distinctions; the intent of the grantor versus the form of the deed.

The form of the deed is not necessarily controlling as to whether the doctrine applies. In Bradley Lumber, Co. v. Burbridge Co., 210 S.W.2d 284 (Ark. 1948), a quitclaim deed was held to convey the after-acquired title because it contained a recital that the grantor conveyed “all of its interest, present and prospective.” Contrarily, in a deed that imported the implied warranty of title pursuant to the statutory short form warranty deed act did not convey after-acquired title due to the recital that the grantor was only conveying “all my right title and interest” to the land. See, Note, Estoppel to Assert an After Acquired Title in Arkansas, 17 Ark. L. Rev. 67, 71.

The Arkansas Supreme Court typically frames the issue in these cases as to whether the deed is a
quitclaim or a warranty deed, with the latter deed only conveying after-acquired title. **Graham v. Quarles**, 176 S.W.2d 703, 705 (Ark. 1944). However, scrutiny of the cases reveals that the underlying test, ultimately founded on the intent of the parties, is simply whether the deed conveyed or attempted to convey the land or only conveyed or attempted to convey the grantor’s *presently owned interest* (or property acquired from a specific source). See, **Bradley Lumber Co. v. Burbridge Co.**, 210 S.W.2d 284, 287 (Ark. 1948). Additionally, see, Richard W. Hemingway, After-Acquired Title in Texas, 20 Sw. L.J. 97, 121 (1966).

C. The Operation of Estoppel by Deed

i. The doctrine of after-acquired title only applies when the grantor conveys or attempts to convey, but fails to convey an interest in land.

The Statute only affects interests in land which the grantor has conveyed or which his deed purports to convey. It does not affect an interest afterwards acquired by the grantor, which he has not previously conveyed or attempted to convey. **Wells v. Chase**, 88 S.W.1030, 1031 (Ark. 1905).

ii. The after-acquired title passes automatically, *Eo Instante*, to the grantee.

**Hayes v. Coates**, 238 S.W.2d 935 (Ark. 1951), adopts, as a rule of property, the “automatic vesting” theory in which the title automatically vests in the grantee at the very moment that it is subsequently acquired by the grantor. Under this theory, the grantee does not have to do anything to obtain the after-acquired title. Arkansas in **Lewis v. Bush**, 283 S.W. 377 (Ark. 1926), overruled by implication in **Coates**, had previously applied the implied trust theory in which the grantor holds the subsequently acquired legal title in trust for the equitable beneficiary grantee. Justice George Smith authored the dissenting opinion which was joined
by two other justices. According to the implied trust theory, as espoused by Justice Smith, the grantee may have to bring specific performance against the grantor to obtain the legal title to the after-acquired and, also, may lose his rights by laches or other equitable defenses. \textit{Id.} at 936.

Title examiners like the automatic vesting theory because the grantee can be determined to have marketable title to the after-acquired interest solely from the record title. No curative efforts are required as to the interest. Critics of the automatic vesting theory lament the fact that it denies to the grantee the option of suing on the covenant of warranty, as opposed to suing to establish title to the after-acquired interest. For a full discussion of the Arkansas cases, see Note, Estoppel to Assert an After Acquired Title in Arkansas. 17 Ark. L. Rev. 67, 74-76.

iii The doctrine of inurement (\textit{feeding the estoppel}).

The doctrine of after-acquired title not only operates in favor of the grantee but for the benefit of her successors-in-interest and, also, not only binds the grantor but the successors-in-interest of the grantor. 6 American Law Property §15.21 (1952). The inurement of the doctrine of after-acquired title to the benefit of those in privity with the grantee, along with the automatic vesting theory, permit \textit{feeding the estoppel}, i.e., allowing the ownership to be \textit{fed} down the chain of title from the grantee to the current owners of the record title interest. The combination of the automatic vesting theory and the doctrine of inurement have prejudiced the equities of subsequent purchasers. See, Osceola Land Co. v. Chicago Mill and Lumber Co., 103 S.W. 609 (Ark. 1907). For a persuasive criticism that Osceola Land does not follow the better view, see 2 Walsh. Commentaries on the Law of Real Property § 221 (1947).
iv. Mechanical application of the doctrine can lead to inequities.

The doctrine of after-acquired title applies to a spouse who joins the warranty deed in order to waive dower or homestead. See, the case of the poor widow Robertson, Robertson v. Griffin, 302 S.W.2d 773 (Ar. 1957).

iii. The unusual application: the two deed scenario (or where the grantee was the grantor in the prior overconveying deed).

In Garvin v. Mack Oil Co., 39 P3d.775 (Okla. 2001), the Oklahoma Supreme Court applied the doctrine of after-acquired title to a subsequent deed between the same parties where the grantee was the grantor in the prior overconveying deed. The result in Mack Oil Co. is better illustrated by an examination of the facts in the case. All the deeds involved were mineral deeds containing covenants of warranty. Feagin originally owned 40 mineral acres in the land involved. In 1927, Feagin conveyed 26.667 mineral acres to Garvin and Gant. Then, in 1928, Feagin, owning only 13.333 mineral acres, purported to convey 20 mineral acres to McCaughey. Title failed in McCaughey’s deed as to 6.667 mineral acres. Thereafter, in a 1929 deed, McCaughey purported to convey 10 mineral acres back to Feagin. The Oklahoma Supreme Court, applying the doctrine of after-acquired title to McCaughey’s 1929 deed back to Feagin, deducted from that grant the 6.667 mineral acre deficiency that existed in Feagin’s 1928 deed to McCaughey. Thus, by his 1929 deed, Feagin only acquired 3.33 mineral acres though it purported to convey 10 mineral acres.