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Elmer W. Roller, Estoppel as Affecting Title to Real Property, 7 Marq. L. Rev. 81 (2009).
Available at: http://scholarship.law.marquette.edu/mulr/vol7/iss2/6

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ESTOPPEL AS AFFECTING TITLE TO REAL PROPERTY

ELMER W. ROLLER, LL.B.

The broad doctrine of estoppel, which affects the most fundamental rights and pervades every branch of the law, has received its greatest development within a comparatively recent time. The purpose of estoppel is to prevent the perpetration of any fraud through which an innocent party would be placed in a position to his irreparable disadvantage. Insofar as this precluded an investigation into the truth of the facts, estoppel was criticized and applied with reluctance.

The immediate purpose of estoppel, in its relation to title to real property, is to maintain security of titles to land. An estoppel affecting title to realty may arise either from matter in writing or matter in pais. Estoppel by deed is the preclusion of a party to a deed, and his privies, to deny, as against the other party, and his privies, any fact asserted therein. Estoppel in pais, also called equitable estoppel and estoppel by misrepresentation, is the preclusion of a party to deny that which, by his previous words or conduct, he may have led another who in good faith relies upon such words or conduct, to change his position to such other's prejudice. Estoppel in pais was not regarded with favor by the common-law judges; it is a doctrine of equitable creation. Estoppel in pais may operate to transfer title in real property as effectually as estoppel by deed. Knauf & Tesch Co. v. Elkhart Lake S. & G. Co., 153 Wis. 306, 141 N. W. 701.

The grantor in a deed, which on its face purports, either expressly or by implication, to convey an estate of particular description, will not be permitted, as against the grantee, to assert that at the time of the execution of the deed he was without title and that no title was transferred by the deed. This is clearly an estoppel by deed, giving rise to "title by estoppel" or "right by estoppel." Van Rensselaer v. Kearney, 11 How. (U. S.) 297; Mutual Life Ins. Co., v. Corey, 135 N. Y. 326, 31 N. E. 1095. An estoppel relating to an interest in land passes with the land. Therefore it is binding on those who are in privity of estate with the original parties. The grantor and his privies are estopped against the grantee and those in privity with him. Mutual Life Ins. Co., v. Corey, supra. In Waterman v. Norwalk, 145 Wis. 663, the successor in title of a lot was estopped from denying the
full effect of an instrument under seal executed by his grantor, which, in language free from ambiguity, granted to a municipality a certain easement and which clearly purported to be binding on the assigns as well as the grantor.

It is clear that an estoppel by deed can operate only against a grantor and those in privity with him. If, therefore, one without authority or in excess of authority assumes to convey by deed the land of another, no estoppel by deed can be raised against the true owner. This is based upon the obvious principle that without a deed there can be no estoppel by deed. *War Fork Land Co., v. Marcum*, 180 Ky. 352, 202 S. W. 668. It is to be observed, however, that while the true owner, under the above circumstances, cannot be estopped by deed, he may, nevertheless, be estopped from asserting his title by matter in pais, that is, by his conduct subsequent to his receiving notice of the fact that another is bona fide claiming an adverse interest in the land and expending money in making improvements thereon. *Sumner v. Seaton*, 47 N. J. Eq. 103. The case of *War Fork Land Co. v. Marcum*, *supra*, is illustrative of these principles. In that case one John Marcum, assuming to act without authority as attorney in fact of Philip Marcum, conveyed the property in question to G. M. Pigg, from whom, by mesne conveyances, it came into the possession of the plaintiff land company. Subsequent to this spurious conveyance, Philip Marcum and his wife did appoint John Marcum their attorney in fact to sell and convey their lands. About forty years later Philip Marcum conveyed the lands in question to James Marcum, the defendant in this action. It is apparent that the defendant could not be estopped from asserting his title to the land by the spurious deed to G. M. Pigg, since that was not the deed of Philip Marcum. But it was contended that the failure of Philip Marcum to take any measures to inquire into what John Marcum had done as attorney in fact, was such laches as would estop him from selling the land almost forty years later. The court held that there was no matter in pais to create an estoppel; that since John Marcum conveyed the land without authority, title remained in Philip Marcum and the mere question of time could add nothing to the strength of the plaintiff land company because it never received title to the land.

Where an agent, duly authorized by power of attorney, conveyed lands by warranty deed, which deed was executed and acknowledged in all respects in the form of a personal deed from
the agent, the deed, at least in form, not being the deed of the principal, it was held that the principal was not estopped by the covenant of warranty. It was further held that the agent, as grantor in the deed, was estopped by the covenant of warranty. *North v. Henneberry*, 44 Wis. 306.

The rules of estoppel pertaining to deeds, as such, are equally applicable to mortgages. The mortgagor is estopped to assert anything in derogation of the mortgage instrument. He is bound by the covenants in the mortgage and will not be permitted to set up, as against the mortgagee and his privies, any outstanding title in another, nor will he be allowed to deny in himself such title as this defeasible form of conveyance purports to pass. *Cable v. Switzer*, 122 Mich. 636, 81 N. W. 560; *Macloon v. Smith*, 49 Wis. 200. In the latter case the court held that mortgagors who have covenanted to defend title against adverse claims, are estopped to allege title in a third person.

A person without title or a defective title to land, who assumes to convey by a deed containing full covenants of warranty an estate of particular description, and subsequently acquires an estate or interest in the land, is estopped by the covenants of warranty in his deed to set up, as against his grantee, such subsequently acquired interest or estate in the land. The grantor cannot convey his after-acquired estate or interest to a third person, because he has divested himself of this power by his first warranty deed. The subsequently acquired interest or estate of the grantor, therefore, immediately inures to the benefit of and becomes complete in, the grantee. The grantee has acquired his title by estoppel. *Mutual Life Ins. Co. v. Corey*, supra; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297; *Dye v. Thompson*, 126 Mich. 597, 85 N. W. 1113; *Henrick v. Patrick*, 119 U. S. 156; *Nichol v. Alexander*, 28 Wis. 118; *North v. Henneberry*, supra; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405. In the *Henneberry* case the agent, acting under a power of attorney, executed a warranty deed which was in the form of a personal deed from the agent, except that it described him as an attorney in fact acting by virtue of a power of attorney from the owner and described the premises as belonging to the owner. The court held that the agent who executed the deed was estopped by its covenants from setting up a title subsequently acquired by him from the principal. It was contended by counsel that the agent ought not to be estopped from setting up the title subsequently acquired by
him from the principal, because the deed on its face showed that the agent was not the owner of the land at the time he executed the conveyance. But the court answered (page 319): "It is the covenant which gives force to the estoppel, and not so much the implied or express statement in the deed that the grantor had title at the date of the grant. The grantor will not be permitted to hold the estate against his solemn covenant that he will defend his grantee and his assigns in the full and perfect enjoyment of the same forever."

And likewise, where one, who, having no title or a defective title to land, gives a mortgage thereon containing covenants of general warranty, or covenants of seisin and against incumbrances, subsequently acquires a title to such land, such after-acquired title immediately inures, by the doctrine of estoppel, to the benefit of the mortgagee and those in privity with him. Caple v. Switzer, 122 Mich. 636, 81 N. W. 560; Avery v. Judd, 21 Wis. 262.

Since an estoppel by deed arises from that which has been covenanted, agreed and declared in the deed itself, it is clear that nothing can be estopped which is not, expressly or by implication, definitely agreed or alleged in the deed. In order to raise an estoppel against the grantor, therefore, it is essential that the deed on its face, either expressly or by implication, reading the deed in light of its whole content, clearly and directly purports to convey absolutely an estate of particular description. And if the invalidity of the grantor's title appears on the face of the deed, clearly an estoppel is impossible. Van Rensselaer v. Kearney, supra, Gilmer v. Poindexter, 10 How. (U. S.) 257.

A quitclaim deed, being in effect nothing more than a release of such right, title and interest as the grantor may have at the time of the conveyance, passing no estate of particular description, will not generally raise an estoppel. A conveyance of all the right which the grantor had or might have to land, will not create an estoppel. "This legal effect can occur only where a party has conveyed a precise or definite legal estate or right, by a solemn assurance, which he will not be permitted to vary or deny." Gilmer v. Poindexter, supra. A quitclaim deed will not, therefore, operate to estop the grantor from setting up an after-acquired title. Jourdain v. Fox, 90 Wis. 99, 62 N. W. 936.

Where, however, in a deed quitclaim in form, reading the instrument in light of its whole content, it is apparent that the
parties intended that a particular estate or interest should pass by the conveyance, the grantor will be estopped to deny such title in himself or to set up in hostility thereto a title subsequently acquired by him. In the case of *Van Rensselaer v. Kearney*, supra, the United States Supreme Court determined that from the whole deed it was the intention of the grantors to convey and of the grantees to receive, an estate of particular description. The court (by Mr. Justice Nelson) said: "The general principle is admitted, that the grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. 7 How. 159; 2 Sugden on Vendors, ch. 12, sec. 2, p. 421; 2 Kent's Comm. 473; 4 Ib. 471 note; 1 Cow. 616; 9 Cow. 1; 4 Wend. 622; 7 Conn. 256; 11 Wend. 110; S. C. 13 Wend. 78; 12 Pick. 78; 1 Rev. Stat. N. Y. 739, secs. 143, 145; 15 Pick. 23; 14 Johns. 193. A deed of this character purports to convey and is understood to convey, nothing more than the interest of which the grantor is seized or possessed at the time; and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view; and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title. But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance. And therefore, 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 particular description or quality, and the bargain had proceeded on 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 on 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." The opinion in this case contains a very excellent review of the early decisions on this subject.

At the early common law, it seems that a distinction was made
between the case in which no interest in realty passed under a warranty deed and the case in which some present interest, however small, passed under a deed containing general covenants of warranty. Thus, where a grantor, having no title whatsoever in the realty, assumed to convey by a deed containing covenants of warranty, it was uniformly held that an estoppel was created, which prevented the grantor from setting up any after-acquired title in the property, but where the grantor had some present interest in the premises, which passed under a deed containing covenants of warranty, the rule seems to have been that there was no estoppel and that the grantor was permitted to set up an after-acquired title or interest in hostility to the title of his grantee. "If any interest, however small, passes by a deed, it creates no estoppel." 4 Kent Comm. 98. It is doubtful whether this was, in fact, the early rule. It is generally believed that this distinction was intended to be limited to leases and to have no application to deeds. Bigelow, Estoppel (5th ed.) 291.

And it is quite certain that no such distinction has been made in the American decisions. House v. McCormick, 57 N. Y. 310; Thompson v. Simpson, 128 N. Y. 270, 28 N. E. 627; Dye v. Thompson, supra; Myrick v. Kahle, 120 Wis. 57, 97 N. W. 506; Weisner v. Zaun, 39 Wis. 188.

In the leading American decision on this subject, House v. McCormick, supra, the court renounces the ancient exception in the following language: "It is further claimed—that there is no estoppel created by the deed—because another exception, well recognized in the doctrine of estoppel, is thus stated by Chancellor Kent (4 Cowen, 98): "If the lease takes effect by passing an interest, it cannot operate by way of estoppel, even though it cannot operate by way of interest to the full extent of the intention of the parties. If any interest, however small, passes by a deed, it creates no estoppel." This claim is untenable. Although the last remark in the statement apparently applies to a deed as well as a lease, it is evident from the connection in which it is used, that it was intended to apply to a lease only. It is, therefore, unnecessary, now, to call it in question. It is to be construed as having application to leasehold interests only; . . . . It may, also, be conceded that there will not be an estoppel so as to give a grantee the benefit of a subsequently acquired estate, where any interest passes under a deed of bargain and sale, or quitclaim, or, by any conveyance containing no covenants; but the rule or
exception claimed does not apply where the deed by which the premises are conveyed contains express covenants of warranty or quiet enjoyment. The question in such cases, as in all other cases arising out of the construction of deeds, is one of intention; and where it appears to have been the object of the covenant to assure to the grantee, or covenantee, the full and absolute enjoyment of the property, without any right of the grantor to divest or interfere with the possession at any time thereafter, there is no reason or principle why it should not operate as an estoppel to avoid circuity of action against a claim of the grantor to a subsequently acquired estate, where a present right or interest, in fact, passed at the time the grant was made, as well as when nothing whatever passed."

In Myrick v. Kahle, supra, B. E. Edwards was the holder of tax deeds and certificates to certain lots. In 1885, he and his wife deeded their interest to the appellant, the holder of the original title, covenanting "that neither I, the said B. E. Edwards, nor my heirs nor any person or persons claiming by, through or under us or them shall at any time hereafter by any way or means have, claim or demand any right, title, interest or estate by, in or to the aforesaid premises or appurtenances or to any part or parcel thereof, forever." In 1891, Edwards obtained a tax deed to these lots, on the tax certificate issued in 1885, which he held when he made the deed. It was held that such interest as Edwards may have acquired by the tax deed of 1891, inured to the benefit of the appellant by virtue of the covenant in the deed of 1885.

Where a deed containing general covenants of warranty, conveys a present interest or estate in real property, a title subsequently acquired by the grantor will inure to the benefit of the grantee, whether such after-acquired title be acquired by purchase or vest in the grantor by descent. In Weisner v. Zaun, supra, A, tenant by courtesy and owner in fee of an undivided one-sixth part of land, as heir-in-law of a deceased son, conveyed the same to Z, the grantor of the defendant. The deed purported on its face to convey the entire tract of land. Subsequently, A acquired another one-sixth interest in fee, which he inherited as heir of his son. The court held that the one-sixth interest subsequently acquired by A by descent, by virtue of the covenant of warranty in the deed, inured to the benefit of the defendant's grantor (A's grantee) by way of estoppel.

As was announced in the case of North v. Henneberry, supra,
it is the covenant which gives force to the estoppel and prevents the grantor from setting up a subsequently acquired title. Where, however, a deed, although containing general covenants of warranty, purports to convey only that title and interest of which the grantor is possessed at the time of the conveyance, the general covenants of warranty are construed to have been limited to the estate or interest actually conveyed by the deed and the grantor is not estopped to set up a title subsequently acquired. If on the face of the deed there is no recital as to the quantum of the estate intended to be conveyed, other than the right, title and interest of the grantor, the general covenants will be construed, not as warranting a perfect and complete title, but they will be construed as limited to or restrained by that right, title and interest described in the deed.

In the case of Hanrick v. Patrick, 119 U. S. 156, the deed containing covenants of warranty, described the grant as "one undivided half of all my right, title, and interest in and to the following described lands." It was held that the covenants of warranty relate only to the estate or interest actually conveyed by the deed; that the conveyance and the covenants of warranty are confined to the right, title and interest described in the deed; that, therefore, the covenants of warranty are inoperative to pass an after-acquired title.

Thus we see that a covenant of warranty, in and of itself, will not be held to pass a subsequent acquired title, which would have the effect of enlarging the estate actually conveyed. In the unique case of Mfg. Co. v. Zellmer, 48 Minn. 408, 50 N. W. 379, a deed of mortgaged land contained a covenant against incumbrances. The only reference to the mortgage in the deed was to except it from the covenant against incumbrances. The court held that the exception of the mortgage did not operate to modify, limit or in any way restrain the covenant of warranty and that therefore, any title subsequently acquired by the grantor by the foreclosure of the mortgage, would, by the doctrine of estoppel, inure to the benefit of the grantee. In the later case of Rooney v. Koenig, 80 Minn. 483, 83 N. W. 399, the court explained its former decision by making the following distinction: "If land is conveyed by warranty deed subject to the mortgage, or the grantee in the deed assumes and agrees to pay the mortgage as part of the purchase price, the case is not within the rule as to title by covenant, which we have stated, and the grantor in such a case
may purchase and enforce the mortgage against the land.” *Meritt v. Byers*, 46 Minn. 74, 48 N. W. 417; *Walther v. Briggs*, 69 Minn. 98, 71 N. W. 909.

“Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, contract, or of remedy, as against another person, who in good faith relied upon such conduct, and has been led thereby to change his position to the worse, and who on his part acquires some corresponding right either of contract or of remedy.” *Kimball v. Baker Land & T. Co.*, 152 Wis. 441. Title by estoppel *in pais*, unlike estoppel by deed, does not arise from the solemn covenants of a party, but from his acts, representations, admissions, silence, laches and negligence. With reference to title by estoppel, estoppel *in pais* may operate to pass title to realty from one person to another as effectually as estoppel by deed. *Knauf & Tesch Co. v. Elkhart Lake S. & G. Co.*, 153 Wis. 306, 141 N. W. 701.

It is essential to an estoppel *in pais* that the acts or omissions set up by way of estoppel relate to material fact and are of such character as are naturally calculated to induce a reasonably prudent and careful man to believe that they were intended to be acted upon. In *Trenton Banking Co. v. Duncan*, 86 N. Y. 221, the court observes that in order to have a title by estoppel *in pais* against the owner of lands, “there must be shown, we think, either actual fraud, or fault or negligence, equivalent to fraud on his part, in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in *Storrs v. Baker* (6 Johns. Ch. [N. Y.] 166), as to render it just, that as between him and the party acting upon his suggestion, he should bear the loss. Moreover, the party setting up the estoppel, must be free from the imputation of laches, in acting upon the belief of ownership by one who has no right.”

In the case of *Kingman v. Graham*, 51 Wis. 232, 8 N. W. 181, in which this principle was directly in issue, the court laid down the rule that in order to estop the owner of lands from asserting his title, on the ground that he induced the party setting up the estoppel to believe that title was in another, there must be an
intention to deceive and mislead, or negligence so gross as to amount to a constructive fraud. "If there is a positive misrepresentation, it in general suffices if it be made either with the intention that another should act upon it, or with knowledge that he is about to act, or under such circumstances that a reasonable man would know that it would be acted upon." Later cases would seem to indicate (Marshall, J. observes in Knauf & Tesch Co. v. Elkhart Lake S. & G. Co., supra), that, "to designedly or inexcusably mislead another is sufficient." Mariner v. City of Milwaukee, 146 Wis. 605.

Kingman v. Graham, supra, was an action of ejectment. It appeared that the plaintiff, Kingman, had a duly recorded title to an undivided two-thirds of certain real property which he had purchased from his father. His father had a lease of the whole property and negotiated with the defendant, Graham, for a partnership in a business to be conducted by means of this property. By the terms of the partnership agreement, a certain valuation was to be placed on this property and the defendant was to put into the partnership, material to the same amount. The plaintiff was not in any way connected with the partnership contract, but he was present at the time when the contract was made. He made no assertion as to his ownership of any interest in the land. The defendant at the time honestly believed that the plaintiff's father was the owner of a two-thirds interest in the property. He testified that he would not have entered into the partnership agreement had he known that the plaintiff's father was not the owner of such interest. The defendant further testified that, acting upon this belief, he extended to the plaintiff's father credit which he would not have given him had he known the true state of the title. It appears that the defendants in order to collect the amount of this indebtedness to them, attached the said two-thirds interest, sold it on execution and purchased it at such sale. The terms of the partnership agreement implied and led the defendant, Graham, to believe that the plaintiff's father was the owner of said interest in the property. The defendant contended that the failure of the plaintiff to assert his own title to the property at the time when the partnership agreement was entered into, estopped him from asserting his title in ejectment. The court decided that the facts were insufficient to estop the plaintiff from asserting his title, on the ground that there was nothing in the partnership contract which amounted to a claim on the part of
the plaintiff's father that he was the owner of two-thirds of the property and that, therefore, there was no reason to require the plaintiff to assert his ownership and deny ownership in his father.

In the case of *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328, 78 N. W. 440, the plaintiff corporation, owner of pine timber lands, was requested by the defendants to fix its price on certain lands which included the tract in question. The plaintiff company gave its price on all lands, except the tract in question, stating to the defendants that this particular tract "we do not own." It had knowledge at the time that the defendants were logging pine lands in the vicinity and were on the market for such lands. Furthermore the disclaimer was made with knowledge of the fact that one B. claimed to own the particular tract in question under a tax deed and was offering the same for sale. The defendants, relying on the plaintiff's disclaimer, purchased the tract in question from B. In this action the defendants sought to establish title by estoppel and their position was sustained by the appellate court. The plaintiff contended that it was not estopped from asserting its title to the tract in question because the disclaimer was not made with knowledge that the defendants proposed to act on it, and that therefore, it amounted to nothing more than a mere casual statement which was insufficient to found an estoppel. The court answered the contention: "The general rule is that the statement relied on as an estoppel must be made with an intent to be acted upon, and without knowledge that the other party is contemplating such action; but it by no means follows that the intended action must be definitely and positively known to the maker of the statement. If the circumstances are such that a reasonable man, under the circumstances, would anticipate that it was to be acted on, it will be sufficient."

It is a universal rule that in order to establish an estoppel *in pais*, it is essential that the party claiming the estoppel should have relied on the misrepresentation in good faith, without knowledge or the means available for acquiring knowledge, of the true state of facts. The party seeking to establish the estoppel *in pais* against the true owner of lands must show that he relied on the misrepresentation of the true owner, in good faith, without knowledge of the true state of the title and without the available means of acquiring that knowledge. Actual occupancy of the premises by the true owner must sufficiently apprise all of his claim of ownership. The record of title is a constructive notice
to all the world which binds every person to examine and respect the true owner's title and it therefore constitutes an available and convenient means of acquiring knowledge of the true state of the title. *Ford v. Smith*, 27 Wis. 261 *Kingman v. Graham*, supra; *Two Rivers Mfg. Co. v. Day*, supra.

The mere fact that the owner's deed is on record, however, will not avail the true owner of the premises against a claim of title by estoppel, where such owner, by an affirmative misrepresentation, induces the person claiming the estoppel to believe that he is not the true owner of the premises. It would be highly inequitable, first to permit the true owner of realty, by some affirmative misrepresentation, to induce an innocent party to honestly believe and act upon the belief, that title to the land is in another, and then, when the true owner's title is assailed, to permit to point with immunity to his record of title. The record of title may not be used as an instrument to accomplish the perpetration of fraud, against which the whole doctrine of estoppel is directed. In *Two Rivers Mfg. Co. v. Day*, supra, in which the plaintiff corporation positively stated to the defendants that it did not own the tract of land in question, the fact that the plaintiff company's title was on record and open to examination by the defendants, was no defense to the claim of estoppel because the absolute disclaimer of the plaintiff company was such as to encourage and mislead the defendants into making expenditures upon the bad or doubtful title.

And the record of title is no defense to a claim of estoppel *in pais*, in a case where the true owner of lands has actual knowledge that another is *bona fide* claiming title or right thereto in ignorance of the true owner's title. It is not permitted that the true owner shall stand idly by and suffer an innocent party to purchase and expend money upon the premises, or to exercise acts of dominion and ownership over the property, under the honest but mistaken belief that he has title thereto. The fact that the party who is acting in good faith upon the mistaken belief that he is the owner of the premises could have easily discovered the true state of the title by examining the records, will not preclude him from setting up an estoppel against the true owner who had knowledge of the innocent mistake but who stood by in silence. The silence of the true owner, who has knowledge of the mistake, becomes a *fraud*. Under these circumstances, equity makes it incumbent on the true owner to assert his title, notwithstanding
that it may be recorded, or to be estopped from ever afterwards asserting it, upon the maxim "qui tacet, consentire videtur; qui potest et debet vetare, jubet si non vetat." Sumner v. Seaton, 47 N. J. Eq. 103; Kingman v. Graham, supra; Mariner v. City of Milwaukee, supra; Wetutzke v. Wetutzke, 158 Wis. 305, 148 N. W. 1088.

Sumner v. Seaton, supra, was an action to enjoin the defendant from further prosecuting an action of ejectment against the complainant at law. It appeared that the complainant’s grantor and the defendant owned lands in severalty which met in the center of a street. A change in the lines of the street, made by the municipality, left a narrow strip of the defendant’s land on the opposite side of the new street. The complainant’s grantor simply added this strip of land to his lot by fencing it in. The land including the strip in question, was conveyed to the complainant, who believing that she owned to the street, erected a house thereon. Meanwhile the defendant stood silently by and asserted no claim to any part of the complainant’s lands. It was held that the defendant was estopped from claiming possession of the strip of land in question, notwithstanding that his title was on record and the complainant, by examining the record, might easily have discovered the true state of his title.

In Kingman v. Graham, supra, it was distinctly held that where the true owner’s title is recorded, mere silence on his part, while another person claims title to the property in question with a view to having a third person act upon such claim, will not estop the true owner from asserting his title to the realty against the third person who has acted upon the claim of title to his detriment. But the court points out that if the true owner has knowledge of the fact that another person is about to act in ignorance of the true state of the title, notwithstanding that the true owner’s title is recorded, good faith may require him to speak, and failure to speak may estop him from asserting his title. “The question is not so much what the party setting up the estoppel might or ought to have known or supposed, as what he actually did know and suppose to the knowledge of the other party.” Sumner v. Seaton, supra. Of course the silence of the true owner who has no knowledge of the fact that another is acting under the mistaken opinion respecting the title to premises, can work no estoppel; in such case the record of title is a complete protection. Sumner v. Seaton, supra.
The following language from *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, was quoted and approved by the Supreme Court of Wisconsin in the case of *Kingman v. Graham*, *supra*; "Thus where title has been recorded, it may fairly be presumed that subsequent purchasers have used the means pointed out by law, and acquired all the knowledge which is important for them to have, or that they will do so. When, however, the owner is directly apprised of the ignorance of the buyer, and of his purpose to act in such ignorance, he cannot claim the benefit of this principle, because good faith then requires him to speak." Where the true owner of property stands by and sees another selling or mortgaging it under a claim of title in good faith, without asserting his title, he is estopped from afterwards asserting his title against the innocent purchaser or mortgagee. *Wetutzke v. Wetutzke*, *supra*.

Where the true state of the title is known to both of the parties, or both have same means of acquiring knowledge as to the true state of the title, there cannot be an estoppel. *Brant v. Virginia Coal & Iron Co.*, *supra*. Thus in *Warner v. Fountain*, 28 Wis. 405, it was held that where both parties were equally ignorant of the true boundary, the fact that A. permitted B. to erect a house on his land, and built a division fence between the premises claimed and occupied by himself and those claimed and occupied by B., would not estop A. from claiming the premises occupied and claimed by B.

It is also essential to an estoppel in pais that the party claiming the estoppel, in reliance on the misrepresentation of the party sought to be estopped, shall have changed his position so as to render it impossible, or inequitable to restore the parties to status quo. *Sweitusch v. Luehring*, 156 Wis. 96. In the unique case of *Mariner v. City of Milwaukee*, *supra*, the plaintiff Mariner claimed title to a certain lot by virtue of two tax deeds. He knew that the city claimed title to the lot and that the lot had not been assessed and was not being taxed. During a period of thirty-two years he paid no taxes on the lot and did nothing to apprise the city of his title to the lot. It was held that by his silence he was estopped from asserting title as against the city. The court said: "It would be no invasion of the domain of common knowledge to say that during the thirty-odd years that Mr. Mariner claimed to own the lot the taxes thereon with the prevailing rates of interest added thereto would, if the lot had been
taxed, amount to a sum approximating its entire value, if indeed it would not exceed such value. Mr. Mariner benefited himself or his estate by his silence and inaction to the extent of that sum whatever it might be, if he was the owner of this lot at the time of his death. The city has lost, or it would be more accurate to say that the other taxpayers of Milwaukee have been required to make up, this sum... But where a municipal corporation acts in good faith on a mistaken assumption for a long series of years, and a taxpayer knows that it is acting on such an assumption and remains silent, and in fact takes an involuntary contribution from the municipality from year to year, he is pursuing a course of conduct that is hardly consistent with fair dealing. We think it was incumbent on Mr. Mariner within some reasonable time to notify the city of his interest in the lot and call its attention to the fact that the same had not been assessed. Instead of doing this he allowed the city to treat the lot as its own, and has in effect deprived it of a large amount of revenue.”

In Wright Lumber Co. v. McCord, 145 Wis. 93, it was held that where a wife, believing that her husband was not legally divorced from her, and knowing that he was setting up another as his lawful wife and that such other was joining in conveyances of lands to innocent purchasers, and having full knowledge of her own rights in such lands, did not assert any right or interest in the lands or in any way apprise the innocent purchasers of her claim therein, she is estopped by her silence from claiming dower in such lands, as against the innocent purchasers for value.