Washington University Law Review

Volume 9 | Issue 3

January 1924

The Doctrine of After-Acquired Title as Between One Who Took Before and One Who Took After—Common Grantor Acquired Title

Maurice W. Covert
Washington University School of Law

ST. LOUIS LAW REVIEW

Published Quarterly During the University Year by the
Undergraduates of Washington University School of Law.

NOTES

THE DOCTRINE OF AFTER-ACQUIRED TITLE AS BETWEEN ONE WHO TOOK BEFORE AND ONE WHO TOOK AFTER—COMMON GRANTOR ACQUIRED TITLE.

In studying a proposition of law it is often advisable to study it not only from authority, but also from the standpoint of the better reasoning. A proposition upon which we find much conflict of opinion is the point of who is to take

title when two grantors hold deeds from a common source of title and one of these deeds has been recorded before the grantor took title and the other deed has been recorded since he took title. To sustain the first deed would be observing the technical rule of estoppel and overlooking the spirit of the registry laws. To sustain the latter deed would be to observe the spirit of the recording laws and to overlook the technical rule of estoppel.

We find much diversity of opinion in the courts about which is the proper theory. A good example of this is the case of *Ford v. Unity Church Society.*[1] James Cargill, the common source of title, died testate in 1858. By his will he gave his wife, Nancy G. Cargill, a life estate in all his real and personal property. Upon her death his son, George, was to receive the home place and the executor was to see to the division of all the remainder into four equal parts, one part to each of his children. In proper time, 1879, these instructions were complied with and the lots in question were given to John Cargill and his heirs. The present defendant claims title through the said John Cargill. In the year 1860 John Cargill had mortgaged his interest to all the real estate which his father owned at his death. The trustee had, in 1865, upon default of the mortgagor, sold the land under the mortgage. At this sale Nancy G. Cargill bought the land. Two years prior (in 1863), said Nancy G. Cargill had deeded to her daughter, Abby N. Ford, by a gratuitous deed, "the one divided fourth part" of certain lots, these lots being the ones in question. The present plaintiff holds under Abby N. Ford.

The Court first decides that this deed, instead of intending to convey "the one divided fourth part," really intended to convey "the one undivided fourth part." They then proceed to the real question of the case.

The theory upon which the present plaintiff attempts to

1. 120 Mo. 498.

sustain his right of action here is that the title acquired by Nancy G. Cargill by the deed of 1865 immediately passed, by estoppel, to Abby N. Ford by reason of the deed executed by Mrs. Cargill to Mrs. Ford two years previous.

The defendant's contention is that this action cannot be maintained because they took without actual notice of the prior recorded deed, and they contend, cannot be charged with constructive notice by reason of the recording.

The deed of 1863 was from Nancy G. Cargill who, at that time had a life estate in the property. But she did not attempt to convey it but attempted to convey a fee simple title which she did not have at that time. The Court here decides that the subsequently acquired title does not pass by estoppel to the grantee of the former deed. If the title did so pass the duty would be placed upon every grantee to trace not only his line of title, but would force him to go back of each grantor that appeared in the chain of title and see whether or not this prior grantor had made any deed attempting to convey the title before he acquired title. This position, says Mr. Rawle,[2] "certainly cannot be considered tenable." The Court says that a deed, even though it be recorded, made by one without title, but who afterwards acquires the title by a recorded deed, is not constructive notice to a subsequent purchaser in good faith from the common grantor.

In *Cockrill v. Bane*[3] the Court lays down the rule that a mortgage that purports to convey a certain estate to which he has no title at the time may give effect to such security by subsequently acquiring title to the same. In this case the mortgagor had mortgaged 40 acres when he owned only 34.3 acres, later he acquired the remaining 5.7 acres. Upon default the whole tract of 40 acres was sold. The Court says that the acquisition of the 5.7 acres after it had pur-

2. Rawle on "Covenants for title"—Page 403.
3. 94 Mo. 444.

ported to be conveyed in this mortgage deed served to place it under the mortgage.

This case is in apparent conflict with the Ford case. The Ford case does not give effect to the former deed by estoppel while in the Cockrill case the subsequent acquisition of the property serves to make it subject to the prior deed. It seems as though we are able to reconcile these two cases because in the Ford case the right of third parties had intervened, while in the Cockrill case only the immediate parties were interested.

The case of *Boyd v. Hazeltine*[4] stands upon similar facts and likewise can be distinguished from the Ford case. But if there is any conflict between the Ford case and these two prior decisions the two prior decisions are necessarily overruled by implication.

In a subsequent case[5] the decision is not really in conflict although, at first blush, it appears to be. A purchaser under a tax sale had given a deed to the land in question and this deed had been recorded before the recording of the Sheriff's deed. The Court holds that such title passes by estoppel to the grantee and this grantee can hold the title as against grantees of subsequent deeds given by the purchaser at the tax sale whose deed was recorded after the recording of the sheriff's deed. The ground for the decision here is based upon the fact that the deed in question was executed after the execution of the sheriff's deed and although it was recorded first, still the subsequent grantees acquired with notice of the tax suit even though they did not necessarily acquire with notice of the particular deed. The grounds for holding that the deed was executed after the sheriff's deed were as follows: The sheriff's deed had been dated September 6, 1887, and acknowledged and

4. 110 Mo. 203.

5. Norman's Land & Manufacturing Co., Appellant v. Stephen B. Hunter & Alfred L. Harty, 270 Mo. 62.

recorded the following March. On October 1, 1887, the deed in question had been made. The Court says that the acknowledgment in March referred back, and the deed "took effect, by relation, from the date of the sale."[6] The notice of the tax suit was sufficient to give constructive notice of the deed. The Court here recognizes the rule as laid down in the Ford case as good law, but holds that it is not applicable to the facts presented here.

The effect of all these cases is to leave the doctrine untouched, that after-acquired title does not pass by estoppel by reason of a prior deed recorded before the common source of title acquires title, if the rights of third parties have intervened. Such is unquestionably the law in Missouri. This doctrine is also supported by decisions from other States.[7]

In *Calder v. Chapman,*[8] the question arose whether or not, when the records showed an absolute conveyance from Chapman to Calder, it was necessary in searching Calder's title to go back of the conveyance of Chapman to him so as to take in any and every possible conveyance made by Calder before he acquired title. In support of the negative of this proposition the Court says, "In searching for incumbrances or conveyances, the search against Calder would begin with his title from Chapman, and the search beyond would be against Chapman and those through whom he claimed; and a search against Calder during the same period would be considered an utter absurdity."[9]

To sustain the principle that the first deed is controlling, we must hold the searchers of title in fault if they do not look at the records for deeds made from every grantee not

6. Porter v. Mariner, 90 Mo. 364, l. c. 368; Boyd v. Ellis, 107 Mo. 394, l. c. 401; Bush v. White, 85 Mo. 339, l. c. 358; Mason v. Perkins, 180 Mo.

7. Wheeler v. Young, 76 Conn. 44; Bingham v. Kirkland, 34 N. J. Eq.

8. 52 Pa. St. 339.

9. In accord, Wood v. Farmere, 7 Watts 385; M'Lanahan v. Reeside. 9 Watts 510; Loan & Trust Co. v. Maltby, 8 Paige 361.

only subsequently to the time of acquiring the title but also to any conveyance or incumbrance made before acquiring the title. The mere statement of this doctrine shows its absurdity. A searcher of title, by the clearly established rule, is required to look only at the chain of title. The chain of title, in the case of each holder, begins with the deed to him and looks for any subsequent conveyance or incumbrance from him. A searcher of title cannot be required to look for every possible, untraceable, secret estoppel that may be lying in ambush to entrap the title.

However, there is a line of decisions which hold that the after-acquired title passes to the prior grantee by way of estoppel. Courts in support of this doctrine say that not only the grantor is bound, but also his grantee.

In the case of *The Builders Sash & Door Co. v. W. D. Joyner,*[10] the Court says that the doctrine is fully settled that a subsequently acquired title inures to make good a former deed of the grantor made when such grantor has no title.

In *Cuthrell v. Hawkins,*[11] the Court says, "If A sell to B by indenture he thereby affirms that he has title when he made his deed, and if he did not and afterwards acquired one, in an action by him against B the title of the latter prevails, not because A passes to him any title, because he had not any then to pass, but because he is precluded the fact."

In a Delaware case,[12] the Court says, "Where one who has no title conveys land with warranty, and afterwards acquires title and conveys to another, the second grantee is estopped to say that the grantor was not seized at the time of the first conveyance. And where both parties claim under the same person, they are privies in estate and cannot, as

10. 182 N. C. 518.
11. 98 N. C. 203.
12. Doe ex. dem. Potts v. Dowdall, 3 Houst. 369.

such, deny the title of the grantor at the time of the first conveyance; and the estoppel working upon the land binds both parties and privies."

The theory advanced by cases holding to this line of reasoning is as follows: An obligation of estoppel attaches against not only the grantor, but his privies. It adheres to the land and is transmitted with the estate, whether the same passes by descent or purchase. The reason that is given is that the estoppel becomes, and forever after remains, a muniment of the title so acquired, and when a party so estopped conveys the land, he necessarily conveys it subject to such estoppel in the hands of his grantee.[13]

These cases necessarily overlook or ignore the registration laws. Holding to this doctrine is to allow a person who is grossly negligent in taking a deed from a grantor who has no title to hold in opposition to a second grantee of this common grantor who may have looked down the chain of title before accepting his deed. It would be more in accord with public policy and fair dealing to make the records constructive notice only of such deeds as are recorded after the grantee received title.

Decisions are numerous that if the subsequent grantee takes with actual notice the title will inure to the benefit of the first grantee as against the subsequent grantor.[14]

In the case of *Salisbury Savings Society v. Cutting*,[15] the Court in speaking of the question whether a deed given with covenants of warranty before the grantor acquires title to the land conveyed is to prevail over a deed given after the title is acquired by the grantor to a purchaser who takes in good faith and with no knowledge of the previous deed

13. The cases of Ayer v. Phila. & B. Face Brick Co., 159 Mass. 84; and Rose v. Agee, 128 Va. 502; together with many others, support this decision.

14. Ketchum v. Pleasant Valley Coal Co., 257 Fed. 274; Clark v. Baker, 14 Cal. 612; Ward v. Willard, 13 N. H. 389. In fact, the authorities upon this proposition are practically unanimous.

15. 50 Conn. 113.

and for value, recognize the difficulty of deciding such a question.

In sustaining the later deed, we should have to deny the controlling application to the case of the well settled principle of estoppel, while in sustaining the prior deed we should have to violate the entire spirit of the registry system, which it is the policy, and we may say in every other case the unyielding policy, of the law to sustain. In this case, it was unnecessary to decide the point.

If the records are to be affected by every deed made by a grantor, even before he acquired title, the effect of the recording laws will be greatly affected. Such construction could not have been within the intent of the statute.

All principles of law must stand or fall upon the final test of whether or not they promote public justice and fair dealing. Sustaining the prior deed is to defeat the rights of parties who may have been very diligent in tracing their title. It also adds an additional burden on searchers of title. To sustain the subsequent deed is to sustain the one which has been recorded in regular order and the one which would be found by a searcher of title in tracing this title.

Public justice requires that the second deed be sustained over and above the prior deed if the rights of innocent third parties have intervened.

MAURICE W. COVERT, '25.