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Nonjoinder of Husband in Wife's Deed: Applicability of Estoppel

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Today, the flagrant abuses arising from the one-bank holding companies have attracted the concern of Congress. While these abuses must be rectified, legislation in this field will not eliminate the need to reevaluate all bank control of industry. The words of President Nixon contained in a message accompanying his proposal to regulate one-bank holding companies apply to all bank control of commerce and industry: "Left unchecked, the trend toward combining of banking and business could lead to the formation of a relatively small number of power centers dominating the American economy. . . ."[54]

By acceding to the discretion of the respective governmental regulatory agencies, the court in the instant case has increased the urgency for congressional action.

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NONJOINDER OF HUSBAND IN WIFE'S DEED: APPLICABILITY OF ESTOPPEL

Real property was conveyed to the coplaintiff, a married woman, who twice conveyed by deed this same tract of land without the joinder of her husband as required by statute.[1] The first deed, wherein the words

54. 5 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS No. 13, 61 (1969).

1. FLA. STAT. § 693.01 (1967): "Any married woman owning real property may sell, convey or mortgage it as she might do if she were not married, provided her husband join in such sale, conveyance or mortgage."

FLA. STAT. § 708.04 (1967): "The husband and wife shall join in all sales, transfers and conveyances of the property of the wife, other than personal property and choses in action."

FLA. STAT. § 708.08 (1967):

> Every married woman is hereby empowered to take charge of, and manage and control her separate property, to contract and to be contracted with, to sue and be sued, and to sell, convey, transfer, mortgage, use and pledge her property, real and personal, and to make, execute and deliver instruments and documents of every character, without restraint, without the joinder or consent of her husband, in all respects as fully as if she were unmarried. Every married woman, without the joinder or consent of her husband, shall have and may exercise all rights and powers with respect to her separate property, income and earnings, and may enter into, obligate herself to perform, and enforce contracts or undertakings to the same extent and in like manner as if she were unmarried; provided, however, that no deed, mortgage or other instrument conveying or encumbering real property owned by a married woman shall be valid without the joinder of her husband; provided, further, that any claim or judgment against any married woman shall not be a claim or lien against such married woman's inchoate right of dower in her husband's separate property.

The purpose of having the husband join is said to be primarily for the protective benefit of the wife and secondarily for the welfare of the husband by preventing the wife, without his consent, from conveying real property which would be detrimental to the welfare of their mutual marital interest. *See In re* Jensch, 134 So.2d 285 (Fla. 2d Dist. 1961).

Serious doubts as to the constitutionality of these statutes are raised by FLA. CONST. art. X, § 5, *as amended* in 1968:

> There shall be no distinction between married women and married men in

"a single woman" appeared, was executed in 1947 and recorded in 1958. The second deed, without any marital status mentioned, was executed and recorded in 1956. In 1959, the two grantees conveyed, each by separate deed, to the defendants. In 1969, the wife and her husband brought an action in ejectment against the defendants. Judgment was entered for the defendants. On appeal to the District Court of Appeal, Fourth District, *held*, reversed: A married woman's deed without joinder of her husband is void and therefore cannot be given effect by the doctrine of estoppel in the absence of a statute permitting it. *Holwell v. Zofnas*, 226 So.2d 253 (Fla. 4th Dist. 1969).

Estoppels are generally said to be of three kinds: (1) by deed; (2) by matter of record;[2] and (3) by matter *in pais*. The first two are also called legal or technical estoppels, as distinguished from the third, which is known as equitable estoppel.[3]

Estoppel by deed is commonly said to be a bar which precludes one party to a deed and his privies[4] from asserting as against the other party and his privies any right or title in derogation of the deed, or from denying the truth of any material facts asserted therein.[5] It is difficult, however, to prescribe a definition of universal application in regard to what is called equitable estoppel,[6] because it depends on the particular facts

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the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.

Notwithstanding this provision, a clear "distinction" in the treatment of conveyances by married men and married women exists under the present statutory scheme. A deed from a married man without his wife's joinder is not "void" but passes title subject to her dower right of one-third interest in fee simple which is dependent upon her surviving her husband and duly filing an election to take dower. As of the date of this note, the issue has not been resolved in the courts and none of the statutes have been changed by the legislature.

The problem is not presented in the instant case since the conveyances were made prior to 1968. If the statutes are declared unconstitutional, however, or repealed by the legislature, the primary issue in this case of whether the doctrine of estoppel is applicable to a conveyance by a married woman wherein her husband does not join would not arise in cases involving conveyances made after 1968.

2. Estoppel by matter of record is defined as "[t]he preclusion to deny the truth of the matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction." Watson v. Goldsmith, 205 S.C. 215, 223, 31 S.E.2d 317, 320 (1944). Estoppel by matter of record is not an issue in the instant case.

3. Estoppel *in pais* and equitable estoppel are generally recognized as convertible terms. *See* Brown v. Corn Exch. Nat'l Bank & Trust Co., 136 N.J. Eq. 430, 439, 42 A.2d 474, 480 (1945), *modified*, 137 N.J. Eq. 507, 45 A.2d 668 (1946); State *ex rel.* Squire v. Murfey, Blossom & Co., 131 Ohio St. 289, 299, 2 N.E.2d 866, 870 (1936).

4. Privity in the law of estoppel has a different and narrower meaning from privity in contract. It concerns merely the succession of rights. *See* Coral Realty Co. v. Peacock Holding Co., 103 Fla. 916, 138 So. 622 (1931); Murrelle v. Broughton, 142 Ga. 41, 82 S.E. 456 (1914).

5. For similar definitions, see Hart v. Anaconda Copper Mining Co., 69 Mont. 354, 358, 222 P. 419, 421 (1924); Talley v. Howsley, 170 S.W.2d 240, 243 (Tex. Civ. App. 1943), *aff'd*, 142 Tex. 109, 176 S.W.2d 158 (1944).

6. This difficulty was recognized in Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775, 790 (Fla. 1956):

> Equitable estoppel or estoppel in pais is a term applied to a situation where, because of something which he has done or ommited to do, a party is denied the right to plead or prove an otherwise important fact. Any more exact or complete

of the case. It is generally defined as that species of estoppel which equity places upon a person who has knowingly made a false representation or a concealment of material facts to a party ignorant of the truth of the matter, with the intent that the other party should act upon it and with the result that such party is actually induced to act upon it to his detriment.[7]

In *First National Bank v. Boles*,[8] a distinction between legal and equitable estoppel was clearly made, the court quoting from 21 C.J.S. § 119:

> Legal estoppel excludes evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppel is admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to the equity and good conscience for him to allege and prove the truth.[9]

Application of the doctrine of estoppel by deed is not unrestricted. It is an essential element of such estoppel that the deed itself be a valid instrument. A void deed is inoperative and may not be the basis of an estoppel by deed.[10]

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definition than this is difficult to formulate for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently, any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. The cases themselves must be looked to and applied by way of analogy rather than rule.

Similarly, in Davis v. Evans, 132 So.2d 476, 481 (Fla. 1st Dist. 1961), *cert. denied*, 136 So.2d 348 (Fla. 1961), it was said:

> No more exact connotative definition, covering all the cases [involving estoppel], can be attempted, and . . . it is better to leave a more general definition of the term to the gradual process of judicial inclusion and exclusion.

7. For similar definitions, see Baker-McGrew Co. v. Union Seed and Fertilizer Co., 125 Ark. 146, 150, 188 S.W. 571, 572 (1916); Louisville Joint Stock Land Bank v. McMurry, 278 Ky. 238, 244, 128 S.W.2d 596, 600 (1939); Roberts v. Friedell, 218 Minn. 88, 96, 15 N.W.2d 496, 500 (1944).

8. 231 Ala. 473, 479, 165 So. 586, 592 (1936). *See also* Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775, 791 (Fla. 1956).

9. 231 Ala. at 479, 165 So. at 592, *quoting* 21 C.J.S. Estoppel § 119 (1920).

10. Maury v. Jones, 25 F.2d 412 (9th Cir. 1928); Sims v. United Auto Supply Co., 221 Ala. 383, 129 So. 53 (1930); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902), *aff'd*, 132 N.C. 959, 44 S.E. 643 (1903).

Although this broad rule is often stated, certain "void" deeds have been made the basis of an estoppel by deed. First, estoppel by deed has been applied where the deed was invalid in the sense that some technical defect in execution rendered it inoperative. For example, in New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637 (1939), *aff'd*, 144 Fla. 744, 198 So. 681 (1940), *cert. denied* 314 U.S. 614 (1941), estoppel by deed was applied against a married woman who failed to meet a statutory formality in executing a mortgage. Although the mortgage was technically void, she was estopped to deny its invalidity. Similarly, in City of Tarpon Springs v. Koch, 142 So.2d 763 (Fla. 2d Dist. 1962), *cert. denied*, 155 So.2d 151 (Fla. 1963), it was held that a government agency was subject to the rule of legal estoppel from later denying the deed even though it was technically void for noncompliance with charter requirements of a freehold election to sell realty.

Second, deeds "void" because no title existed in the grantor at the time the property

At common law, a married woman, by virtue of her contract disability,[11] was incompetent to make a conveyance of real property by deed.[12] Thus, whatever power of contract a married woman has is purely statutory. Today, statutes in many states provide that the married woman may, by executing a deed in accordance with the statute, convey title and interest in real property as effectively as though she were a single woman.[13] However, failure to comply with the statutory requirements in the execution of the deed, such as that her husband join therein, renders it invalid. Such a deed is generally said to be void.[14]

On the basis of the foregoing, the courts conclude that a married woman who executes a deed either in absence of, or contrary to, the requirements of a statute enabling her to do so is not estopped by deed from denying its validity.[15] Their reasoning is that estoppel would, in effect, allow the married woman to do indirectly what she cannot do directly and would dispense with the limitation the law has placed upon her capacity to alienate real property.

Despite the often inequitable result, the view taken by some courts is that a married woman is also not equitably estopped for the same

was conveyed are given effect by the doctrine of after-acquired title. The deed is held to estop the grantor from setting up an after-acquired title. *See* Butler v. Bazemore, 303 F.2d 188 (5th Cir. 1962); Daniell v. Sherrill, 48 So.2d 736 (Fla. 1950); Colorado Trout Fisheries v. Welfenberg, 84 Colo. 592, 273 P. 17 (1928); Bliss v. Tidrick, 25 S.D. 533, 127 N.W. 852 (1910).

But where the deed is void because the party executing it is not *sui juris* and incompetent to do so, it is the majority rule that the doctrine of estoppel by deed is inapplicable. *See* Harrell v. Powell, 25 N.C. 636, 112 S.E.2d 81 (1960); Lewis v. Apperson, 103 Va. 624, 49 S.E. 978 (1905).

11. Ankeney v. Hannon, 147 U.S. 118 (1893); Hogan v. Supreme Camp of American Woodmen, 146 Fla. 413, 1 So.2d 256 (1941). The wife's disability is based on the merger of her legal existence with that of her husband. At common law, husband and wife become, by marriage, one person, and the entire legal existence of the woman is completely merged or incorporated in that of the husband.

12. *See, e.g.*, Taylor v. Swafford, 122 Tenn. 303, 123 S.W. 350 (1909).

According to English common law, the only way in which the real property of a married woman could be conveyed or encumbered was by a fine of record or the suffering of a common recovery in which her husband concurred. This practice was never widely accepted in American courts and was soon abandoned, although it was the forerunner of the substitute practice of a deed of a married woman in which her husband joins.

13. *E.g.*, FLA. STAT. § 693.01 (1967).

14. Cornell v. Ruff, 105 Fla. 504, 141 So. 535 (1932); Phillips v. Lowenstein, 91 Fla. 89, 107 So. 350 (1926); Wilkins v. Lewis, 78 Fla. 78, 82 So. 762 (1919). At least one Florida case seems to contradict the holdings which state that the deed is void:

> Consider the case of Hill v. Lummus [123 So.2d 365 (Fla. 3d Dist. 1960)]. O made a gratuitous conveyance to M, a married woman, to defeat creditors. Then M conveyed without the joinder of her husband to A, a party designated by O. Later M, joined by her husband, conveyed the same land to B on the representation that the land would go to O's estate. It was held that O and her administrator were estopped from claiming that the property belonged to the estate on the ground that the conveyance to M was invalid as a fraudulent conveyance, and although the deed to A was void because of the husband's nonjoinder, title was nevertheless quieted in A (the grantee of the "void" deed), and the deed to B was cancelled. Boyer, *Real Property Law*, 16 U. MIAMI L. REV. 139, 151 (1961) (Florida Survey).

15. *See, e.g.*, Ingram v. Easley, 227 N.C. 442, 42 S.E.2d 624 (1947); Daniel v. Mason, 90 Tex. 240, 38 S.W. 161 (1896).

reasons.[16] It has been held that the statute requiring her husband to join in the deed provides the exclusive method of alienation and "no theory of estoppel against her is permitted to weaken or render ineffective the statute."[17]

It appears to be the law in Florida that a married woman who conveys without adhering to the statutory requirement that her husband join in the deed is not estopped by deed from asserting its invalidity. This conclusion is based upon the express holdings of *Wilkins v. Lewis*[18] and *Phillips v. Lowenstein*.[19] A contrary rule would have the effect of nullifying the statute in every case in which a married woman conveyed without her husband's joinder. Therefore, the court in the instant case was correct in refusing to apply estoppel by deed. The dissenting judge asserted that, in light of cases decided subsequent to *Wilkins* and *Phillips*, all void deeds may be made the basis of estoppel by deed.[20] The judge overlooked, however, the important fact that these later cases involved the application of the doctrine of after-acquired title,[21] and therefore are not authority for the proposition that estoppel by deed is applicable where the deed is void because of the grantor's inherent incompetency.

The court also refused to employ the doctrine of equitable estoppel. In doing so, it relied on *Wilkins*, *Phillips*, and *Bryan v. Dennis*.[22] Considering language used by the Florida Supreme Court to the effect that "equitable estoppel rests largely on the facts and circumstances of the particular case," and that cases must be applied "by way of analogy rather than rule,"[23] it is difficult to justify the weight given to *Phillips* and *Bryan*. The *Phillips* case is easily distinguished on the basis of the fact that in that case the wife was not a party. In the instant case, she is invoking the court's process, in an action of ejectment, to regain property for herself and her husband. In *Bryan*, a deed of manumission was void because bond was not given as required by law for transportation of the slaves out of the state. It was held that the ancestors of the grantor were not estopped from asserting any property right in these slaves.

It is true that the *Wilkins* case, wherein a married woman made false representations as to her marital status, is analogous; but another case, which was not mentioned in the court's opinion, is an even stronger

16. *See, e.g.*, Harrell v. Powell, 251 N.C. 636, 112 S.E.2d 81 (1960); Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944); *In re* Haines' Estate, 356 Pa. 10, 50 A.2d 692 (1947). *Contra*, Bernard v. Jefferson County Inv. and Bldg. Ass'n, 65 S.W.2d 503 (Tex. Civ. App. 1933), *aff'd*, 128 Tex. 97, 95 S.W.2d 1307 (1936); Wilson v. Beck, 286 S.W. 315 (Tex. Civ. App. 1926).

17. Newman v. Borden, 239 Ala. 387, 389, 194 So. 836, 837 (1940).

18. 78 Fla. 78, 82 So. 762 (1919).

19. 91 Fla. 89, 107 So. 350 (1926).

20. Holwell v. Zofnas, 226 So.2d 253, 256, 257 (Fla. 4th Dist. 1969) (dissenting opinion).

21. *See* note 10 *supra*.

22. 4 Fla. 445 (1852).

23. *See* note 6 *supra*.

precedent. In *Ponce de Leon v. Day*,[24] it was held that a married woman who conveyed property after her divorce was estopped from asserting in her action for ejectment, brought by her against a subsequent purchaser, that the divorce decree was void and her conveyance did not pass title. Thus, in effect, she was allowed to convey without her husband's joinder as required by statute.

Conceding that the statute restricting the wife's ability to convey would be circumvented by its application, strong arguments remain for permitting the doctrine of equitable estoppel to be utilized to prevent results such as the one in the case at bar. Unlike estoppel by deed, the application of which would give every deed from a married woman effect and would render the statute completely nugatory, equitable estoppel would apply only to situations where it would be inequitable and unjust to permit the married woman to deny the validity of her deed. For example, it would not be inequitable if the purchaser was on actual or constructive notice of the marriage.[25]

Is the necessity of having the husband join in his wife's deed so much more sacred than other legal requisites so as to preclude the selective use of this equitable tool, the purpose of which is to prevent injustice and guard against fraud?[26] In *Shivers v. Simmons*,[27] wherein equitable estoppel was applied to a married woman whose deed was void because of lack of private examination and acknowledgement, the court stressed this point in relation to the real purpose of equitable estoppel in language well worth quoting at length:

> It is suggested by counsel that our decision virtually works a repeal of the statutes regulating the conveyance by married women of their real estate. . . . An equitable estoppel, so far from operating to repeal the law, proceeds upon a full recognition of the legal rights of the party against whom it is invoked, but declares that his conduct has been such that he shall not claim the benefit of the law. The court says to him, in effect, We [sic] admit your legal title, but we shall not permit you to assert it, because it would be a fraud for you to do so. Is this repealing the law? If so, then Statute of Frauds, of Limitations, of Registration, of Wills, and of every other conceivable character, have, time out of mind, been abrogated by Courts of Chancery. It is not too much to say that no statute was ever drawn sufficiently rigid in its terms to preclude a court of

24. 90 Fla. 197, 105 So. 814 (1925).

25. *See* Bernard v. Jefferson County Inv. & Bldg. Ass'n, 65 S.W.2d 503 (Tex. Civ. App. 1933), *aff'd*, 128 Tex. 97, 95 S.W.2d 1307 (1936).

26. Dunn v. Fletcher, 97 So.2d 257, 261 (Ala. 1957); Ennis v. Warm Mineral Springs, Inc., 203 So.2d 514 (Fla. 2d Dist. 1967), *cert. denied*, 210 So.2d 870 (Fla. 1968); 3 J. POMEROY, EQUITY JURISPRUDENCE 176, 178 (5th ed. 1941); 3 J. STORY, EQUITY JURISPRUDENCE 569, 570 (14th ed. 1918).

27. 54 Miss. 520 (1877).

> equity, under some circumstances, [from] prohibiting a party from claiming its benefits.[28]

In conclusion, it is this writer's opinion that the court erred in refusing to hold the plaintiffs equitably estopped from asserting title. Equitable estoppel should be used in those cases where the court determines that justice will be served by its application; strict refusal to do so leaves open the door for fraud.

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28. *Id.* at 522-23.