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NORTH DAKOTA'S TEN-YEAR STATUTE OF LIMITATIONS, PART II

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IN the first part of this discussion,[1] two of the requirements of the ten-year statute of limitations with respect to real property[2]—*i.e.*, that adverse possession be under color of title, and that the possession be genuinely adverse—were commented upon. The third requirement of the statute, that the claimant shall have paid all the taxes upon the land for a period of ten years, remains to be considered, as does the effect of the amendments to the statute adopted in 1951.

3. PAYMENT OF TAXES

The ten-year statute of limitations provides that in addition to holding adverse possession of the land involved for a period of ten years under color of title, the claimant shall "have paid all taxes and assessments legally levied thereon."

It was this provision which prompted the Eighth Circuit Court of Appeals to state in *Schauble v. Schulz*[3] that the statute is, in a "limited sense . . . a revenue measure," and further that "it is difficult to perceive why, as between two persons holding adverse titles to land, the failure of one to either pay taxes or assert a right to the possession for several years may not justly be made the ground of requiring a comparatively prompt assertion of title, at the risk of its extinguishment in favor of the other claimant, when, during the same years, he has paid the taxes and has been in actual, open, adverse, and undisputed possession."[4]

In *Streeter Co. v. Fredrickson*,[5] the problem of whether tacking was permissible under the statute came before the court. The court said that, "The statute . . . makes the payment of taxes by the claimant an essential condition, and one which is prerequisite to the perfecting of title thereunder. It is necessary to the claimant as his adverse possession; in other words, *payment of taxes and adverse possession must concur . . . . There is no doc-*

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1. Ruemmele, *North Dakota's Ten-Year Statute of Limitations, Part I*, 28 N.Dak.L.Rev. 159 (1952).
2. N.D. Sess. L. 1951, c. 276, amending N.D. Rev. Code §47-0603 (1943).
3. 137 Fed. 389 (8th Cir. 1905).
4. *Id.* at 392.
5. 11 N.D. 300, 91 N.W. 692 (1902).

trine of tacking payment of taxes which can be invoked. The feature requiring payment of taxes is modern, is found in but few states, and is peculiar to special statutes fixing short periods of limitation. Where the payment of taxes is thus made a condition for acquiring title by adverse possession, the claimant is held to a strict performance of the condition, and it is not enough that the taxes have been paid during the statutory period. It must be made to affirmatively appear that they were paid by the claimant, or on his behalf." [6] This case seems to have settled the question of whether tacking was permissible under the statute, as no cases have been found where the issue was raised again.

In *Stiles v. Granger,*[7] the court was called upon to decide whether purchase of a tax sale certificate constituted payment of taxes, where the purchase was made by an agent of the adverse possessor in the name of the adverse possessor. The defendant Granger had gone into adverse possession of the land involved in 1890, under a deed from one Bowdle, who had in turn acquired the land through invalid tax deed proceedings. Granger paid the taxes for six years and on the seventh year took a trip for his health, instructing his agent to pay the taxes. Through oversight the agent failed to do so, but purchased the land in Granger's name at the resulting tax sale. The court held, when Granger's acquisition of the title under the statute was challenged, that "the sale of land to the person claiming ownership and in possession, whose duty it is to pay the taxes, is void, and operates as a payment. The purchaser under such circumstances acquires no title by his purchase, and it is deemed to be only one method of paying the taxes." [8] The decision is apparently contra to the weight of authority on the subject,[9] and it might be possible that in again considering the question in a situation where the facts were not so favorable to the adverse possessor, the court would decide otherwise.

In what is apparently the only other reported case in North Dakota on the subject of payment of taxes, the court, in *Hille v. Nill,*[10] inferred that the property claimed was "taxed as unplatted acreage property." The case involved an easement of way in favor of the public which it was claimed had been extingushed by adverse possession under the ten-year statute. One of the

6. Id. at 305-06, 91 N.W. at 695.
7. 17 N.D. 502, 117 N.W. 777 (1908).
8. Id. at 507-08, 117 N.W. at 779.
9. See Note, 132 A.L.R. 216, 248 (1941); 2 C.J.S. 753.
10. 58 N.D. 536, 226 N.W. 635 (1929).

questions involved was whether taxes had been assessed and paid on the basis that the property was subject to the easement. The inference that the property had been taxed as unplatted acreage property was arrived at without proof in the record, and seems to be in the face of the language already quoted from *Streeter Co. v. Fredrickson, supra,* to the effect that with respect to the payment of taxes the adverse claimant is obliged to make it "affirmatively appear that they were paid by the claimant, or on his behalf." [11]

There was no showing of an acceptance by the public of the easement of way given to it in *Hille v. Nill.* If there had been an acceptance, of course, the property would have been exempt from taxation. The case therefore raises the interesting question of whether property exempt from the payment of taxes can be claimed under the statute in question. It has been said that, "Where land is exempt from taxation some courts hold it is not necessary to show payment, while others hold that title to such property cannot be acquired under such a statute but must be acquired under a statute which does not require payment of taxes." [12] And it has been further said that "under a statutory requirement of 'payment of taxes legally assessed,' the authorities are in conflict as to whether the absence of an assessment, or an illegal assessment, dispenses with the necessity for payment of taxes." [13]

It has been generally held under statutes of this type that the payment of taxes must concur for the number of consecutive or successive years provided by the statute, and a failure to pay any one or more years of the statutory period is fatal. There seems to be a conflict as to whether payment of the taxes by the true owner will interrupt the running of the statute in favor of the adverse claimant.[14]

4. The 1951 Amendments to the Statute

In 1951, the North Dakota Legislative Assembly amended and re-enacted Section 47-0603 of the North Dakota Revised Code of 1943 to read as follows:

> "TITLE TO REAL PROPERTY; ADVERSE POSSESSION. A title to real property, vested in any person *or those under whom he claims,* who shall have been in the actual open ad-

11. 11 N.D. at 306, 91 N.W. at 695.
12. 2 C.J.S. 746.
13. 2 C.J.S. 746.
14. There is an excellent annotation on the entire subject of payment of taxes in 132 A.L.R. 216 (1941).

verse and undisputed possession of the land under such title for a period of ten years and who shall have paid all taxes and assessments legally levied thereon, shall be valid in law. *A contract for deed shall constitute color of title within the meaning of this section from and after the execution of such contract.*" [15]

The italicized portions of the section were added by the legislature, and their purpose is fairly evident. The words "or those under whom he claims" undoubtedly were intended to permit tacking under the statute and thus do away with the decision in *Streeter Co. v. Fredrickson.* However, it would nevertheless appear that in order to tack adverse possessions under the statute, there will have to be privity of estate as between the successive adverse possessors. That this is so is manifest from a consideration of the function of the doctrine of tacking as the North Dakota court conceives of it.

Discussing the requirement of privity in *Streeter Co. v. Fredrickson,* the court said that the purpose of "this so-called 'doctrine of tacking' is . . . not to determine whether the occupant has been in possession for any fixed period of time, but is to determine whether the claimant out of possession has in fact or in law been in possession within the satutory period, so as to entitle him to maintain his action. In other words, it is merely a uniform rule adopted by the courts for determining whether a claimant out of possession when his action is commenced has been in possession at any time within the 20 year period. If no privity is found to exist between the successive disseisors, and the last occupant has not held adversely for the full statutory period, the bar is not complete, as the law presumes that the possession of the land returns to the true owner at each change of possession, when there is no privity between the several occupants."[16]

In discussing the question of why tacking was permissible under the twenty-year statute of limitations with respect to real property, and not under the ten-year statute, the court pointed out that in contrast to the twenty-year statute the ten-year statute "does not provide that no action shall be maintained to recover real property or the possession thereof unless the plaintiff shall have been in possession within ten years prior to the commencement of the action. Neither does it make possession by the plaintiff at any time a prerequisite to the maintenance of his

15. N.D. Sess. L. 1951, c. 276.
16. 11 N.D. at 304, 91 N.W. at 694-95.

action . . . This statute, on the contrary, instead of presenting any question as to the possession of the claimant out of possession, deals entirely with persons in possession, and extends the benefits of its provisions to such persons by boldly declaring that their title is good if they have been in actual, open, adverse, and undisputed possession of the land for ten years, and have paid all taxes and assessments legally levied thereon."[17]

Having made this distinction between the two statutes, the court continued that "the legislature saw fit, in the statute under consideration, to extend its benefits only to persons who have been in possession for ten years, and have paid the taxes during such period. This being true, under the rule of statutory construction, we are without authority to extend its operation by construction to protect the titles of persons who do no come within is provisions." [18] The court added, in language already cited, that even if this were not so, the payment of taxes could not be tacked.

It should probably be pointed out that North Dakota seems to stand alone in its interpretation of the statute as not permitting the tacking of payment of taxes [19] but apparently other courts have more or less limited the doctrine to some extent and some of them hold that the taxes must be paid by the person in whom the color of title is vested, or by some one on his behalf, and that payment by the predecessor or grantor after the conveyance is not acceptable payment under the statute.

It is highly probable that the North Dakota court will follow the provisions of the statute and permit tacking. However, in the matter of the payment of taxes an interesting question arises which the court will probably have to face in the near future: what of the situation where the minerals have been severed from the surface?

Under Section 57-0224 of the Revised Code of 1943, the assessor is obliged to "list for taxation all coal and other minerals underlying any lands the ownership of which has been severed from the ownership of the overyling strata, and shall assess such coal and other minerals to the owner in the county in which the same actually lie."

Section 57-0225 requires the county auditor to give the assessor an accurate description of any lands in which the title to the coal or minerals is not in the person holding the title to the over-

17. Id. at 304-05, 91 N.W. at 695.
18. *Id.* at 305, 91 N.W. at 695.
19. See Note, 132 A.L.R. 216, 232 (1941).

lying strata, with the name of the holder of the title to such land and of the holder of the mineral rights.

Construing these two sections in *Northwestern Improvement Co. v. Oliver County*,[20] where a reservation or exception was made of coal and iron, the court stated that "such reservations as these should be assessed in the name of the plaintiff, if they have a taxable value." [21] The court pointed out that such reservations possess a taxable value by stating that "the interest retained must necessarily detract from the volue of the land to the grantee," and further that "the value of these mineral rights can be ascertained . . . Where no mines have been opened, and where no deposits of coal have been ascertained so as to be able to estimate the amount of mineral present in the land, the difference of the value of the land as sold with and without this reservation of title in the grantor would measure the value of plaintiff's interest in the land. Where the amount of mineral in the land has been ascertained, then the value of that mineral, together with the value of the rights to go upon the lands, would be a fair measure of the plaintiff's interest." [22] In a concurring opinion, Justice Christianson stated, "I also agree that a reservation of mineral rights is an interest in real property, assessable against the grantor making the reservation. . . ." [23]

The court, in *State v. Amerada Petroleum Corporation*,[24] held that oil and natural gas are generally classified as minerals. The question thus becomes quite material whether or not a severance of the minerals by a mineral deed, with the following requirement that the minerals must be assessed separately, has not created a severance in the tax so that payment by the surface owner would not inure to the benefit of the mineral owner, and a subsequent clearing of the title to the surface will not avail insofar as the minerals are concerned. This and many other questions remain unanswered.

The other addition to the statute made by the 1951 legislature was the provision that "A contract for deed shall constitute color of title within the meaning of this section from and after the execution of such contract." From the previous discussion of the matter of whether a contract for deed gives the vendee color of

20. 38 N.D. 57, 164 N.W. 315 (1917).
21. *Id.* at 65, 164 N.W. at 318.
22. *Id.* at 65-66, 164 N.W. at 319.
23. *Id.* at 67, 164 N.W. at 319.
24. 49 N.W.2d 14 (N.D. 1951).

title,[25] it would appear that in all probability the legislature was trying to remove any doubts, but at the same time it might be argued that the amendment indicates that prior to the enactment of the change a contract for deed did not, in the contemplation of the legislature, constitute color of title. However, the important question concerning the amendments is simply whether they have a retrospective effect so as to in some instances shorten the ten year period, or whether they will apply only prospectively to transactions occurring after their enactment.

The same problem arose when the ten-year statute of limitation was first enacted, and the manner in which it was solved at that time casts a good deal of light on the problem. One of the most interesting early cases was *Schauble v. Schulz*,[26] where the constitutionality of a retrospective application of the statute came before the court. The facts of the case were that when the ten-year statute of limitations was first enacted, the defendant had already been in adverse possession of the tract of land involved for nine years. He contended that the statute was retroactive and that his title had therefore matured when he completed ten years of adverse possession and payment of taxes a little over a year and a half after the act was approved by the governor. The plaintiff, on the other hand, contended that the act applied to only those transactions occurring after it became effective, and that if it were construed otherwise it took away his rights abitrarily, leaving him no reasonable time within which to assert them, hence violated the Fourteenth Amendment to the United States Constitution.

The court said, in dealing with this contention, that "it is an essential requisite of due process of law that full opportunity be afforded for the assertion and enforcement of the right after it comes within the present or prospective operation of such a statute and before the extinguishment takes effect. A statute which does not afford this opportunity is abitrary and violates the constitutional prohibition, but, if the opportunity be afforded, it is no objection to the statute that it has some regard to the past acts and omissions of the parties concerned, or to conditions produced by past occurrences, and is therefore not wholly prospective."[27] The court then concluded that the original act itself, by the use

25. See Ruemmele, *North Dakota's Ten-Year Statute of Limitations, Part I*, 28 N.Dak.L.Rev. 171-75 (1952).
26. 137 Fed. 389 (8th Cir. 1905).
27. *Id.* at 392.

of the words "have been or hereafter may be" [28] showed an intention that it should have a retrospective effect, and decided on the facts of the case that the plaintiff had a sufficient time within which to protect himself, and that this was sufficient even though the act itself did not provide such a time. In other words, the test was whether the particular plaintiff had a reasonable time, and not whether the act provided a reasonable time.

The *Schauble* case, while noting that the ten-year statute is not strictly a statute of limitations, does apply rules of interpretation and constitutional limitations which are ordinarily applied to such statutes, and it may be that from these some information can be gleaned. The *Schauble* case, however, arose in the federal courts, and the North Dakota decisions also shed light on the subject.

The first North Dakota case to consider the statute, *Power v. Kitching,* [29] was decided in 1901 and also involved the constitutionality of the ten-year statute on several grounds: (1) that the bill embraced more than one subject—a contention the case rejected—and (2) that the statute unreasonably abridged the plaintiff's right to bring his action to recover possession of the land because of its retrospective operation. The defendant had obtained a tax deed to the land on November 2, 1889. The tax deed was concededly invalid, and the ten-year statute had not been enacted, so that the plaintiff had a period of twenty years within which to bring an action to recover possession of the property. In 1899, a little less than ten years after the defendant went into possession of the land, the legislature adopted the ten-year statute of limitations. The bill was approved on March 8, 1899, and took effect on July 1, 1899. Pointing to these facts, the court said that, "There was therefore a period of over seven months after the approval of the law by the governor, and a period of over four months after the law took effect, within which an action might might have been brought against the defendant to determine his adverse claim of title. Said chapter, therefore, when applied to conditions established in this case, did not operate to unreasonably abridge the period within which an action might be brought to determine defendant's claim of title. A purchaser at a tax sale has no vested right in the statute of limitations in force at the date of sale. The statute may be changed and shortened by subsequent

28. It might be pointed out that these words have been omitted from the act as it was revised by the Legislative Assembly in 1951.

29. 10 N.D. 254, 86 N.W. 737 (1901).

legislation, provided, always, that a reasonable time is allowed within which actions may be brought." [30] It is to be noted in this case that the court applied the test of reasonableness as to the plaintiff and not to any provision in the act itself, so that an action brought in 1900 was subject to the ten-year statute passed in 1899. This in effect reduced the true owner's rights in the property from a twenty-year period to a ten year period.[31]

The rule of *Power v. Kitching* has not survived unchallenged, however. In 1920, in a concurring opinion in *Stoll v. Gottbreht*,[32] Justice Robinson stated that the ten-year statute was void as not meeting the requirement of having a title to express its purpose and further that "it is a mere blind and it in no manner indicates that the purpose of the act was to fix a limitation of ten years in which an action may be commenced to recover real property. The act does not give the owner of real property a day, nor a minute, to commence an action after it takes effect; and if it was void when passed, it is still void as to an action commenced years after its passage. If it was void as to an action commenced on the first day of July after its passage, it is still void, because time does not make it valid. The decision of the court in *Power v. Kitching* . . . is clearly wrong and it should be expressly overruled." [33]

Looking at the possible effect of the amendments, it may be pointed out that if tacking is to be permitted and if the amendments have a retrospective effect it will be possible under the amendments for one who has been in adverse possession for only one day under color of title to gain a clear fee simple if "those under whom he claims"—and they might be several persons—have been in adverse possession for ten years less one day and have paid all taxes properly. Conversely, from the angle of the true owner it might be possible for a title to be wiped out in a much shorter time than he had supposed if the amendment is to be considered retrospective in operation. Thus, if *A* went into adverse possession of the land of *B* nine years before the passage of the amendments, and sold to *C* five years before the adoption of the amendment, *B's* title might be wiped out in one additional year if the amendments are to be considered retrospective in character, whereas under the prior statute five additional years would be required before *C's* title would ripen. The same situa-

30. *Id.* at 258, 86 N.W. at 738.
31. The court followed *Power v. Kitching* in Woolfok v. Albrecht, 22 N.D. 36, 133 N.W. 310 (1911).
32. 45 N.D. 158, 176 N.W. 932 (1920).
33. *Id.* at 165, 176 N.W. at 934.

tion might arise if contracts for deed were not color of title before the amendment and are after the amendment. Of course, it might be said that under the rule of *Power v. Kitching* and *Schauble v. Schulz* a reasonable time must be afforded the true owner for protecting his interests, and the test of reasonableness must be applied to the facts in each case in question.

But this latter statement is not as cut and dried as it would appear. The general rule, and the rule in North Dakota, seems to be that when a statute of limitations is shortened or a vested right is taken away, that the act so shortening or taking away the vested right must itself make provision for a reasonable time, and the court is not at liberty to supply the omission under the facts of any given case. A rather cursory examination of the authorities will disclose a rather interesting situation in this regard.

Apparently in the period between 1890 and 1900 the legislature was busy reducing the periods provided for in the various statutes of limitations, and out of this grew a good deal of judicial interpretation and enunciation of what the rules were to be in North Dakota. In 1898, in *Merchants National Bank v. Braithwaite*,[34] the court had an opportunity to discuss the effect of such reductions in the case of a statute reducing the lien of judgments from twenty to ten years. It appeared in that case that the act was signed by the governor on March 2, 1895, and became effective on January 1, 1896, but the act itself provided for no reasonable time for judgment holders to protect themselves from the reduction. The court stated the rule to be that "the time in which to commence an action may be lessened as to existing causes of action, provided the suitor has still a reasonable time after the new law is *passed* in which to commence his suit." [35] The court then added that the "reasonable time is to be computed from the day when the new law is passed, and not from the time when it takes effect." [36]

In meeting the objection that the law itself provided for no reasonable time, the court stated that "we do not think that this provision is essential to the validity of such statutory change, when applied to existing causes of action, provided the time actually left in which to sue is not unreasonable." [37] It stated the rule to be that "if in the particular case the time is not reasonable, the court must either declare that the statute does not embrace such a case,

34. 7 N.D. 358, 75 N.W. 244 (1898).
35. *Id.* at 371-72, 75 N.W. at 248.
36. *Id.* at 372, 75 N.W. at 248.
37. *Id.* at 373, 75 N.W. at 248.

or that with respect thereto it is unconstitutional because it impairs the obligation of a contract," [38]

The court thus had adopted the following rules:

(1) That in computing reasonable time, the computation was to begin with the time the act was passed and not when it went into effect.

(2) That the act itself need not provide for a reasonable time within which to sue, but reasonableness was to be governed by the time afforded in each case, or in other words by whether the suitor had brought his action in a timely manner.

The same statute was before the court in *Osborne v. Lindstrom*,[39] and in its decision the court began to withdraw from the position it had taken in the *Braithwaite* case. In discussing the first rule, concerning the date from which the reasonable time was to be computed, the court was cited to the New York case of *Gilbert v. Ackerman*,[40] which held that the time for computing reasonableness was from the time the act took effect and not from the date of its passage. The court was still willing, however, to follow the precedent of the *Braithwaite* case, in that regard.

However, in speaking of the second rule, the court stated, "We shall hold in this case that the legislature need not fix an exact time, provided the time they do fix must, in any event, be a reasonable time; but so far as the language which is used in the *Braithwaite* case imports that the legislature need not fix any time, we think it misstates the law, and we do not wish to remain committed to it." [41]

The court added that "it is stated in the syllabi of that case—although the opinion does not fully bear it out—that in the absence of a legislative provision fixing a time within which actions may be brought on existing causes of action 'the court will determine in each case whether, after the new law took effect, the suitor still had reasonable time under such new law, in which to commence his action.' That language was wholly unnecessary in the case, and does not meet our approval. When the legislature, in fixing such time, makes it so short that the right to sue is practically denied, courts will declare such time unreasonable, and refuse to enforce the law. But courts cannot go further, and fix a time different from that fixed by the legislature within which suits may be brought, and if the legislature has failed to fix any

38. *Id.* at 373, 75 N.W. at 248.
39. 9 N.D. 1, 81 N.W. 72 (1899).
40. 159 N.Y. 118, 53 N.E. 753 (1899).
41. 9 N.D. at 9, 81 N.W. at 75.

time, the courts cannot, in a given case, supply this legislative lapse. The fixing of the time within which to bring suit, under such circumstances, is purely a legislative function. It is not within the power of the judiciary. We take this earliest opportunity to correct the errors that inadvertently found their way into the *Braithwaite* case." [42]

In applying the rules it thus laid down for itself in the *Lindstrom* case, the court encountered some difficulty in finding a legislative fixing of a reasonable time, and stated that "we are somewhat embarrassed by reason of the unusual circumstances attending the passage of the act here involved.[43]

This left the rules as follows:

(1) The rule of the *Braithwaite* case, that in computing a reasonable time for bringing suit, the time was to be computed from the date the act was passed and not the date it went into effect, was retained.

(2) The rule of the *Braithwaite* case, that the act itself need not provide for a reasonable time within which to bring suit, was rejected and the court held that the legislature had to fix a reasonable time within which to bring suit, this being outside the power of the judiciary.

In 1905, in *Schauble v. Schulz,* the Eighth Circuit Court of Appeals stated on the authority of the *Braithwaite* and *Osborne* cases that "it is settled by the decisions of the Supreme Court of North Dakota that the statute was effective as notice of its prospective operation from the date of its approval." [44] And as to the second question it followed the *Braithwaite* case in adopting a rule of reasonableness under the facts of the case, rather than as contained in the act itself.

However, in the same year, the North Dakota court in *Clark v. Beck and Ahman* [45] had before it an emergency measure which took effect upon its approval by the governor on February 27, 1901, providing for a limitation upon the right to foreclose a mortgage by advertisement. In citing the *Osborne* case the court said that "while the legislature has full power to enact limitation laws, and even to frame them in such a way that the time already elapsed before the law takes effect shall be computed as part of the time limited by the new act, yet its power in this respect is subject to the condition that it must allow a reasonable time *after*

42. *Id.* at 9-10, 81 N.W. at 75.
43. *Id.* at 10, 81 N.W. at 75.
44. 137 Fed. at 393.
45. 14 N.D. 287, 103 N.W. 755 (1905).

the new law becomes operative in which persons affected by it may resort to the remedies to which the law applies . . . The law in question makes no provision in this respect and the courts have no power to supply the omission." [46] The foreclosure in the case was had on November 23, 1901, and consistent with the *Braithwaite* case and the *Schauble* case the court would have looked at the time from February 27 to November 23 to determine whether a reasonable time had elapsed. But the court refused to do this, and in order to sustain the statute held that it had prospective effect only, stating that "the time elapsed before the passage and approval of the act cannot be taken as any part of the time limited by the amendment for commencing proceedings to foreclose by advertisement. The act does not expressly so declare and if it did it would be unconstitutional as to those whose right to invoke the remedy had accrued ten years or more before the act took effect." [47] It will be noted that the Court stated the legislature must allow a reasonable time "after the new law becomes *operative.*"

In 1908, in *Adams & Freese v. Kenoyer,*[48] the court had before it an amendment passed on March 10, 1905, which went into effect on July 1, 1905, providing that absence from the state did not toll the statute of limitations as to the right to bring action to foreclose a mortgage. Speaking of the *Osborne* case, the court stated that "it was there held, after disapproving a contrary rule announced in the earlier case of *Bank v. Braithwaite* . . . that in order that the amendatory statute may apply to existing causes of action the legislature must fix a reasonable time in which actions may be brought thereon after such new statute is passed,[49] and the court continued that "in so far as the *Osborne* case holds that the legislature and not the courts must fix the reasonable time in which suits upon existing causes of action may be brought in order to make the amendatory statute applicable as to such causes of action, it undoubtedly is sound, and the contrary doctrine laid down in *Bank v. Braithwaite* . . . was correctly repudiated." [50]

In discussing the question of whether or not the time between passage of the amendment and the effective date of the amendment was to be considered part of the time limited for bringing suit, the court said that in the *Osborne* case it was "squarely held that the time between the passage of such amendatory statute and

46. *Id.* at 288, 103 N.W. at 755.
47. *Id.* at 288, 103 N.W. at 755.
48. 17 N.D. 302, 116 N.W. 98 (1908).
49. *Id.* at 305, 116 N.W. at 99.
50. *Id.* at 305-06, 116 N.W. at 99.

the time of its taking effect will be considered in determining whether a reasonable time is given for the bringing of suits on such existing causes of action, and they expressly refer to and repudiate the doctrine announced by the Court of Appeals of New York to the contrary." [51] The opinion then continued: "The writer of this opinion is firmly convinced both of the palpable fallacy and injustice of the rule thus announced in the *Osborne* case and of the eminently correct and just doctrine enunciated by the New York court. The practical effect of holding that the creditor must take notice of the amendment and bring his suit before the statute takes effect as a law is to deprive him of his property rights altogether; for it is a matter of general knowledge of which we must take judicial notice that during the greater portion of the time, if not the entire time, between the passage of a law in this state and July first thereafter, at which date the law takes effect, in the absence of an emergency clause or the designation of another date, there is no method by which the citizen can acquaint himself with the official contents of such statute except by an examination of the original in the office of the secretary of state, as there is no law requiring publication of new statutes except in bound volumes, which usually takes until after July first following their enactment . . . Regardless of what courts may have held on this point in other states, the writer firmly believes that no such harsh rules should be longer sanctioned in this jurisdiction." [52] This was, however, dictum as the court added that "we are not required . . . to either affirm or reverse the *Osborne* case on this point, as we do not consider said point at all decisive of this appeal, or necessarily involved, and therefore the majority of the members of the court express no opinion thereon either way." [53]

The court then held that the statute could not be applied to existing actions for two reasons: (1) in the enactment of the statute the legislature had fixed no time for the bringing of suits on such causes of action, and (2) conceding that it intended to and did fix such time, the time thus fixed was unreasonable as a matter of law.

The court was then confronted with the reasoning of the *Braithwaite* case that the action involved was not brought until eight months after the act was passed, and six months and thirteen days after it took effect, and that this was a reasonable time. The court

51. *Id.* at 307, 116 N.W. at 99.
52. *Id.* at 307, 116 N.W. at 99-100.
53. *Id.* at 307, 116 N.W. at 100.

stated "the act must be applied generally to all claims and to all estates. A single claim or a single estate cannot be pointed out in which the act applied and then say it does not apply to any other claim or to any other estate. But conceding that the legislature in enacting the statute intended to make it retroactive as well as prospective in its operation, and also intended to and did fix the time between its enactment and the date of its taking effect . . . for the institution of proceedings on existing mortgages, still the time thus fixed was as a matter of law unreasonable, and hence the statute cannot be held to apply to foreclosure proceedings under mortgages which had matured prior to the enactment thereof." [54]

This leaves the rules the court has adopted concerning retroactive amendments to statutes of limitations as follows:

(1) It is essential to the validity of such amendments that the legislature must fix a reasonable time within which to bring suit upon existing causes of action in order to allow such amendment to be retrospectively applied to them, and if it fails to do so the court cannot supply the omission.

(2) That in computing what is a reasonable time, the court will not take into consideration the time between the date the act is approved and the date it becomes effective, since the court has held that the time between passage and effect is unreasonable as a matter of law, even conceding that the legislature intended it to be a reasonable time.

It is said in *Corpus Juris Secundum* [55] that "in determining what constitutes a reasonable time, the period which elapses between the enactment of the statute and its taking effect is *also* to be taken into consideration," and the Iowa cases of *Collier v. Smaltz*,[56] and *Wooster v. Bateman*,[57] are cited in support of the statement. Both of these cases involved statutes which provided for a year after the act took effect in which to bring action, and the Iowa court, in construing the time granted as being reasonable, merely added the time between passage and effect to the year to arrive at the conclusion that the time was reasonable.

The *Osborne* case is also cited in *Corpus Juris Secundum* [58] for the proposition that the time between passage and taking effect is to be taken into consideration as to reasonableness, but in *Ruling*

54. *Id.* at 308-09, 116 N.W. at 100.
55. 16 C.J.S. 1238.
56. 149 Iowa 230, 128 N.W. 396 (1910).
57. 126 Iowa 552, 102 N.W. 521 (1905).
58. 53 C.J.S. 918.

Case Law [59] the matter is presented as being in conflict, the *Osborne* and *Braithwaite* cases being cited for the taking of the time between passage and effect into account, and the New York case of *Gilbert v. Ackerman, supra,* for the contrary position.

There is no doubt that the rule enunciated by the *Braithwaite* case that the act itself need not provide for a reasonable time has been directly overruled by subsequent cases. The other rule that the time between passage and effect shall be considered in arriving at whether a reasonable time has been provided for by the legislature has been weakened by the dictum appearing in the *Adams & Freese* decision, where the New York rule is spoken of as being "eminently correct and just." And in addition the court, in the *Adams & Freese* case and in *Clark v. Beck and Ahman, supra,* held that as a matter of law the time between taking effect and passage was unreasonable.

In the light of these precedents, the question which raises itself is whether or not a retrospective application of the 1951 amendments to the ten year statute would, in the language of the *Schauble* case, "extinguish rights arbitrarily" so as to violate the Fourteenth Amendment to the Constitution.

There is no doubt that a retroactive application of the amendment intended to permit tacking will act to extinguish rights in a shorter period of time. The same would hold true if a contract for deed is to be considered as not having given the vendee in the contract color of title within the meaning of that phrase prior to the amendment. It would therefore appear that for the amended statute to be retroactively valid the legislature should have provided for a reasonable time for the protection of those "rights" as affected by the amendment, and the question arises whether the time between passage and taking effect, in this instance from March 7, 1951, to July 1, 1951, should be considered as a legislative intended time. The writer is inclined to believe that even if the legislature had intended that the period should be so considered the court would hold it unreasonable as a matter of law.

In the case of a contract for deed giving color of the title the court could very possibly dodge the issue by stating that a contract for deed always did give the vendee color of title under the statute, and that the amendment merely placed in statutory

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59. 17 R.C.L. 677.

form what already was the law. [60] It would be the writer's conclusion that the amendments do not have retroactive effect and would probably be held inapplicable to rights of the true owners which had not been divested prior to the effective date of the amendments.

60. This would be a highly probable result, since the Eighth Circuit Court of Appeals held in *Schauble v. Schultz, supra,* that contracts for deed were to be considered as giving color of title under North Dakota law. While the decision of a federal court on a matter of this kind is not binding precedent, it is certainly persuasive authority of the highest order.

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