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# Estoppel and Rebutter in North Carolina

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But the federal reserve banks cannot pay exchange. This precludes par collection through the mails in the case of certain state banks. The only alternative, if the above argument is valid, is presentation at the counter with insistence upon all technical rights usually accorded the holders of checks, particularly the right to demand payment in cash. To set aside such action arbitrarily as being "coercion" is to overlook the right of the holder of any ordinary check to demand payment at the bank in cash, a right which, though purely technical in the case at issue, certainly serves to offset the equally technical and much insisted upon right of state banks to charge exchange on remittances through the mail. But what is of vastly greater importance is the imperious necessity of such action in the interest of the economic operation of the banking machinery which the Federal Reserve Act brought into existence.

Such laws as the states have passed or are likely to pass can but befog the issue. The right of the state banks to remit in the form of exchange drafts is not in issue. It has never been questioned by the federal reserve banks. It was dragged into court purely because of its arbitrary coupling with the exchange. Exchange drafts have not been refused by the federal reserve banks except when they called for amounts less than the face value of the checks collected.

Acts of certain federal reserve banks in accumulating checks before their presentation, and in resorting to methods which in and of themselves were annoying and injurious to the non-member banks and unnecessary to the successful achievement of par clearance, are to be classed merely as unfortunate incidents with no permanent bearing whatsoever on the problem at large.

Regardless of the disposition which may be made of pending par clearance cases by the United States Supreme Court, the eventual establishment of par clearance is inevitable. Par clearance long since became an actuality in the more important clearing centres of the country. Its appearance is a normal incident of growth in banking efficiency, trade volume, use of credit, and population density, together with safe and rapid communication and transportation facilities. Universal recognition of it will achieve for the country far more than is indicated by the claim of an annual $135,000,000 saving. Its real service will be the incomparably greater rapidity, economy, safety, and ease with which transfers of capital and settlements of trade and financial balances may be effected throughout the business world generally.

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# ESTOPPEL AND REBUTTER IN NORTH CAROLINA

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IN THE recent case of *Door Co.* v. *Joyner*,[1] the Supreme Court of North Carolina stated the doctrine of title by estoppel to be that a subsequently acquired title

[1] (1921) 182 N. C. 518, 109 S. E. 259. *Cf.* 1 N. C. L. Rev. 56. See also the statement of the principle (quoted from 16 Cyc. 689) in *Baker* v. *Austin* (1907) 174 N. C. 433, 93 S. E. 949.

inures to make good a former deed of the grantor made at a time when such grantor had no title. "Whether," observes the court, "this mode of acquiring title shall be regarded as a conveyance taking effect as of the date of the former deed, or as an equitable principle made available under common law forms, is not a settled proposition." In other words, there are two theories as to title by estoppel. One is that the after-acquired title inures by operation of law to the grantee, with the same effect as if the grantor had had and conveyed it at the time of the original conveyance. The other is that when the grantor with no title or with defective title by his deed assumes to convey a title or interest to the grantee, and subsequently acquires such interest, the grantee has an equity to compel the conveyance of such after-acquired interest to himself.[2] Moreover, a court of law will recognize and administer this equity and, considering, in accordance with the equitable maxim, that as done which ought to be done, will regard the title as in the grantee, subject to the usual equitable exception as to the rights of a purchaser for value and without notice.[3] The case is strictly parallel to the state of things which exists, where courts of law recognize and enforce equitable assignments of future contingent interests in property, as well as mere legal grants.[4]

Under the first theory, that after-acquired title passes by operation of law as if conveyed in the original deed, the effect of the transfer of title is the same as the old *rebutter of warranty,* and, as our courts have paid much attention to the distinction between rebutter and estoppel, it will be necessary to examine the doctrine of rebutter and see to what extent it has been recognized as subsisting in this state.

Rebutter grew out of the old feudal warranty which was an incident of the tenure subsisting when the feudal lord granted a fief to his vassal, and which bound the lord to replace the lands if the tenant was deprived of them.[5] The statute *quia emptores* (A. D. 1290) put an end to such tenures in conveyances in fee and thus to the warranty implied from them,[6] but the express clause of warranty which had long been in use in charters of feoffment[7] preserved many of the characteristics of feudal warranty. Thus it was a true covenant *real,* the breach of which the grantor made good by giving the grantee another *res* or estate of equal value, and not by damages.[8] The *active* obligation to make recompense in

[2] *Chew* v. *Barnet* (Pa. 1824) 11 S. & R. 389. See also cases on mortgages of after-acquired property: while, at common law, nothing which is not in *esse* and the property of the mortgagor, can be mortgaged, equity will give effect to a contract to convey future-acquired property whether real or personal, for equity regards as done that which ought to be done, and treats the mortgage as already attaching to the newly acquired property as it comes into the mortgagor's hands. *Lumber Co.* v. *Lumber Co.* (1909) 150 N. C. 282, 286, 63 S. E. 1045; *Godwin* v. *Bank* (1907) 145 N. C. 320, 328, 59 S. E. 154.

[3] See *Door Co.* v. *Joyner,* note 1, *supra*; and the cases cited in the last note as to mortgage of future-acquired property. Especially would this course seem proper under our judicial system, where equitable titles and defenses may be asserted in actions at law. *Min. Co.* v. *Lumber Co.* (1915) 170 N. C. 273, 277, 87 S. E. 40; *Levin* v. *Gladstein* (1906) 142 N. C. 482, 55 S. E. 371.

[4] *Mastin* v. *Marlow* (1871) 65 N. C. 696, 703; *Kornegay* v. *Miller* (1905) 137 N. C. 659, 50 S. E. 315; *Hobgood* v. *Hobgood* (1915) 169 N. C. 485, 86 S. E. 189; *Williams* v. *Biggs* (1918) 176 N. C. 48, 96 S. E. 643; *Bourne* v. *Farrar* (1920) 180 N. C. 135, 104 S. E. 170.

[5] *Cover* v. *McAden* (1922) 183 N. C. 641, 112 S. E. 817; Jenks, *Short History of English Law,* 109 *et seq.* Butler's note, no. 315, to Co. Litt.

[6] Butler's note, *ubi supra*; *Rickets* v. *Dickens* (1810) 5 N. C. 342, 346.

[7] Clauses of warranty became a normal part of charters of feoffment about the year 1200. 2 Pollock and Maitland, *History of English Law,* 311; 3 Holdsworth, *History of English Law,* 93.

[8] Co. Litt. 384b; 3 Bl. *Com.* 156. Rawle, *Covenants,* 3rd ed., 209. In *Gilliam* v. *Jacocks* (1826) 11 N. C. 310, Taylor, C. J., bases his holding on the ground that in a bargain and sale a warranty is not a covenant real but a mere personal covenant. See also S. C. (1819) 7 N. C. 47, where he says, p. 54; "There is no authority to superadd to a covenant which is clearly personal, the remedy by rebutter, which belongs to that real covenant which is called a warranty." The modern "covenant of warranty" should be carefully distinguished from old "warranty." In the modern sense a covenant real is one that is annexed or incident to the estate conveyed by the deed and runs with it, etc. (a covenant which runs with the land). *Wiggins* v. *Pender* (1903) 132 N. C. 628, 638, 44 S. E. 362. This change in the meaning of "real covenant" has been a large cause of confusion.

other land could only be inforced in the old real actions by the common law process of voucher to warranty or by *warrantia cartae*,[9] but the *passive* effect of a warranty as rebutter was wider and was available in personal actions such as ejectment, being originally given to avoid circuity of action.[10] The usefulness of rebutter, however, as a protection to title, was further hampered by its origin. It could not extend farther than the warranty of which it was an incident, and warranty in its old sense could be attached only to conveyances effective through livery of seizin, which had a "tortious operation," like feoffment.[11] It did not attach to the "innocent or rightful conveyances" which became the common assurances of title after the statute of uses.[12] So, when the young and vigorous action of ejectment superseded the old real actions as a method of trying title, the *active* benefits of warranty were swept away with the real actions through which they were available, and its *passive* protection to title, through rebutter, became available only in forms of conveyance such as feoffment, fast disappearing from use. English conveyancers therefore devised the familiar "covenants for title" and omitted the clause of general warranty in their conveyances.[13] In America a different course was pursued; we retained the old warranty in form, even in deeds of bargain and sale, but interpreted it in its *active* operation as a mere personal covenant, equivalent to the covenant of quiet enjoyment.[14] How to treat it in its *passive* operation as rebutter has been a troublesome question, to which we shall return later in this paper.

Before considering the North Carolina cases alluded to above on rebutter and estoppel, it may be helpful to summarize briefly the characteristics of rebutter, contrasting it so far as possible in each case with estoppel. It may be premised that all the qualities of rebutter of warranty are logical results of the common law transfer of title by livery of seizin with its tortious operation.

1. *Rebutter* is annexed only to warranty and cannot exist without warranty; while *estoppel* is independent of warranty and may exist where there is no warranty.[15]

2. *Rebutter* operates on "the right to the estate" or upon the estate itself; *estoppel* "operates entirely as to facts," arising wholly "out of affirmations of matters of fact contained in the deed."[16]

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[9] 3 Bl. *Com.* 300; 2 Th. Coke, 245, note a; Jenks, *Short History*, 110; *Rickets* v. *Dickens*, *supra* note 6.

[10] Jenks, *Short History*, 111; Co. Litt. 265a. Coke says that "rebutter' is a kind of estoppel," Co. Litt. 352a. A plea in rebutter was in form a plea in estoppel, Sheppard's *Touchstone*, Preston's ed. 182, where the form of plea is given. See also, Bigelow, *Estoppel*, 6th ed. 422.

[11] See *infra*, note 20.

[12] See *infra*, note 21.

[13] The invention of covenants for title is ascribed to Sir Orlando Bridgeman in the time of the commonwealth. Rawle on *Covenants*, 3rd ed., 11. "The clause of warranty [in England] has long been disused in modern conveyancing." Williams, *Real Property*, 17th ed., 649.

[14] *Rickets* v. *Dickens* (1810) 5 N. C. 343, sustaining the action of covenant on warranty in a bargain and sale deed. *Spruill* v. *Leary* (1852) 35 N. C. 408, per Pearson, J.: "After the action of ejectment superseded real actions, as in ejectment there could be no voucher, the courts construed a warranty to be a covenant for quiet enjoyment, and gave an action for damages in case of eviction." *Southerland* v. *Stout* (1873) 68 N. C. 446, 449.

[15] *Taylor* v. *Shufford* (1825) 11 N. C. 116, 15 Am. D. 512; *Weeks* v. *Wilkins* (1905) 139 N. C. 215, 51 S. E. 909; *Olds* v. *Cedar Works* (1917) 173 N. C. 161, 91 S. E. 846, and cases cited.

[16] *Taylor* v. *Shufford* (1825) 11 N. C. 116, 15 Am. D. 512. The statement that estoppel operates only as to facts seems to have in mind Coke's description (Co. Litt. 352a) that "estoppel closeth a man's mouth to allege the truth" (the fact). As applied to the conventional effect of particular clauses and words in deeds this is not unfair. The old estoppel at law was based on the presence of certain words or clauses; if they were not present in just the required form, equivalent expressions would not work estoppel. See judgment of Jessel, M. R., in *General Finance, etc. Co.* v. *Bldg. Soc.* (1878) 10 Ch. Div. 15. This estoppel has nothing but the name in common with modern estoppel as stated in *Van Rensselaer* v. *Kearney* (U. S. 1850) 11 How. 297, 13 L. Ed. 703, the principles of which are adopted by the North Carolina courts in several cases. *Baker* v. *Austin* (1917) 174 N. C. 433, 93 S E. 949; *Olds* v. *Cedar Works* (1917) 173 N. C. 161, 165-6, 91 S. E. 846. See note 59.

3. *Rebutter,* since its affects the estate itself, is a bar as to the estate in favor of the whole world; *estoppel* bars only parties and privies.[17] In a word, rebutter operates *in rem,* estoppel *in personam.* But it should be noted that estoppel arising from leases by indenture has the effect of common law rebutter and is a bar in favor of the whole world;[18] while under the modern American doctrine estoppel bars everyone.[19]

4. *Rebutter* was an incident of warranty only when the warranty was annexed to "tortious conveyances" which operated through, or at least presupposed, actual livery of seizin.[20] In the common law conveyances which operated without livery and in "rightful conveyances" under the statute of uses, a warranty would only act as estoppel, not as rebutter.[21]

5. *Rebutter* arose only when *an estate passed* by the livery out of which the warranty, with its rebutter, grew, and ceased with the estate to which it was annexed.[22] *Estoppel,* since it arose out of the contract, may exist when nothing passes by the deed, if the parties so intended and expressed themselves. But no estoppel can grow out of a deed which is void by law.[23]

6. *Rebutter* operates only when the estate to be barred has been "put to a right" before or at the time of the warranty made.[24]

If the above summary of the origin and characteristics of rebutter is correct, it is obvious that under the present state of the law there cannot exist in North Carolina any such thing as "rebutter by warranty," in the sense in which that expression is used at common law. For our deeds are deeds of bargain and sale, to whose clauses of warranty the quality of technical rebutter does not attach. If such deeds are said to "rebut or estop," rebutter is evidently used in a general sense as a synonym for estoppel.

But technical rebutter might exist by virtue of some statute, and it has been suggested or assumed in *Olds* v. *Cedar Works,*[25] that such a provision is found in the statute of 1715 (C. S. sec. 3308), which enacts that registered deeds are "valid and pass title and estate without livery of seizin." The statute, in terms at least, does not give to registered deeds the effect of conveyances *with livery,* but on the contrary enacts that registered deeds *without livery* shall pass title. It is, however, settled law in North Carolina that by the statute all registered deeds "are put on the same footing with feoffments at common law, with respect to

[17] *Taylor* v. *Shufford, supra,* note 15; *Doe* v. *Oliver* (1829) 10 B. & C. 181, 2 Smith, *Leading Cases,* 7th Am. ed., 605.

[18] Like other estoppels, estoppels in leases arose out of the contract, Butler's note no. 328 to Co. Litt.; but carried after acquired title like rebutter. Co. Litt. 47b; Williams, *Real Property,* 17th ed., 504; Bigelow, *Estoppel,* 6th ed., 425, 426. *Trevian* v. *Lawrence* (1705) 1 Salk. 276, Smith, *Leading Cases,* 7th Am. ed., 580.

[19] See *infra,* note 58.

[20] *Taylor* v. *Shufford* (1825) 11 N. C. 116, 129, 15 Am. D. 512. See *Gilliam* v. *Jacocks* (1826) 11 N. C. 310, *Spruill* v. *Leary* (1852) 35 N. C. 408, 418. This is settled doctrine in England. 2 Tiffany, *Real Property,* 2nd ed., 2117, and authorities cited.

[21] See Rawle, *Covenants,* 3rd ed., 408; 2 Tiffany, *Real Property,* 2nd ed., 2118. *Gilliam* v. *Jacocks* (1826) 11 N. C. 310.

[22] Sheppard's *Touchstone,* Preston's ed., 186(3); Co. Litt. 378; *Seymour's Case* (1612), 10 Coke 95b; *Taylor* v. *Shufford* (1825) 11 N. C. 116, 15 Am. D. 512. *Gilliam* v. *Jacock* (1826) 11 N. C. 310, 333; *Lewis* v. *Cook* (1851) 35 N. C. 193; *Register* v. *Rowell* (1856) 48 N. C. 312.

[23] *Smith* v. *Ingram* (1903) 132 N. C. 959, 44 S. E. 643, S. C. (1902) 130 N. C. 100, 40 S. E. 984, married woman's deed without privy examination; *Drake* v. *Howell* (1903) 133 N. C. 163, deed not delivered; *Wallin* v. *Rice* (1915) 170 N. C. 417, 87 S. E. 239, deed without wife's privy examination.

[24] Sheppard's *Touchstone,* Preston's ed. 187(7); Co. Litt. 388b. *Seymour's Case* (1612) 10 Coke 95b, 3rd Resolution: "It is a maxim in law that no warranty shall extend to bar any estate of freehold or inheritance which is *in esse* in possession, reversion, or remainder, and not displaced and put to a right before or at the time of the warranty made;" quoted in *Spruill* v. *Leary* (1852) 35 N. C. 408, 414.

[25] (1917) 173 N. C. 161, 166, 91 S. E. 846.

seizin, the declaration of uses thereon, and the consideration."[26] That is, because the statute has *abolished livery,* all registered deeds operate as if they were given *with livery.* In the earlier cases, where rebutter is so carefully discussed, there is no hint or suggestion that its existence is in any way affected by the statute of 1715. The illogical and, I venture to think, regrettable doctrine of the later cases should not be so extended as to give to an *innocent conveyance* with a covenant of warranty, the *tortious operation* of common law livery with warranty. Certainly this should not be done with the idea that effect is thereby given to a statute which simply *abolishes all livery.*

In *Olds* v. *Cedar Works,*[27] it is said: "the distinction between an estoppel and a rebutter, while questioned in some jurisdictions, has been recognized and established with us." It is submitted, however, that while the distinction is well established, there is, with one exception presently to be noticed, no case in our reports, not overruled, which has ever recognized common law rebutters as a valid and subsisting quality of any species of a deed in North Carolina.[28] In several cases it is said that after-acquired title inures by "estoppel or rebutter," without distinguishing their effects.[29]

The important North Carolina cases which have considered the distinction will now be noticed.

*Taylor* v. *Shufford.*[30] Ejectment. The plaintiff claimed title under a grant from the British crown in 1768, the defendant under a state grant of 1801. The plaintiff contended that, the state having succeeded to the position of the crown upon our separation from England, the title of defendant under the grant of 1801 would inure to the plaintiff under his prior grant. The defendant had several defenses to meet various contingencies: (1) the grant of 1768 was void, and therefore could not be the foundation of any right, nor could it be a bar; (2) if the grant of 1768 was held valid, there was no estoppel, because the state was not bound by estoppel; (3) if the first two positions were held against him, there could be no estoppel here, for the grant was without warranty, and estoppel depended on warranty. The court *held* with the defendant on the first and second defenses. Therefore, the holding as to the third defense was utterly immaterial. But Judge Badger, the defendant's counsel, having rashly argued for the heresy

[26] *Bryan* v. *Eason* (1908) 147 N. C. 284, and cases cited at pp. 291-2, 61 S. E. 71; *Jones* v. *Jones* (1913) 164 N. C. 320, 80 S. E. 430. It is interesting to note that this anomalous doctrine finds no support in any case earlier than *Love* v. *Harbin* (1882) 87 N. C. 249, and was announced over the dissent of the very able Judge Ashe. The earlier cases cited in *Love* v. *Harbin* will all be found consistent with the decision in *Hogan* v. *Strayhorn* (1871) 65 N. C. 279 (miscited in *Love* v. *Harbin,* see *Rowland* v. *Rowland* (1885) 93 N. C. 214) either in principles stated or in the actual point decided.

The effect of this construction of the statute is, apparently, to do away with the doctrine of resulting trusts arising from the fact of no consideration, as it does away with the theory of a use upon a use (*Rowland* v. *Rowland* (1885) 93 N. C. 214), to nullify the statute of uses (C. S. sec. 1740), and the whole theory of modern conveyancing. It would seem that when we adopted the statute of uses, we intended to adopt the highly artificial, but thoroughly consistent system of conveyancing which had grown out of that statute. To take parts of that system and reject other parts would lead to anarchy. The effect of the statute as explained in *Hogan* v. *Strayhorn* (1871) 65 N. C. 279, is thoroughly satisfactory, and leaves the system of conveyancing established by the statute of uses untouched.

[27] (1917) 173 N. C. 161, 91 S. E. 846.

[28] See *infra, Southerland* v. *Stout* (1873) 68 N. C. 446, at note 43.

[29] *Hauser* v. *Crafts* (1904) 134 N. C. 319, 46 S. E. 756; *Buchanan* v. *Harrington* (1906) 141 N. C. 39, 53 S. E. 478; *Cooley* v. *Lee* (1915) 170 N. C. 18, 86 S. E. 720. *James* v. *Hooker* (1916) 172 N. C. 780, 783, 90 S. E. 925.

[30] (1825) 11 N. C. 127, 15 Am. D. 512.

involved in the third defense, Judge Henderson, with his profound knowledge of common law, improved the occasion by a masterly analysis of the difference between rebutter and estoppel. He did not assert, however, that rebutter existed here, and for its value in connection with any point involved in the decision, the opinion might as well have been a "reading" in the Inns of Court in the time of Lord Coke. The actual *holding was against rebutter.*

*Gilliam* v. *Jacocks.*[31] Ejectment. Gilliam, plaintiff, deduced title from a deed of bargain and sale with full warranty given for value in 1748 by a tenant in tail general in possession. Jacock, the defendant, claimed as heir under the entail. The statute of limitation was held inapplicable, and as the deed long antedated the act destroying entails (now C. S. sec. 1734) the question was whether a bargain and sale with warranty barred the heir. *Held,* the defendant was not barred by the deed. Taylor, C. J., placed the holding on the difference between a real and a personal covenant. He declared that warranty in a bargain and sale deed was a mere personal covenant, and was not a rebutter,[32] but thought it might be a discontinuance.[33] Henderson, J., showed with great learning that a bargain and sale, even with warranty, was no discontinuance of the entail, because a bargain and sale, being innocent, only transferred the seizin which the grantor rightfully had, i.e., the life estate of the grantor, the tenant in tail, and not the estate of the heir in tail which had descended to him as heir to the original grantee in tail, and was entirely independent of the bargain and sale.[34] Therefore, the bargain and sale in no way affected the estate of the heir, whose estate was "not put to a right" but "remained still in him."[35] But Judge Henderson expressed no opinion as to the ground upon which the Chief Justice had disposed of the case, *viz.,* whether the deed of 1748 contained "a pure warranty or only a covenant." The holding of both judges was *against the rebutter.*

*Flynn* v. *Williams.*[36] A father devised land to his son, A., with executory devise over to his son, B., in case A. died without living issue. A., while in possession of his defeasible fee, bargained and sold the land with warranty to F. Afterwards B. died, leaving A. his sole heir, and finally A. died without issue. *Held,* that A.'s heirs at law were rebutted by the warranty in the deed to F., whether it were "lineal or collateral," which descended to them, and that as they were rebutted, it was unnecessary to decide whether they were estopped. After some confusion, the decision has been rested on the ground that the death of B., which took place before the condition happened that was to vest the devise over in him, extinguished the condition and the land vested in A. absolutely, and he and his heirs were barred: "First, [on the theory of estoppel] they were estopped by his deed from claiming as his heirs; second [on the theory of rebutter] the warranty

[31] (1826) 11 N. C. 310.

[32] See *supra,* note 8.

[33] See Butler's note 284 to Co. Litt, *in fine,* referring to the passage of Gilbert's *Tenures,* 120, disapproved by Judge Henderson in our case at p. 334.

[34] "Under the statute *de donis,* descent is traced from the original donee, the issue in tail taking as heir to him *per forman doni* and not as heir to the last actual tenant in tail." Challis, *Real Property,* 3rd ed., 244. See 1 Tiffany, *Real Property,* 2nd ed., 73.

[35] See *supra,* note 24.

[36] (1841) 23 N. C. 509.

was lineal and they could not claim the land as derived by descent from him in opposition to his warranty."[37] It was afterwards established that collateral warranty, mentioned by the court, upon the existence of which the case was thought by very eminent judges to turn, is entirely abolished in this state.[38] As is apparent from the facts and from this quotation, the case is easily referable to simple estoppel, which is stated as an alternative ground of decision.

*Spruill* v. *Leary*.[39] The question was: whether a bargain and sale deed with full warranty given by one seized of a fee defeasible upon his death without living children, barred the executory devise over, the bargainor having died without children after making the deed. The case was wrongly decided at first,[40] against the dissent of Pearson, J.,[41] whose opinion was afterwards and in the same year recognized as a correct exposition of the law. And it has been settled ever since that such a deed is no bar.[42] Judge Pearson's opinion is a learned and detailed examination of warranty and rebutter, but since his conclusion is *against rebutter in this case* it will be unnecessary to follow his argument in detail.

*Southerland* v. *Stout*.[43] Ejectment. Plaintiff claimed by a chain of bargain and sale deeds with general warranty as follows: Cox to Potter, Potter to McQueen, McQueen to plaintiff. The last deed was dated 11 years before the trial. Defendant claimed as daughter and heir at law of Potter. Cox, plaintiff's original grantor, conveyed only a life estate, though seized in fee, but the subsequent deeds purported to be in fee. Defendant was claiming against a grantee of her father and against his deed, on the strength of an outstanding title in the heirs of Cox, with which she did not connect herself. Apparently the case might have been satisfactorily disposed of on the ground that defendant, claiming under a common grantor with plaintiff, could not in ejectment defend on the ground of an outstanding title without connecting herself with it; or, as the court hints, on the issue of estoppel pure and simple, for the defendant stands in her father's shoes and is bound by his assumption of title in himself. But the court preferred to put its decision on the common law ground of rebutter from warranty, and learnedly traced the history of rebutter from the statutes of Gloucester (A. D. 1278) to date; found that none of the various statutes covered this case, and held therefore that defendant was rebutted by the warranty. Of this decision it may be remarked that it is the first judicial recognition ever given by our courts of the old feudal

[37] *Spruill* v. *Leary* (1852) 35 N. C. 416, 417. And see *Meyers* v. *Craig* (1852) 44 N. C. 169.

[38] See the cases last cited, and C. S. sec. 1741.

[39] (1852) 35 N. C. 225, 408.

[40] (1852) 35 N. C. 225. The court thought the case ruled by the statute of 4 and 5 Anne (1705) ch. 16, sec. 21, which, after being reported as in force in North Carolina in 1792, [see Potter's Rev. (1821) p. 92] had been adopted in this state, Rev. Stat. (1837) ch. 43, sec. 8. The statute abolished collateral warranties except those made by an ancestor having an estate of inheritance in possession in the land. The court thought the warranty here was within the exception and therefore not abolished by the statute. Pearson, J., showed that the statute was passed to restrain warranties and that the exception had reference to estates tail only, which of course had been abolished in Norh Carolina. The statute, its phrasecology changed to conform with the ideas here expressed, is now C. S. sec. 1740. See *Southerland* v. *Stout*, *infra*, note 43.

[41] (1852) 35 N. C. 408.

[42] *Meyers* v. *Craig* (1852) 44 N. C. 169. This is an affirmance of the elementary rule that, with the exception of executory interests after estates tail, which were barrable by common recovery suffered by tenants in tail, an executory interest can not be affected by any act of the holder of the prior estate out of which or after which it is limited. 1 Tiffany, *Real Property*, 2nd ed., 568. *Southerland* v. *Cox* (1832) 14 N. C. 394, 397. Pearson, J., points this out in his opinion. 35 N. C. 408, 415, *et seq.*

[43] (1873) 68 N. C. 446.

law of warranty as modern subsisting law (and probably the last in the English speaking world); that logically it requires the recognition of the *tortious effect* of the conveyance on which warranty and therefore the rebutter is founded;[44] that it gives this effect to warranty in a bargain and sale, contrary to the authorities here and elsewhere;[45] and finally that it was entirely unnecessary.

*Bell* v. *Adams*.[46] Full warranty deed undertaking to convey an absolute estate in a certain lot, transfers the grantor's interest and "has the effect by way of *rebutter* of passing against his heirs, parties to the action" the interest of another devisee subsequently inherited by the grantor, and the whole title thus acquired by the grantor vests in the defendant, a purchaser from him. Though the court speaks of "rebutter," the controversy between the parties makes it a case of estoppel only.[47]

*Foster* v. *Hackett*.[48] Land was devised to several children, the share of any such child dying without issue to go to the survivors. One of the children after the testator's death conveyed his share by bargain and sale with warranty. The deed passed not only the share to which the maker was entitled at the time of making the deed, but also accessions to his share subsequently acquired by the death of other children without heirs. The court said: "The deed estops him, or the warranty his heirs."[49] It is settled now that such a deed even without warranty binds the after-acquired interest, if capable of transfer.[50]

*Weeks* v. *Wilkins*.[51] In 1863, plaintiff, living with his six brothers and sisters, conveyed the land in controversy in fee for value by joint and several bargain and sale deed with joint and several covenants of warranty to defendant's predecessor in title. Three of the sisters, married women, executed the deed without privy examination. In 1899, the other grantors in the deed of 1863, including the married sisters, conveyed their shares to plaintiff by deed properly executed. *Held,* the plaintiff was estopped by the deed of 1863, which he executed as a several grantor with several warranty, to set up title acquired under the deed of 1899, against defendant, claiming under the grantee of the deed of 1863. A title acquired by the grantor after his deed inures as against him, to his grantee and to those claiming under the grantee. The holding is based on estoppel and to show that it is so the distinction between the warranty and estoppel is quoted from *Taylor* v. *Shufford*.[52]

*Olds* v. *Cedar Works*.[53] Ejectment. Plaintiff showed title from the state by grant to Newby; a deed dated 1815, from Newby to plaintiff's ancestor, and

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[44] See *supra*, note 20.

[45] See *supra*, note 21.

[46] (1879) 81 N. C. 118.

[47] This case is cited in *Olds* v. *Cedar Works* (1917) 173 N. C. 161, 91 S. E. 846, as approving the distinction between *rebutter* and *estoppel*.

[48] (1893) 112 N. C. 546, 17 S. E. 426.

[49] (1893) 112 N. C. 546, at p. 557, 17 S. E. 426.

[50] *Hobgood* v. *Hobgood* (1915) 169 N. C. 485, 489-90, 86 S. E. 189; *Kornegay* v. *Miller* (1905) 137 N. C. 659, 50 S. E. 315.

[51] (1905) 139 N. C. 215, 51 S. E. 909. See s. c. (1904) 134 N. C. 516, 47 S. E. 24.

[52] (1825) 11 N. C. 116, 15 Am. D. 512.

[53] (1917) 173 N. C. 161, 91 S. E. 846.

regular chain of title since. Defendant showed deed with warranty dated 1812, from Newby, plaintiff's ancestor, to W., made before Newby had any title; and contended that by virtue of the warranty in the deed of 1812, Newby and his heirs were estopped to claim the title subsequently acquired in 1815, which "fed the estoppel" and inured to the grantee in the first deed. The court says, moreover that "the defendant is neither a party nor a privy to the deed of 1812." *Held,* the plaintiff was "estopped or rebutted" because in ejectment the plaintiff must prove title in himself, and here "in one case [rebutter] there is no right of action and in the other [estoppel] there is no title in the plaintiff as it has vested in the grantee in the deed with warranty." The case does not mention the registry of either deed and does not consider priority of registry, or the principle that a *bona fide* purchaser without notice takes free from rights or equities accruing under deeds made before the grantor had title.[54] Moreover, in announcing the reason for the holding, the court apparently overlooked the principle that when both parties claim under a common source, the defendant cannot defeat recovery upon the ground of an outstanding title unless he connects himself with it.[55]

But as to the distinction between rebutter and estoppel, it is submitted that while the contrast is emphasized in words, no difference of any practical value is left. The after-acquired title is held to inure against the grantor, whether the principle upon which it is available is called "estoppel" or "rebutter," and in either case it is available to one without privity with the deed from which the estoppel grows—that is, it is available to any one as against the grantor and his heirs. Since in each case it has the same effect, what does it matter what the principle is named? The suggested distinction, that when the question is whether, under a particular clause in a deed, an after-acquired title actually passes, it is to be called "estoppel," but when the question is whether the same clause in the same deed bars the grantor's heirs it is "rebutter" only gives different names to the shield as viewed from different sides. Besides, such a distinction turns topsy-turvy the real difference as set out in our earlier cases and in all the books; namely, that rebutter by warranty does actually transfer the after-acquired title as against the grantor in favor of the whole world, while estoppel merely operates to transfer the title as to parties and privies.[56] The position is not improved by construing the statute abolishing livery so as to make all registered deeds take effect as feoffments, that is, by livery.[57]

The only satisfactory ground for the decision is that the American courts, owing to historical reasons, have been compelled to give to "estoppel," even in innocent conveyances, the effect on after-acquired title of common law rebutter in tortious conveyances. This broad meaning of estoppel in modern American law[58] is assumed as an alternative ground of decision in *Olds* v. *Cedar Works,* is

[54] See *infra,* note 64.

[55] *Bonds* v. *Smith* (1890) 106 N. C. 553, 565, 11 S. E. 322, and numerous cases before and since. Sedgwick and Wait, *Trial of Title to Land,* 2nd ed., sec. 803; 7 A. L. R. 860, note.

[56] See *supra,* note 17.

[57] See *supra,* note 26.

[58] See Tiffany, *Real Property,* 2nd ed., 2119, and note 6; *Ayer* v. *Philadelphia Brick Co.* (1893) 159 Mass. 84, 34 N. E. 177.

recognized in several North Carolina cases,[59] and is in thorough harmony with our theory of construing deeds not by separating them into their technical common law parts, each with its own artificial weight, but by construing them as entireties evidencing the intention of the parties by everything "within the four corners" of the instrument.[60]

It thus appears that in English law all warranties were abolished ninety years ago and with them rebutter in a technical sense; that in American law by the entire disuse of feoffments and of real actions, and by the universal use of innocent conveyances under the statute of uses as the common assurance of title, a similar result has been accomplished; that though American conveyancers retained the form of warranty, yet, attached to innocent conveyances, the warranty became a mere personal covenant; and that the liberalizing tendencies of the time, throwing off outworn common law distinctions, has led to the broadening of the meaning of estoppel so that it now supplies the place of common law rebutter. It is submitted that our courts should discard in theory, as they have already done in fact, the doctrine of rebutter by warranty, and dispose of cases frankly on the score of estoppel.

One or two very interesting additional points should be glanced at. Which of the two theories of estoppel stated toward the beginning of this paper do our courts adopt—does after-acquired title pass as if conveyed by the instrument creating the estoppel? Or is its transfer the result of equitable principles made available in legal actions? A class of cases, which would seem crucial, exists when a deed containing covenants of title is given and the vendor not having title at the date of the deed subsequently acquires title. Is the vendee forced to accept this title in entire or partial satisfaction of the covenant, or may he elect to stand on the breach and recover substantial damages?[61] Our courts have adopted the view that the grantee can be compelled to accept the after-acquired title in satisfaction,[62] that is, the effect of estoppel seems to be just as if the title had been conveyed in the original deed. But in recognizing a right of action for nominal damages, the subsequent acquisition is differentiated from a title passing at the date of the deed. On the other hand, if estoppel is based on a recognition in courts of law of the purchaser's equitable right to have the after-acquired title conveyed to him, it would be subject to the equitable defense of purchaser for value without notice. Suppose two grantees from the same grantor, each deed capable of carrying after-acquired title by estoppel, and that after the first grant

[59] *Hallyburton* v. *Slagle* (1903) 132 N. C. 947, 950, 44 S. E. 655; *Weeks* v. *Wilkins* (1905) 139 N. C. 215, 218, 51 S. E. 909. See *Benick* v. *Bowman* (1857) 56 N. C. 314; *Eddleman* v. *Carpenter* (1860) 52 N. C. 616 (cited 173 N. C. 165); 2 Tiffany, *Real Property*, 2nd ed., 2118. That after-acquired title may inure without warranty, appears from the cases where it inures under a covenant of seizin (note 62, *infra*) and cases deciding that "when the holders of a contingent estate are specified and known, they may assign and convey it, and in the absence of fraud or imposition, when such a deed is made, it will conclude all who must claim under the grantors, even though the conveyance is *without warranty*, or any valuable consideration moving between the parties." *Hobgood* v. *Hobgood* (1915) 169 N. C. 485, 489-90, 86 S. E. 189.

[60] *Triplett* v. *Williams* (1908) 149 N. C. 394, 63 S. E. 79, the leading case in North Carolina.

[61] See 2 Tiffany, *Real Property*, 2nd ed., 2119. A good statement of the alternative is given in *Resser* v. *Carney* (1893) 52 Minn. 397, 54 N. W. 89.

[62] *Meyer* v. *Thompson* (1922) 183 N. C. 543, 112 S. E. 328, citing earlier cases. The subsequently acquired title "inures to the grantee by estoppel" although the covenant sued on is for seizin (*Bank* v. *Glenn* (1873) 68 N. C. 35), a personal covenant which does not run with the land.