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CHAPTER 158 of the Session Laws of the State of North Dakota for 1899 was approved on March 8, 1899, and took effect on July 1, 1899, pursuant to the constitutional provision that unless a bill is passed as an emergency act it shall take effect on the following July first.

Chapter 158 read:

> "AN ACT RELATING TO TITLES TO REAL PROPERTY. All titles to real property vested in any person or persons who have been or hereafter may be in the actual, open, adverse and undisputed possession of the land under such title for a period of 10 years and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in the law, any law to the contrary notwithstanding."

The statute became Section 3491a of the Revised Codes of 1899, and without change Section 4928 of the Revised Codes of 1905, Section 5471 of the Compiled Laws of 1913, and by merely leaving off the words "any law to the contrary notwithstanding" Section 47-0603 of the Revised Code of 1943. Chapter 276 of the 1951 Session Laws amended Section 47-0603, and the changes which the amendments endeavor to make will be discussed after a consideration of the law from the time of its passage in 1899 to Chapter 276.

There were at the time the statute was enacted 20-year statutes of limitation [1] and therefore the only conclusion which can be drawn is that the enactment of Chapter 158 was intended to shorten the period for acquiring title by adverse possession in a given situation, a conclusion which is consistent with the view that the law favors certainty of ownership and encourages alienability.

In *Streeter Co. v. Frederickson*,[2] in a case where the plaintiff brought an action to quiet title as against a defendant claiming through grantors who had secured the property by tax deed, the Court stated, "The statute under consideration is entirely unlike

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1. N.D. Rev. Codes §§5187-5197 (1895). These have now become §§28-0103 - 28-0113, N.D. Rev. Code (1943).

2. 11 N.D. 300, 91 N.W. 692 (1902).

the statutes of limitation common in most of the states, and also the 20-year limitation statute. In fact, it is so dissimilar that its identity as a statute of limitations is almost obscure." [3]

Discussing the statute in *Woolfolk v. Albrecht*,[4] a quiet title action brought against a defendant who claimed through a tax deed, the Court stated that, "The contention, in effect, that the statute . . . is merely a statute of limitations, and may not be used as a sword of attack, but only as a shield of defense, is without merit. By the express language of this section, as well as the preceding one, a compliance therewith operates to confer a good and valid title, and we know of no reason why a title thus acquired cannot be asserted by its owner in exactly the same manner as a title acquired in any other way." [5]

In *Schauble v. Schulz*,[6] the Eighth Circuit Court of Appeals said: "Unlike ordinary statutes of limitation which convert adverse possession into perfect title after a prescribed period of years, this statute contains a provision designed to encourage the payment of taxes and assessments on land the title to which is uncertain, and, as a protection to one who unites adverse possession for the period of 10 years with the payment of all taxes and assessments for those years, it declares his title good and valid, although the period of adverse possession otherwise in effect under the laws of the state is 20 years . . . In a limited sense the statute partakes of the nature of a revenue measure which, consistent with due process of law, may have a more summary operation than other laws. . . ." [7]

It would seem that whether the statute is one of limitation or not, it may be used to assert a title, and to defeat a claim of title, and in its inception undoubtedly served to shorten the period within which an owner could successfully maintain an action for the recovery of his property from an adverse possessor, who had met all the requirements of the statute.

The first occasion that the North Dakota Supreme Court had to consider the statute was in *Power v. Kitching*,[8] in which the Court said that,

> "The benefits of the statute are intended for all who are vested with imperfect titles to real estate, and are not limited to

3. *Id.* at 303, 91 N.W. at 694.
4. 22 N.D. 36, 133 N.W. 310 (1911).
5. *Id.* at 45, 133 N.W. at 314.
6. 137 Fed. 389 (8th Cir. 1905).
7. *Id.* at 392.
8. 10 N.D. 254, 86 N.W. 737 (1901).

> persons holding tax titles. The statute . . . establishes a mode and manner of acquiring title to land which is new to this state. Under this statute title is not acquired until each of three prescribed conditions are fully met:
> 1. The claimant must be vested with some sort of title;
> 2. he must occupy the land, under claim of title thereto, openly, adversely, and exclusively for a period of 10 years;
> 3. the claimant must pay all taxes assessed against the land for such period." [9]

Again, in *Streeter Co. v. Frederickson, supra,* the Court stated that, "By the language employed in the statute under consideration—and it is not ambiguous—the legislature of this state extended the benefit of its provisions not to all persons indiscriminately, but to certain persons; that is, to persons who have been or may hereafter be in the actual, open and undisputed possession of land for 10 years, and who shall have paid all taxes and assessments legally levied thereon. It is the title of persons complying with these conditions which are declared good and valid in law, and the titles of no other persons. There is no language in the statute which can be construed as extending the benefit of its provisions to persons or in aid of titles other than those described." [10]

Thus, in order to take advantage of this statute, there are three requirements, which will be hereinafter discussed under the headings of Color of Title, Adverse Possession, and Payment of Taxes.

1. Color of Title

The statute merely states that "All *titles* to real property vested in any person or persons . . . shall be . . . declared good and valid in the law . . ." and naturally the first question which would face the Court would be a determination of just what sort of titles the Legislature had in mind.

The Court, in *Power v. Kitching, supra,* stated that "The act of 1899 does not attempt to define the nature of the title upon which the claimant under the statute may rest as a basis upon which to build up a title by adverse possession and the payment of taxes,"[11] and that "the benefits of the statute are intended for all who are vested with *imperfect titles* to real estate. . . ." [12]

In that case, the defendant had purchased the land involved from a county which had taken it for taxes, and he secured a deed which

9. *Id.* at 260, 86 N.W. at 739.
10. 11 N.D. at 303, 91 N.W. at 694.
11. 10 N.D. at 260, 86 N.W. at 739-40.
12. *Id.* at 260, 86 N.W. at 739.

apparently was void on its face in 1889. He immediately went into possession, fenced part of the land, farmed another portion, placed buildings on the land and resided on it for a continuous period of over 10 years after he received the deed, in the meantime paying the taxes charged against the property. In 1900 the previous owner brought an action to recover the possession and the value of the use of the land. It was conceded that the tax assessment was void, as was the tax deed under which the defendant claimed.

Without much adieu, the Court launched into a discussion of color of title, and arrived at an inferential decision that what the Legislature intended to cover by the 10-year statute was the situation where a person had held the land under color of title. The question which the court then faced was whether a void tax deed constituted such color of title as the statute contemplated.

A. Tax Deeds

Discussing the much-litigated question of whether a tax deed void on its face constitutes color of title, the Court said in *Power v. Kitching* that "there seems to be great unanimity in the holdings that a tax deed regular on its face, even when voidable on account of fundamental defects in the antecedent tax proceedings, will constitute color of title within the meaning of the law governing the acquisition of title by adverse possession." [13] The Court added, "The cases are numerous which hold that an instrument void on its face for certain reasons may nevertheless be good as color of title on which to found a claim of title by adverse possession. . . ." [14]

Referring to what constitutes color of title, the Court quoted from *Black on Tax Titles*,[15] which states that "Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described," and further states that "the courts have concurred, it is believed without exception, in defining color of title to be that which in appearance is title, but which in reality is no title." [16]

In upholding the claim of the defendant, the Court stated as to the facts in the case that "The deed in suit is one made prima

13. *Id.* at 261, 86 N.W. at 740.
14. Id.
15. Black, Tax Titles §287 (1888).
16. *Ibid.*

facie evidence of title by statute. It has a grantor and a grantee. It contains a description of the land, and apt words showing an intent to convey. It came from an officer clothed with authority to sell land for taxes and to give deeds therefor. We therefore hold, under what we deem to be the better authority, that the deed in question is a sufficient color of title upon which defendant can build a claim of ownership by adverse possession." [17]

The proposition that a void tax deed gives color of title seems to have been settled by *Power v. Kitching;* but in *Styles v. Granger,*[18] the question arose as to whether or not a grantee of the purchaser of a void tax deed secured color of title under his deed where it was shown that the purchaser of the tax deed from the county in fact received no title.

The facts of the case were that the property in question was purchased from a county on October 3, 1887, by one Bowdle, who on August 2, 1890, quitclaimed his interest to one Granger, who was thereafter called upon to defend a quiet title action brought by the owner previous to forfeiture for nonpayment of taxes, from whom Granger had endeavored to secure a quitclaim deed to perfect his title prior to the action, but after the 10 year period.

The plaintiff contended that Bowdle had conveyed only such title as he had, and that he had none, so that there was no color of title in Granger. The Court replied that, "It is equally clear to us that the deed from Bowdle to Granger constitutes color of title, and brings Granger within the terms of Section 4928. The facts are almost identical in this respect with those in *Power v. Kitching.* . . . The tax deed gave Bowdle color of title. His deed to Granger was an assignment of whatever right or title he acquired by tax deed. If the deed gave Bowdle color of title, his grantor or assignee took the same title that Bowdle had held." [19]

There was some question in the case as to whether Granger in good faith assumed that his deed from Bowdle gave him title at the time he purchased, in view of his subsequent attempt to secure a quitclaim deed from the previous owner. The Court said, "There is no suggestion in the record of any lack of good faith on the part of Granger in his assumption that his deed gave him title at the time he purchased," [20] and further that any conversa-

17. 10 N.D. at 262, 86 N.W. at 740.
18. 17 N.D. 502, 117 N.W. 777 (1908).
19. *Id.* at 508, 117 N.W. at 779-80.
20. *Id.* at 508, 117 N.W. at 780.

tions or negotiations had in the case were after title had ripened in Granger, and therefore immaterial.[21] This being so, the language of the Court where it stated, "While it may be conceded that the tax deed to Bowdle conveyed no title, yet the deed was delivered, as was also the deed from Bowdle to Granger, before the decision in *Power v. Larabee* [22] . . . was rendered by this court, and the fact that both parties may have misinterpreted the law prior to the decision of that case does not impeach their good faith," [23] would seem to be dictum. None the less there seems to be the possibility of a showing that a grantee accepted a deed on the basis that it conveyed no title to him and then set about to secure title. In other words, it would seem the court did leave the door open for a contention that the grantee did not claim title in good faith and therefore did not secure color of title.

The Court again inferred that good faith is an element of color of title when in *Page v. Smith*,[24] in discussing the title of a holder of a sheriff's certificate under a void foreclosure by advertisement it stated, "That it (the original holder of the certificate) actually asserted no title under its foreclosure is apparent from the fact that it took no sheriff's deed for six years after sale, and that it knew the foreclosure to be invalid. Of this and the fact that no assignment was of record and that the foreclosure was void . . . all subsequent purchasers had constructive notice, and are in no better position than was the mortgage company." [25]

There seems to be a decided split of authority as to whether under statutes requiring color of title, good faith is essential to the claim of right, title, or possession. Some courts construe good faith to mean the absence of fraudulent purpose in the acquisition of the color of title and the knowledge of a defect in the title does not of itself evidence such a purpose; other courts require an honest belief in the claimant that he has valid title.[26] In speaking of such statutes as this, many of the courts have held that the requirement for the payment of taxes is a means of showing the good faith of the adverse claimant.[27]

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21. 17 N.D. at 509, 117 N.W. at 780.
22. 2 N.D. 141, 49 N.W. 724 (1891).
23. 17 N.D. at 508-09, 117 N.W. at 780.
24. 33 N.D. 369, 157 N.W. 477 (1916).
25. *Id.* at 379, 157 N.W. at 480.
26. See 2 C.J.S., Adverse Possession, §§167-70.
27. See Note, 132 A.L.R. 216 (1941).

B. Void Judicial Sale

In *Page v. Smith, supra,* a sheriff's certificate of sale was issued upon a foreclosure by advertisement on the power of sale in a mortgage, on June 4, 1892, and a sheriff's deed obtained in 1899. In 1902 the title was conveyed to one Hill by warranty deed, in performance of a contract of purchase entered into some two years before. He in turn in the same month conveyed the property to the Sioux Valley State Bank of Iowa, which in turn deeded to the Bailey State Bank of Iowa, which transferred the property to Joseph Know, who, in May, 1912, conveyed the property to the plaintiff, who brought an action to quiet title.

The defendant, Smith, on January 4, 1887, secured the property by warranty deed from the mortgagor under the foreclosed mortgage, and it was conceded that the foreclosure proceedings were void and the Court stated that "so far as the record title is concerned defendant Smith is the holder thereof. . . ." [28] In deciding the case the Court found that there was no actual adverse possession until 1907, and therefore only a six year period of adverse possession up to the time when the action was brought. It naturally followed that the Court found that constructive possession was then in the legal title holder, Defendant Smith. The statement of the Court quoted in the preceding section, to the effect that the holder of the sheriff's certificate actually asserted "no title under its foreclosure is apparent from the fact that it took no sheriff's deed for six years after sale, and that it knew the foreclosure to be invalid" [29] would therefore appear to be dictum, as would its inference that there was not even color of title given by the void foreclosure proceedings.

This inference came before the court in *Steinwand v. Brown,*[30] where the Court was once again faced with the question of a void foreclosure under a power of sale in a mortgage. The Court stated that "it is still true that one who goes into possession of land under a sheriff's deed, issued in pursuance of a void foreclosure, is in possession under color of title." [31]

C. Parol Gifts of Real Property

In *Urbanec v. Urbanec,*[32] the plaintiff and his father migrated to North Dakota from Russia, and filed upon adjoining home-

28. 33 N.D. at 374, 157 N.W. at 478.
29. See note 25, *supra.*
30. 38 N.D. 602, 166 N.W. 129 (1917).
31. *Id.* at 610, 166 N.W. at 131.
32. 43 N.D. 127, 174 N.W. 880 (1919).

steads, between 25 and 30 years prior to the commencement of the action. Because of his age the father was dependent upon the son, and told the neighbors that he was going to vie the land to his son. After the father received his patent to the land he gave it to the son, but did not give him a deed or any other written evidence of the transfer. He moved in with the son, who immediately went into possession of his father's land and paid the taxes for 15 years. The father died, and the son brought an action to quiet title which was contested by the other heirs of the father.

The question, in the opinion of the Court, hinged upon whether or not a parol gift of real property could constitute color of title. Citing *Power v. Kitching,* in which it was stated that the first requisite under the statute is that "the claimant must be vested with some sort of title," the Court continued by saying that, "The plaintiff here does not claim to have been in possession under any sort of title, but rather as a donee of an executory gift. The plaintiff's wife, who was present when the patent was delivered, testified, 'my husband wanted him to give him some more in writing and he said that was enough. He gave him the patent and he said that was good.' " [33]

Realizing that it was faced with a fairly close question, the Court stated that, "The patent was, of course, not an instrument of conveyance from the father to the son, and the change of possession thereof did not invest the son with *any title paper* which would serve in his hands to give color of title. It is unnecessary here to determine all of the requisites that may go to make up color of title, whether, for instance, it is necessary in every case that there should be some sort of a paper title or whether one going into possession in good faith, on the supposition that he is the sole heir of the person last seised, might be considered as holding color of title so as to draw to his possession the benefits of the 10-year statute. . . . Suffice it to say here that there must at least be presented that which, in appearance, is title, but which, in reality, is not title." [34]

What the Court was really trying to distinguish was "claim of title" from "color of title," and it went on to state that the "defendants rely principally on the case of *Rannels v. Rannels* [35]. . . . and other similar cases which define the term 'color of title' in such

33. *Id.* at 132, 174 N.W. at 881.
34. *Id.*
35. 52 Mo. 108 (1873).

broad language as to include practically every transaction whereby one may be put in rightful occupancy of real property under circumstances entitling him, in good faith, to consider it as his own. The Supreme Court of Missouri, in a later case, *Allen v. Mansfield* [36] . . . found it necessary to qualify the broad holding of the *Rannels* Case, as appears from the following quotation from the latter decision: 'Claim of title does not necessarily include color of title. The definitions and descriptions of color of title given in the books are various and conflicting. It is, we think, safe to say that any writing which purports to convey land and describe the same is color of title, though the writing is invalid and conveys no title.' " [37]

This view by the Court—that to constitute color of title there must be some documentary evidence—is apparently the majority view of the subject.[38] In its final disposition of the *Urbanec* case, however, the Court granted the plaintiff the relief he was really looking for, by construing the arrangement with the father as a contract to convey, and holding that since the son had performed his part by keeping the father during his lifetime, he was entitled to specific performance.

D. Tenancies at Will

In the *Urbanec* case, the Court was cited to a line of authority to the effect "that one who enters upon real estate by virtue of a parol gift, and who claims as owner, may claim the benefit of the Statute of Limitations after he has been in the open, exclusive, adverse and uninterrupted possession for the statutory period." [39] The Court said that this authority meant "that one taking possession of land under a parol gift holds it adversely as to the donor and all others," [40] but that "such parol gift conveys no title and only operates *as a mere tenancy at will,* capable of revocation or disaffirmance by the donor at any time before the bar is complete." [41] The Court distinguished the authority cited on the ground that it dealt with adverse possession under the 20-year statute, and added that "it is well settled that color of title is not needed where adverse possession under the 20-year statute is relied upon. . . . Claim of right is essential, but not title, color-

36. 108 Mo. 343, 18 S.W. 901 (1892).
37. 43 N.D. at 132, 174 N.W. at 881-82.
38. See Note, 2 A.L.R. 1457 (1919).
39. Note, 35 L.R.A. 835 (1897).
40. 43 N.D. at 134, 174 N.W. at 882.
41. *Id.*

able or otherwise." [42] The Court concluded that the "plaintiff . . . had no title which was capable of being protected by the 10-year statute." [43]

Of course the lack of any documentary evidence was considered vital, but at the same time it would seem that a mere tenancy at will is not sufficient to constitute a color of title which can ripen into a greater estate.

E. Unprobated Lost Wills and Unrecorded Lost Deeds

Can an unprobated lost will or an unrecorded lost deed constitute color of title?

In *Stoll v. Gottbreht*,[44] the Court did not answer the question of whether color of title was furnished by such instruments, but Justice Christianson in a dissenting opinion discussed the problem at length.

The facts were that one John Kelly, three or four years prior to his death, made a homestead entry upon the land in question. He had made no final proof at the time of his decease and no patent had been issued. He left a daughter, Mary Gottbreht, and several other heirs, and in his will he devised the homestead to his daughter and made specific bequests to each of the other heirs. Mary's husband was named executor of the will. Several years after Kelly's death the will was taken to an attorney for the purpose of having it probated. The attorney, in due course, proceeded to lose the will and it was never presented to the courts.

After Kelly's death, however, Mary and her husband occupied the homestead and made final proof and a patent was issued on December 1, 1904, to "the heirs of John Kelly." Thereafter the husband made a verbal agreement with his wife to pay the specific bequests and she then deeded the property to him. This deed was also subsequently lost and never recorded. The husband had been in possession of the land since 1903, having farmed it and rented parts of it to others, and he continued to pay all of the taxes. At the same time he made interest payments on the specific bequests in the lost will. In December, 1916, he sent quitclaim deeds to the other heirs to whom he had made the interest payments, with the balance due on the bequests. The other heirs claimed this to be their first knowledge of any interest in the land, and brought an action to quiet title.

42. *Id.*
43. *Id.*
44. 45 N.D. 158, 176 N.W. 932 (1920).

The husband's defense was based on the 10-year statute. The majority of the Court stated that, "It is deemed wholly immaterial to consider whether the claimed will constituted color of title or not. The only claim made by respondents is that it does constitute color of title. Clearly the title of the defendant . . . rests wholly, not only upon proper proof of color of title, but also upon the fundamental requisites necessary to establish title by adverse possession under the statutory provisions. . . ." [45] The Court then decided the case on the adverse possession feature of the statute.

Justice Christianson in his dissent argued that "the question here is not whether there was a valid will, but whether the will and the deed . . . gave a color of title upon which his (the defendant's) claim of title by adverse possession . . . may rest." [46] He went on to discuss what color of title is, stating that, "Color of title has been said to be that which gives the semblance or appearance of title, but is not title in fact; that which, on its face, professes to pass title but fails to do so because of want of title in the person from whom it comes or the employment of an ineffective means of conveyance. . . . If an instrument actually passes title, it is clear that it is not 'color of title.' The term implies that a valid title has not passed. . . . A deed from a mere volunteer is good color of title. A title founded on adverse possession under a deed which purports to convey the title is wholly independent of prior conveyances or of the grantor's actual title." [47]

The majority of the Court, in deciding the case on the issue of adverse possession, stated that, "Upon this record it is evident, under well-established principles of law, that the defendant . . . has not established the hostile adverse possession required under the statute. After the patent was issued to the heirs, he had possession of this land as a cotenant, by reason of the alleged deed made by his wife, to him. As cotenants, the possession of one was presumed to be the posession of all. In order to overcome this usual presumption, and to start the statute to operate by adverse holding, it was necessary for the cotenants, claiming adversely, to perform or do some act in direct hostility to the claims of his other cotenants, so as to show in some way an ouster of the rights of such cotenants. This meant such an emphatic deprivation of the rights of the cotenants, as to show either direct knowledge to the other cotenants of such claim, or of circumstances sufficient to

45. *Id.* at 162, 176 N.W. at 933.
46. *Id.* at 170, 176 N.W. at 937.
47. *Id.* at 170-71, 176 N.W. at 937.

establish such knowledge or the means of the knowledge thereof." [48] The majority concluded that the defendant acted clandestinely and that the plaintiffs had no knowledge of his alleged hostile acts.[49]

Justice Christianson in discussing the same point stated that, "Where real estate is held in common, and one tenant assumes to convey the entire estate and does convey it by metes and bounds, the deed will give color of title as to the whole tract, and an entry by the purchaser thereunder claiming title to the whole will operate as an actual ouster and disseisin of the cotenant." [50] On this basis, he continued, "it seems to me that the instruments, under which the defendant . . . entered into and has remained in possession of the premises, gave him sufficient color upon which to build a claim of ownership by adverse possession. . . ." [51] He criticized the majority for applying what he contended was the "rule applicable to a case where one who has originally entered into, and remained in possession of the premises as a tenant in common, seeks to assert title by adverse possession against his former cotenants." [52] "But the defendants in this case did not enter into possession of the premises with the understanding that they were cotenants of the plaintiffs or anyone else. Mary thought she held the whole title, and thought she conveyed the whole title to William (her husband)." [53]

F. Title Passing by Implication with Adjacent Lands

Does title which passes by implication with adjacent lands constitute color of title?

In *Hille v. Nill*,[54] one Nill purchased from the original owner of platted property in the City of Kulm all of the lots except one block. Three years later Nill made an ineffectual vacation of the streets and alleys and fenced in all of his property. He paid all the taxes until 1927 when an action was brought to restrain him from closing up the streets.

The Court found there was no dedication to the public, as the public had not accepted, but that there were vested rights

48. *Id.* at 163, 176 N.W. at 933-34.
49. Among the cases cited in support of this conclusion were Ildvedsen v. First State Bank, 24 N.D. 227, 139 N.W. 105 (1912); Enderlin Investment Co. v. Nordhaugen, 18 N.D. 517, 123 N.W. 390 (1909).
50. 45 N.D. at 171, 176 N.W. at 937.
51. *Id.*
52. *Id.*
53. *Id.* at 172, 176 N.W. at 937.
54. 58 N.D. 536, 226 N.W. 635 (1929).

in the streets and alleys vested in each purchaser of lots in the addition. However, Nill claimed title under his deed and his vacation proceedings. He had the premises fenced and excluded all others therefrom. He paid the taxes on the property, and the record being silent on the matter, the Court inferred it was taxed as unplatted or acreage property. The Court stated that the plaintiff, "under the circumstances disclosed by the record . . . delayed too long in asserting his rights and objecting to the vacation. If any of his rights were abridged or destroyed by the vacation he should have vindicated them at an earlier time. He and his grantor were content to wait for more than 10 years before attempting to assert or protect any rights they may have had." [55] The Court concluded that under the 10-year statute Nill's claim of title had been sustained.

The "vested rights in the streets and alleys" which the Court spoke of is in reality a right in the nature of an easement, and the conclusion must be that the owner of the servient tenement can use the 10-year color of title statute to clear his land of the servitude.

G. Contracts for Deed

Does a contract for deed give the vendee color of title?

In *Clapp v. Tower*,[56] the Court cited with approval *Pomeroy on Equity Jurisprudence* as to the relationship of the vendor and vendee under a contract for deed, wherein it is stated that "the vendor still holds the legal title, but only as a trustee, and he in turn acquires an equitable ownership in the purchase money. His property, as viewed by equity, is no longer real estate in the land, but personal estate in the price; and if he dies before payment, it goes to his administrators and not his heirs. In short, equity regards the contracting parties as having changed positions, and the original estate of each as having been 'converted'—that of the vendee from personal into real property, and that of the vendor from real into personal." [57]

Applying this doctrine of equitable conversion the Court held that "where a valid and binding contract of sale of land has been entered into such as a court of equity will specifically enforce against an unwilling purchaser, the contract operates as

55. *Id.* at 547, 226 N.W. at 639.
56. 11 N.D. 556, 93 N.W. 862 (1903).
57. Pomeroy, Equity Jurisprudence §105 (2d ed. 1892).

a conversion," [58] so that the interest of the vendor for purposes of probate was held to be personal property.

The North Dakota courts have always considered that the vendee under a binding contract becomes the equitable owner of the land, but that the legal title remains in the vendor, as security for the purchase price.[59]

In *Miller v. Shelburn*,[60] the Court had occasion to consider the extent of the relationship and stated in that case that "it was contended that the plaintiff became vested with an equitable ownership in the land upon the execution of the contract, and that there could be no complete recission until he had conveyed such interest back to the defendants. Equity does not so regard the effect of such contracts. Under certain circumstances the vendor becomes the trustee of the title for the benefit of the vendee, and the vendee becomes the trustee of the purchase money for the benefit of the vendor. But this doctrine applies only in equity. Speaking of the effect of such contracts in law, it is said in *Pomeroy on Equity Jurisprudence* §367:[61] 'It is wholly in every particular executory, and produces no effect upon the respective estate and titles of the parties, and creates no interest in nor lien or charge upon the land itself. The vendor remains to all intents the owner of the land: he can convey it to a third person free from any legal claim or encumbrance. . . . In short, the vendee obtains at law no real property nor interest in real property. The relations between the two contracting parties are wholly personal.' " [62]

Applying this holding in *Cummings v. Duncan*,[63] where the Court was considering §7082, Revised Codes of 1905, which provides for the lien of a judgment upon the real property of the judgment debtor,[64] the Court held that the section was "intended to make a judgment a lien on the legal title of real property, and not on some hidden equitable title, which could only be brought to light and made available by the extraordinary proceedings of a court of equity." [65]

In *Salzer Lumber Co. v. Claflin*,[66] where the vendee under a

58. 11 N.D. at 559, 93 N.W. at 864.
59. See Nearing v. Coop, 6 N.D. 345, 70 N.W. 1044 (1897).
60. 15 N.D. 182, 107 N.W. 51 (1906).
61. (2d ed. 1892).
62. 15 N.D. at 186, 107 N.W. at 52.
63. 22 N. D. 534, 134 N.W. 712 (1912).
64. This is now N.D. Rev. Code §28-2013 (1943).
65. 22 N.D. at 538, 134 N.W. at 714.
66. 16 N.D. 601, 113 N.W. 1036 (1907).

contract for sale entered into a contract for the purchase of lumber for improvements on the contracted premises, the Court in construing §35-1216,[67] which provides that the lien of a mechanic's lien shall be "to the extent of all the right, title, and interest of the owner," found that the "statute . . . in express terms permits the lien holder to enforce his lien to the extent of all the right, title, and interest of the owner. This precludes the idea that there must be absolute ownership in fee before the lien attaches."[68] This decision was made in the face of the fact that the vendee had made no payment whatsoever under the contract, and without any discussion of legal title as opposed to equitable title, as was pointed out in *Cummings v. Duncan, supra.*

It can be taken as settled that the Court in North Dakota has adopted the rule that in equity the vendee of a contract for deed holds the equitable title to the real property and that the vendor holds the naked legal title as trustee for the vendee, but that at law the vendor remains to all intents the owner of the land and that the vendee's interest is merely a personal one arising out of the contract. In applying these rules in any situation in relation to a given statute, the courts are pretty much at liberty to shift from one to the other.

In *Robertson v. Brown,*[69] where the plaintiff in a quiet title action was held to be the holder of a champertous deed,[70] taken from the owner of the property before it was taken by McHenry County for the nonpayment of taxes, and the defendant was the holder of a contract for deed from the county, the Court stated that "presumptively the contract was valid on its face. Nothing appears to the contrary in the findings. This Court, as well as many others, has held that a tax deed valid on its face is sufficient to constitute color of title and will, therefore, support a claim of adverse possession. . . ."[71]

In a note in American State Reports,[72] following a report of *Power v. Kitching,* it is stated that "a bond for a deed or title, or an executory contract for the sale of land, after performance on the part of the vendee and the accruing right to a deed is usually considered sufficient color of title whereupon to base

67. N.D. Rev. Code (1943).
68. 16 N.D. at 605, 113 N.W. at 1037.
69. 75 N.D. 109, 25 N.W.2d 781 (1947).
70. See N.D. Rev. Code §12-1714 (1943).
71. 75 N.D. at 115, 25 N.W.2d at 785.
72. 88 Am. Rep. 701 (1903).

the defense of adverse possession." [73] "However, if such bond or contract is purely executory, entitling the vendee to a deed at some future day in case of his compliance with certain conditions, it is not color of title. It does *not purport to convey.* . . . Though it has been held that one who enters into possession under a contract of purchase with a bond for title when the purchase money is paid is in under color as against a stranger, though the purchase money has not been paid." [74] This seems consistent with the holding in *Power v. Kitching,* wherein it was said that to constitute color of title there must be a grantor and a grantee, a description of the property and apt words of conveyance. A contract for deed does not contain apt words of conveyance, but only an agreement to convey. However, in equity it might well be said that the contract does convey an equitable title, and support color of title on that basis.

In *Corpus Juris Secundum* [75] it is stated that "it has been broadly held that neither a contract for the purchase of land, nor a bond for title constitute color of title under the law relating to acquisition of title by limitation, although other authorities are to the effect that a bond for title or written contract to convey may operate as color of title against persons other than the obligor, and it has also been held that after payment of the purchase money an instrument of this character may be a color of title sufficient to support adverse possession."

To say the least, such authorities throw nothing but confusion on the subject when the other elements of possession are shown. In *Robertson v. Brown, supra,* the Court stated that "The same rule applies to the contract of sale of this property by the county. F. C. Brown (the defendant) entered into possession under a contract which the statute authorized. *It vested in him color of title and his possession thus became adverse to all claims of the original owner or his grantees."* [76] The Court has probably gone quite a ways in stating that going into possession under color of title is adverse to all claims of the original owner or his grantees, as it would seem that the statute would not need the words "actual, open, adverse and undisputed" if mere possession were sufficient. What the Court probably meant was that the possession of the vendee under the contract of sale in this

73. *Id.* at 719.
74. *Id.*
75. 2 C.J.S. 614.
76. 75 N.D. at 115, 25 N.W.2d at 785.

case was adverse to the plaintiff insofar as the champerty statute involved in the case [77] was concerned, so as to make the deed void as to the defendant pursuant to the decision in *Galbraith v. Payne.*[78] The question of whether a contract of sale vests in the vendee such a color of title as is contemplated by the 10-year statute as to the holder of the legal and constructive possession still seems to be left open.

2. Adverse Possession

The statute states that only those "who shall have been in actual, open, adverse and undisputed possession of the land under such title for a period of ten years" shall have title.

In *Power v. Kitching, supra,* the Court stated that the claimant "must occupy the land, under claim of title thereto, openly, adversely, and exclusively for a period of 10 years." There does not seem to be much question but that the nature of the adverse possession contemplated by the 10-year color of title statute is the same as is contemplated by the other adverse possession statutes, for in *Page v. Smith, supra,* where the Court was considering the case of a claimant under void judicial proceedings in relation to the statute, it quoted from *Johnston Land Co. v. Mitchel,*[79] to the effect that "It is undisputed that the land was wild prairie land without a vestige of improvement, and at the most it is merely contended that the plaintiff's possession thereof was constructive only and such as it would obtain by reason of the fact that on a few occasions it entered into leases with third persons authorizing them to cut hay thereon. Such acts fall far short of constituting actual, open and notorious possession sufficient to set the champerty statute in motion." [80] The Court also quoted from the syllabus in *State Finance Co. v. Beck,*[81] to the effect that "The occasional cutting and removal of hay from unoccupied lands under a permit from one claiming title adverse to the plaintiff's grantor is not sufficient to constitute adverse possession so as to avoid plaintiff's deed for maintenance. . . ." [82] In *Stoll v. Gottbreht, supra,* the Court clearly followed the rule applicable to the statutes of limitation generally, that the possession of one cotenant is presumed to be the pos-

77. N.D. Rev. Code §12-1714 (1943).
78. 12 N.D. 164, 96 N.W. 258 (1903).
79. 29 N.D. 510, 151 N.W. 23 (1915).
80. *Id.* at 528, 151 N.W. at 28.
81. 15 N.D. 374, 109 N.W. 357 (1906).
82. State Finance Co. v. Beck, *supra* note 81, Syl. 1.

session of all, and that the one cotenant's posession does not become adverse as to the others until some act of direct hostility to the claims of the other cotenants is performed.

In *Wright v. Jones*,[83] one Margaret McGibbney, in 1882, made a homestead entry on a quarter section of land and took up her residence thereon. Shortly afterwards she married John Wright, by whom she bore two sons, one Arthur and a younger son. Margaret died in 1887 and the younger boy was given away and apparently disappeared. The husband continued to reside on the property and two years later a patent was issued to "the heirs of Margaret J. McGibbney, deceased." In 1890 Wright placed Arthur with the Joneses and disappeared. In 1898 the Jones family adopted Arthur, and several years later they located Wright in Washington. The property was sold to the county for nonpayment of taxes for the year 1889, and bought from the county by one Lindwell. This caused a stir in the community, and Lindwell quitclaimed the property to Mrs. Jones on the understanding that she would keep the property for Arthur. Mrs. Jones held the property and paid all the taxes thereon, when in 1901, three years later, Arthur, then 17, ran away and did not return until he had reached his majority, when he returned and claimed the land. This action was started by Arthur more than 10 years after 1901 for an accounting and return of possession. The Court found the tax deed void, and was then faced with the defense of the color of title statute.

The Court stated that under previous decisions the "defendants, to recover, must show that for the full period of 10 years they were in the open, adverse and undisputed actual possession of the land under a color of title, and had paid thereon all taxes and assessments. In this order of proof it will be necessary to consider whether the Joneses took the land from Lindwell 'openly adverse' to Arthur Wright, and whether for a period of 10 years such possession was undisputed by Arthur."[84] After citing some testimony which showed that Mrs. Jones was holding the property for Arthur, the Court stated: "We are satisfied that the extracts given will satisfy most minds that Mrs. Jones did not assert any title hostile as against Arthur until after he had run away, if she ever so asserted it. In fact it seems clearly established that this good woman, either through love of the boy or

83. 23 N.D. 191, 135 N.W. 1120 (1912).
84. *Id.* at 196, 135 N.W. at 1121.

through pride toward her neighbors, had assumed a voluntary trust toward this boy and advanced the money from her meager means to keep the land for him. After he had so ungratefully run away, she may have decided to keep the land for herself, and she probably has maintained an adverse claim against the elder Wright and the younger son, but as against the one-third interest of Arthur, we cannot see that she has established any such claim. While she was under no obligation to assume such trust, nevertheless, having so assumed it, she must account to her trustee (sic). . . . It is our conclusion then, that as against this plaintiff's one-third interest in the land, defendants have no right, title, or interest, and the trial court was right in quieting such interest in plaintiff." [85]

The Court did not decide the ownership of the other two-thirds interest, beyond the dictum appearing in the quotation above, except to point out that Arthur had no interest in it because if his brother was dead his interest would go to the father, and there was not sufficient proof of the death of the father to enable Arthur to claim any rights by inheritance from him. But it would seem that if the Court was right in deciding that the defendants were holding as trustees for Arthur, that they were holding all of the land as trustees for him, and the question would appear to arise whether the trustees could not acquire title under the statute for the benefit of the beneficiary.

One of the advantages of claiming adverse possession under color of title—*i.e.*, under color of some documentary evidence or written instrument—would seem to be that it gives the claimant a better claim of adverse possession as to all the property described in the instrument. Under what are now Sections 28-0108 and 28-0109 of the North Dakota Revised Code of 1943, pertaining to adverse possession under written instruments, the Court held in *Gale v. Shillock*,[86] that possession of part of a tract under a deed is presumed to be possession of all the real property described in the deed. Section 28-0109 states that,

"For the purpose of constituting an adverse possession by any person claiming title founded upon a written instrument or upon a judgment or decree, land shall be deemed to have been so possessed and occupied in each of the following cases:

1. When it has been usually cultivated or improved;
2. When it has been protected by a substantial enclosure;

85. *Id.* at 198-99, 135 N.W. at 1122.
86. 4 Dak. 182, 29 N.W. 661 (1886).

3. When, although not enclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or the ordinary use of the occupant; or
4. When a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not enclosed according to the usual course and custom of the adjoining county, shall be deemed to have been occupied for the same length of time as the part improved or cultivated, but when the premises consist of two or more contiguous lots, the possession of one lot shall not be deemed a possession of any other of such lots."

In conclusion it might be said that there seems ample authority for holding that the "actual, open, adverse, and undisputed possession of the land" is generally considered the same as under any other adverse possession statute or law, and that this is subject to the general rule that the legal owner or record title holder is presumed to have constructive possession of the property, and the adverse possessor must base his claim upon an actual possession, and it will be noted that this adverse possession must be for ten years, and that merely claiming title is not sufficient, but must be coupled with adverse possession for the full period of 10 years.

(To be continued.)