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**Deeds--Estoppel By Deed--Void Deeds Not Given Effect by Estoppel**

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Caplan felt that such a hearing should be like any other criminal proceeding and the defendant should be entitled to the assistance of counsel.

Both dissenting opinions reached the conclusion that a defendant has substantial rights that would be affected in a probation revocation hearing. According to the Mempa decision where such substantial rights may be affected at a criminal proceeding, counsel must be afforded the indigent defendant. It seems that the majority decisions have drawn a fine distinction center around whether a prisoner was sentenced when his probation was revoked rather than granting a broad constitutional right to counsel in every situation where a defendant's liberty is in jeopardy.

The West Virginia Supreme Court may have made a proper technical distinction between Riffle and Mempa. In West Virginia, however, as well as in other jurisdictions, the option to revoke the probation remains with the hearing judge. Thus, although the judge may be more restricted in his power to impose a criminal penalty than in the sentencing procedure, he still controls the defendant's liberty. Because of this, at such a critical proceeding, there are strong considerations favoring the position that the defendant should be afforded counsel.

Steven C. Hanley

Deeds — Estoppel By Deed — Void Deeds Not Given Effect by Estoppel

On April 1, 1947, Gold conveyed real estate to Eveline Foulds Holwell by a deed which used only the grantee's maiden name. On the same day Eveline Foulds Holwell conveyed the same tract back to Gold, but in the deed immediately following Foulds' name were the words "a single woman." The next day Foulds recorded her deed from Gold, but the deed of reconveyance to Gold was left unrecorded until 1958. In 1956 Foulds executed a deed of conveyance of the same land to a Florida corporation which soon after recorded that deed. Again the marital status of Eveline Foulds was not stated. In 1959 Gold and the corporation conveyed the same tract of land by separate deeds to the defendant Zofnas. In 1969 plaintiff Eveline Foulds Holwell and her husband of fifty-six
years instituted an ejectment action against the defendant. The trial court entered judgment for defendant on the grounds of estoppel. Held, reversed and remanded. Florida statutes require the joinder of the husband's signature on a deed of conveyance of a wife's separate property and without such joinder the entire conveyance is void. Holwell v. Zofnas, 226 So. 2d 253 (4th D.C.A. Fla. 1969).

Recording statutes were originally enacted to give purchasers of land a method of protecting their titles from subsequent conveyances of the same property by their grantors as well as other grantors. Although recording statutes do provide the purchaser with considerably more protection than he had at common law, they nevertheless do not protect the purchaser against defects that are not revealed by the record title. The general rule is that void deeds do not convey title even though recorded. Thus, a deed may be properly recorded and acknowledged but still be invalid to transfer title, even to a bona fide purchaser.

In the Holwell case the plaintiff's deeds through mesne conveyances to defendant were void because of the statutory requirement of the husband's signature on deeds of conveyance of a wife's separate property. This statute is made unusual by the fact that the failure of the husband to join in a deed made by the wife

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1 The earliest recording acts show a desire on the part of the enacting bodies to secure a permanent record of landholding, and to prevent fraudulent claims to lands by concealment of transfers. The subsequent purchaser, while not at first mentioned, soon appears as a person worthy of protection.

2 AMERICAN LAW OF PROPERTY § 17.5 at 535 (A. J. Casner ed. 1952).

3 Marital status incorrectly given; afterborn or other undisclosed heirs; mental incompetence; minority; delivery of deed after death or without authority; title by adverse possession; alteration of instrument after delivery; expired power of attorney; insufficient authority of officers; impersonation or similarity of names; foreign bankruptcy; mechanics' liens; erroneous description; encroachments and rights of persons in possession; fraud or false affidavits; certain liens, assessments, taxes and fines; lack of jurisdiction for judgment; governmental regulations; forgery.

T. McDermott, DESCBOOK ON LAND TITLES AND LAND LAW § 1.32H (1954).

4 The instrument is still void, although recorded. The record can give it no validity. . . . [A] purchaser of real estate from a person holding under a void recorded deed, although in fact a bona fide purchaser, cannot obtain a good or valid title, or, indeed, any title. . . . Stone v. French, 37 Kan. 145, 150, 14 P. 530, 533 (1887).

5 "[N]o deed, mortgage or other instrument conveying or encumbering real property owned by a married woman shall be valid without the joinder of her husband. . . . " FLA. STAT. § 708.08 (1969).
voids the entire conveyance. In many states the failure of such joiner by a spouse only makes the deed void as to that spouse's interest, such as dower or curtesy. Although the Florida statute requiring joinder was specifically applicable to a wife's separate property, it bears remarkable resemblance to other states' statutory or constitutional provisions requiring joinder for a valid conveyance of community property such as a homestead.

All members of the court in Holwell agreed that plaintiff's deeds of conveyance were clearly void under the Florida statute. The defendant maintained, however, that even though the deeds were void the plaintiff should be estopped to assert that invalidity. Defendant's argument without further consideration seems logical. Why should a grantor who has title and purports to convey that title later be permitted to deny the validity of that conveyance? The majority of the court took the position that to estop the plaintiff from asserting the invalidity of the deeds would render the statute nugatory—something the court was powerless

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6It seems that in only eight jurisdictions (Alabama, Florida, Indiana, Kentucky, New Jersey, North Carolina, Pennsylvania, Texas) is there any general requirement which compels the wife to seek the husband's counsel and consent when she wishes to convey her real property. In the balance of the fifty-one jurisdictions (including the District of Columbia) (. . . except that both spouses must commonly unite in conveying the wife's homestead property . . . ), it seems clear that the wife's sole conveyance is effective to pass her interest in her lands.

3 C. Vernier American Family Laws § 183 (1953).

6In many jurisdictions the husband has a contingent interest in the wife's lands, by way of dower or a statutory substitute therefor, which the wife cannot defeat by her sole act. . . . To bar such interest, it may be necessary for the husband either to join in her conveyance or otherwise to release the same. . . . Id.

7Consonant with the basic policy of the homestead laws to preserve the family home, nearly all homestead statutes contain provisions prohibiting the conveyance or encumbrance of homestead property without the concurrence of both spouses. A conveyance or mortgage executed contrary to the statutory prohibition is generally held to be entirely void. . . . The fact that a transferee is an innocent purchaser for value will not validate the transfer.


8"The deeds which Mrs. Holwell executed (under the name of Foulks) without the joinder of her husband were clearly invalid under the statutes and cases cited in the majority opinion." Holwell v. Zofnas, 228 So. 2d 253, 256 (4th D.C.A. Fla. 1969) (dissenting opinion).
to do. In addition, the court argued that it could not estop the plaintiff since "void deeds cannot work an estoppel."\(^9\)

The court's statement that "void deeds cannot work an estoppel" is worth noting since it seems opposed to the well accepted doctrine of estoppel by deed. This doctrine prevents a grantor from asserting anything in derogation of his deed of conveyance, such as lack of title, or failure of title to pass by the deed.\(^10\) It is generally accepted that in order to have estoppel by deed there must be a warranty or covenant of title.\(^11\) It would seem, therefore, that estoppel by deed could more accurately be termed estoppel by warranty or covenant. Today most courts hold that the warranty or covenant need not be in express terms but may be found in any recital of title or intention to convey title.\(^12\) From the recognized limitation that estoppel by deed applies only when there has been a warranty or recital in the deed, it necessarily follows that quitclaim deeds cannot work an estoppel.\(^13\)

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\(^9\) "A review of the . . . cases leads us to the only reconcilable conclusion possible under the statutory enactments in force and effect in Florida . . . . That conclusion is that the statutes and decisions appertaining render void the deed of a married woman whose husband does not join in its execution." Id. at 255.

\(^10\) Id. at 256.

\(^11\) See, e.g., 4 H. Tiffany, Real Property § 1230 (1939).

\(^12\) If a conveyance purports to transfer a certain estate, whether this appears from recitals, convenants, or any other part of the instrument, the grantor is estopped thereafter to assert that, by reason of lack of title in him at that time, such as estate did not pass by the conveyance—to assert, in other words, that he acquired title after and not before the conveyance. Id. at 639.

\(^13\) Id. § 1232.

\(^14\) See e.g., Van Rensselaer v. Kearney, 52 U.S. (11 How.) 297, 322-23 (1851), where the Court stated:

[1]If the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least, so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance.

\(^14\) See, e.g., Dowsn v. Kammerman, 122 Utah 85, 246 P.2d 881 (1952), where the plaintiff purchased the tax title to certain land which he later conveyed to Doris by quitclaim deed. Doris then conveyed title by warranty deed to Kammerman. Plaintiff later discovered that the tax title was void and purchased the actual title from the true owners "for a paltry sum." The plaintiff then instituted an action to quiet title to the land which had at least trebled in value. The court held that since the plaintiff's deed to Doris was merely a quitclaim deed, the plaintiff was not estopped to deny the invalidity of the tax title and his quitclaim deed.
In Holwell all deeds of conveyance by plaintiff may have been quitclaim deeds, and thus the principle of estoppel by deed could not apply.\textsuperscript{15} Furthermore, even if the deeds had contained a warranty of title, the majority probably would have refused to estop the plaintiff from asserting their invalidity,\textsuperscript{18} since estoppel would circumvent the statute and permit the plaintiff to do indirectly what she could not do directly - namely, convey a valid title without her husband's signature.

In the Holwell case the dissenting opinion asserted that although the plaintiff's deeds were void she should nevertheless be estopped from asserting their invalidity.\textsuperscript{17} The dissent maintained that the cases relied upon by the majority sustained their position, but were older cases which had been "substantially modified (if not overruled)"\textsuperscript{18} by holdings in later cases. The dissent stated that the issue to be resolved was "whether a deed which is void [for whatever reason] may be given effect by the doctrine of estoppel."\textsuperscript{19} It would appear that this incorrectly worded the issue. Perhaps it could have been phrased more accurately by asking whether a deed which is void for this reason (violation of a statute) may be given effect by the doctrine of estoppel. As the dissenting opinion indicated, there is some confusion whether or not void deeds may be given effect by estoppel. This confusion partially stems from a tendency of the courts to rely upon general statements of holdings in prior cases\textsuperscript{20} to decide present cases involving the same general

\textsuperscript{15}The only indication that plaintiff's deeds were quitclaim deeds is the quotation by the district court of the trial court's finding in which the trial court stated "[t]hat Plaintiffs ... are estopped as against the Defendants ... from asserting the invalidity of the deeds of conveyance or quit-claim ... Holwell v. Zofnas, 226 So. 2d 253, 254 (4th D.C.A. Fla. 1969).

\textsuperscript{16}In Mullen v. Pickens, 250 U.S. 590 (1919), an Indian in violation of a federal statute attempted to convey an interest in certain tribal lands prior to that land's allotment to him. The deed of conveyance by the Indian contained a warranty of title. The Court stated "it is obvious that this policy [no sale prior to allotment] cannot be evaded by giving to a conveyance with warranty or its equivalent, made prior to actual allotment ... effect ... upon the ground of estoppel ...." Id. at 595.

\textsuperscript{17}"[A]part from the legal estoppel involved, it appears to me that under the facts of this case the doctrine of equitable estoppel would also be applicable against the plaintiffs." Holwell v. Zofnas, 226 So. 2d 233, 237 (4th D.C.A. Fla. 1969) (dissenting opinion).

\textsuperscript{18}Id.

\textsuperscript{19}Id. (emphasis added).

\textsuperscript{20}"It is not an uncommon thing that general expressions used in disassociated cases, when invoked to apply beyond their original meaning, are found inapplicable in the light of special instance." National Life & Accident Ins. Co. v. Eddings, 188 Tenn. 512, 522-23, 221 S.W.2d 695, 699 (1949).
issues but entirely different factual situations.\textsuperscript{21} An analysis of the cases\textsuperscript{22} indicates that public policy is the principal factor in determining whether or not a void deed will be given effect by estoppel. If a deed is void for public policy reasons, the courts generally hold that it cannot later be given effect by estoppel.\textsuperscript{23}

\textsuperscript{21}Compare the inconsistency between the statement found in some cases (see cases cited in notes 23, 24, and 25 infra) "that a void deed cannot work an estoppel against the grantor" with the statement "a grantor is estopped from asserting the invalidity of his own deed" found in other cases (see cases cited in note 26 infra). The reason for this inconsistency lies with the particular reason a deed was declared void. Perhaps, two examples will serve to explain better the inconsistency and untangle some of the confusion. Assume that both of the following examples take place in the same jurisdiction and before the same court.

Example 1. The case of A. v. C.

In 1960 T, the true owner of Blackacre, dies devising Blackacre to his 13 year old son A. The statutory codification of the common law provides that any attempted conveyance of real property by a minor shall be void. In 1965 A deeds Blackacre to B who immediately records the deed. The next day B conveys the land to C a bona fide purchaser, who also records his deed. When A sees C in possession of Blackacre, he brings an action against C to quiet title. At the trial A's counsel points out that A's deed to B was void since A had not reached majority. C's counsel in reply contends that A has no right to recover the land since it is a well established principle that "a grantor is estopped from asserting the invalidity of his own deed." A's counsel then contends that the legal doctrine propounded by C's counsel does not apply because "void deeds, including those made by minors, cannot work an estoppel against the grantor." In accordance with the statute, A wins even though he is asserting the invalidity of his own deed. The court rules in A's favor and in so doing states, "void deeds cannot work an estoppel against the grantor."

Example 2. The case of X v. Z

O is the true owner of Whiteacre. In 1967 X gives Z a warranty deed purporting to convey title in Whiteacre to Z although X owns no interest in Whiteacre. Z records his deed and enters into possession of Whiteacre. In 1968 X obtains title to Whiteacre from O. X now brings an ejectment action against Z. At the trial Z's counsel asserts as a defense the principle of estoppel by deed arguing that a "grantor is estopped to assert the invalidity of his own deed". X's counsel replies that X's deed to Z in 1967 was void because X had no title in Whiteacre at that time. X's counsel then cites the case of A. v. C. (example number one) where the court specifically held "void deeds cannot work an estoppel against the grantor". X's counsel therefore contends that on the basis of A v. C, X's void deed in 1967 cannot work an estoppel against X and prevent him from asserting the invalidity of his prior deed. On the basis of estoppel by deed Z must win even though X's first deed was void and the same court had previously held "void deeds cannot work an estoppel against the grantor".

It should be noted that the Holwell case falls in the class of cases included in the first example although the dissent considered it to fall in the class of cases included in the second example.

\textsuperscript{22}[W]hile the general rule is that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the land assumed to be granted, to deny the grantee's title . . . it is well settled that the doctrine does not apply to the case of a conveyance made by one Non sui juris, or that is contrary to public policy or statutory prohibition. Starr v. Long Jim, 227 U.S. 613, 624 (1913); see 28 Am Jud. 2d Estoppel and Waiver § 7 (1966); 23 Am. Jur. 2d Deeds § 136 (1965).
Deeds void for public policy include those void by statutory prohibition as well as those void owing to various types of fraud. On the other hand, deeds which are void merely because the grantor had no title at the time of conveyance are usually given effect by estoppel if the grantor later acquires title. In Holwell the deeds were void because of public policy reasons embodied in the statute; to give those deeds validity by estoppel would vitiate the statute.

Although the deeds were void and the plaintiff-grantor could thus assert their invalidity, it seems harsh that the defendant-grantee should be required to give up the land and also lose the consideration he paid to the intervening conveyancer. Despite the fact that there were intervening conveyances between the plaintiff and defendant, there would appear to be two avenues of restitution open to a similarly situated grantee.

The first avenue would be the bringing of a bill for unjust enrichment against the original grantor for at least the price at

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24 In the following cases the deeds were held void for lack of joinder. Clark v. Bird, 158 Ala. 278, 48 So. 389 (1909); Phillips v. Lowenstein, 91 Fla. 89, 107 So. 350 (1926); Thompson v. Dyess, 218 Miss. 770, 67 So. 2d 721 (1953); Cruthis v. Steele, 259 N.C. 701, 131 S.E.2d 344 (1963); See cases cited in notes 7, 15 and 23 supra.

25 In Vai v. Bank of Am. Nat'l Trust & Savings Ass'n, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal.Rptr. 71 (1961), a man deceived his wife as to the value of certain property and succeeded in having her sign a property settlement with him. The court held that the wife was not estopped to assert the invalidity of the settlement. In Carpenter v. Osborne, 102 N.Y. 552, 7 N.E. 823 (1886), the wife was the creditor of her husband. By fraudulent means the husband induced the wife to sign a deed of conveyance. The court held that the wife was not estopped to assert the invalidity of the deed. In Thees v. Prudential Ins. Co., 325 Pa. 465, 190 A. 895 (1937), a husband and wife owned property as tenants by entireties. The wife signed a deed of conveyance and forged her husband's signature on the deed. The court held that the husband was not estopped to assert the invalidity of the deed. In Pows v. Wallis, 258 S.W.2d 360 (Tex. Civ. App. 1953), a guardian attempted to convey property without valid consideration. The court held that the deed was void and the ward was not estopped from denying its validity.

26 See Cook v. Katiba, 190 So. 2d 309 (Fla. 1966); Daniell v. Sherrill, 48 So. 2d 736 (Fla. 1950); Harlon v. McLain, 206 Okla. 227, 242 P.2d 732 (1952).

27 See note 9 supra.

28 See note 9 supra.

29 No case could be found in which a suit for unjust enrichment had been brought after a court had declared a deed void. The following dicta was found, however:

"The inequality of allowing the plaintiff to retain whatever purchase money he received from the Doris Trust Company and also regain possession of the land, may amount to grounds for rescission of the of the quitclaim deed, or it may be a basis for a suit in unjust enrichment. ..." Dowse v. Kammerman, 122 Utah 85, 89, 246 P.2d 881, 883 (1952) (dictum). For the facts of this case see note 14 supra.
which that grantor purported to convey title. However, it must be
cautionsed that this avenue may now be blocked to the defendant-
grantee in Holwell by the doctrine of res judicata\(^\text{29}\) since he had al-
ready had the opportunity to ask for a counterclaim for unjust en-
richment in the plaintiff-grantor's ejectment action.

The second avenue of approach for a similar grantee would be
to contend that the original grantor's deeds, although void, con-
istituted a contract to convey. There is some authority that inoper-
tive or void deeds may be given effect as contracts of conveyance
for which damages as well as specific performance may be granted.\(^\text{30}\)
However, in the Holwell case an immediate obstacle arises from
the fact that the plaintiff was not the defendant's immediate
grantor. It might be successfully contended, therefore, that there
was no contract between the plaintiff and defendant. Two possible
counter-arguments against this contention would be (1) that the
defendant was in privity with the plaintiff's grantees, and (2) that
defendant was a third party beneficiary of the contract between the
plaintiff and her grantees. These two counter-arguments, although
perhaps weak in a contractual sense, may nevertheless be sufficient
in a court of equity considering the inequitable result of permitting
the plaintiff-grantor to keep the property and the money. Although
the line of argument that plaintiff's deeds constituted an enforce-

\(^{29}\) "[I]t is well settled that a verdict and judgment of a court of record or a
decree in chancery, puts an end to all further controversy concerning the points
thus decided between the parties to the suit." Mutual Life Ins. Co. v. Newton,
50 N.J.L. 571, 577 (Sup. Ct. 1888).

\(^{30}\) In Cruthis v. Steele, 259 N.C. 701, 131 S.E.2d 944 (1963), a married wo-
man executed a deed of conveyance without the joinder of her husband in viola-
tion of a statute. The court found that the deed was void for violation of the
statute, and that the conveyance was not supported by valuable consideration.
Although the court could not find an enforceable contract due to the lack of
valuable consideration, the court went on to say:

A deed having no validity cannot be made the basis of an estoppel.
But a deed which is invalid in the sense that it is inoperative may never-
theless under some circumstances be held operative as a contract. The
rationale of the holdings that the separate deed of the wife, unassented
to by the husband, may be binding on her after the death of the hus-
band, the wife surviving, is: The purported deed is a contract to con-
vey, and while the husband is alive the obligation of the contract can be
enforced only by an action for damages—the reason being that the
court cannot require specific performance because it cannot compel
the husband to give his written assent. After the death of the husband
the obstacle to specific performance is removed, and equity will declare
the contract effective as a deed under the maxim "equity regards as done
that which ought to be done." Id. at 703, 131 S.E.2d at 946 (citations
omitted).
able contract probably would fail in Florida, it might be used successfully in other jurisdictions.

James R. Watson

Domestic Relations — Recognition of Foreign Modifiable Alimony Decrees

Suzanne S. Hill obtained a divorce from Ernest B. Hill on July 7, 1955, in Washington County, Pennsylvania. Thereafter, the custody of the children was awarded to Suzanne, and Ernest was ordered to pay support money for the maintenance of the children. Pennsylvania law provides that support decrees may be modified, either prospectively or retrospectively, as the case may warrant. Modifications of the order pursuant to the Pennsylvania statute were made at various times, the last being October 30, 1964, requiring Ernest to pay $250.00 per month maintenance and $50.00 per month toward past due installments. Ernest then moved to West Virginia and subsequently failed to make the payments under the Pennsylvania decree. Upon Ernest's failure to make the required payments, Suzanne instituted an action in Pennsylvania which was transmitted to the Marion County Circuit Court according to the provisions of the Uniform Support Law of Pennsylvania. The Marion County Circuit Court dismissed the action on the grounds that the Pennsylvania order, by virtue of the statute, did not possess the requisite finality to be entitled to full faith and credit under the Constitution of the United States. Suzanne appealed to the West Virginia Supreme Court of Appeals. Held, reversed. The order, while modifiable, was sufficiently final as to be entitled to full faith and credit. Hill v. Hill, 168, S.E.2d 803 (W. Va. 1969).

See note 4 supra for an excerpt from FLA. STAT. § 708.07 (1969) which requires joinder of the husband before "encumbering real property". FLA. STAT. §§ 693.03, 708.07 (1969) require such contracts to be executed in the presence of two witnesses. See Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957); Frederick and Logan, Specific Performance Against Married Women, 16 U. FLA. L. REV. 353 (1963).

2 PA. STAT. ANN. tit. 17, § 263 (1962). "Any order . . . made . . . for the support of a wife, child or parent, may be altered, repealed, suspended, increased, or amended, and the said court may, at any time, remit, correct or reduce the amount of arrearages, as the case may warrant."