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THE DOCTRINE OF COLOR OF TITLE IN NORTH CAROLINA

MONICA KIVEL KALO*

If asked about the term "color of title," the average attorney would likely be able to respond that it is an instrument that purports to pass title but fails to do so because of some defect¹ and is a part of the law of adverse possession. Thus, at least in legal circles, the doctrine's existence is well known. However, attempts to probe beneath such surface familiarity usually reveal that neither the doctrine's meaning nor its significance is either simple or well-understood. The very richness and complexity of this somewhat specialized area of adverse possession law might of themselves justify an examination of this old and uniquely American jurisprudential invention which has continued to survive long after the disappearance of the social and economic climate that gave birth to it.² However, new social and economic developments over the past several decades have given renewed and very practical significance to the doctrine.

Recent decades have witnessed a tremendous upsurge in real estate development. Almost overnight, residential subdivisions have sprung up where large family farms once existed.³ Not only has the number of small individually owned tracts of land increased, but as our society has become increasingly mobile,⁴ families no longer tend to purchase

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1. For purposes of this article, "color of title" is more fully defined as "a writing that purports to pass title . . . but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of conveyance that is used." J. WEBSTER, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 294 at 320 (P. Hetrick ed. 1981).

2. See *infra* text accompanying notes 10-24.

3. "Every day 12 square miles of America's farmlands vanish forever. Where crops, barns, and silos once stood, roads, subdivisions, and shopping centers have sprouted. In the past decade we have lost farmlands equivalent to the combined areas of Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey and Delaware." Ognibene, *Vanishing Farmlands: Selling Out the Soil*, SAT. REV., May 1980, at 29. "The U.S. Department of Agriculture estimates 2 million acres of farmland disappear annually before advancing urban sprawl." *Gaining Momentum: A Drive to Stop Urban Sprawl*, U.S. NEWS AND WORLD REP., Mar. 21, 1977, at 82.

4. The reasons given for moving include crime, overcrowded schools and pollution, as well as more positive ones such as promotions and raises. "[Americans] are pulling themselves up by their roots in order to pursue the good life in places that are smaller, sunnier, safer, and perhaps saner than those they left." *Americans on the Move*, TIME, Mar. 15, 1976, at 54.

land, build a house and remain there for generations. Such factors have led to the proliferation of title transactions and have made the job of the title examiner increasingly difficult. Today, a title research spanning a fifty-year period may well involve not two or three "links" in the chain of title but seven or ten or more. Each time that title to land changes hands, the likelihood increases that some defect may occur that jeopardizes the title. Then too, some title defects can occur, such as forged signatures or lack of capacity⁵ by a prior transferor, which will not be unearthed even by the most diligent search of the records but which later surface and create problems for both the purchaser and the company that issued a policy insuring the title against the existence of such defects.⁶

Against this backdrop, adverse possession under color of title represents a potentially significant method for the curing of defective titles and the settling of title disputes. First of all, since most claims of title today are premised on a written instrument such as a deed, a will or a judgment, the stage is already set for a contention that the instrument constitutes color of title. Secondly, when possession is maintained under color of title, the benefits of substantially shorter statute of limitation periods⁷ and the doctrine of constructive possession⁸ come into play which together may not only shorten the period of time during which possession must have continued, but also result in the claimant being able to acquire title to the entire tract described in his defective instrument, rather than merely the part that was in his actual possession and control.

The purpose of this article is to take an in-depth look at the doctrine of color of title as it exists and operates primarily in North Carolina. The first major section of the article examines the origins of the doc-

[S]maller families (the product of falling fertility) and the rise of single-person and non-family households may allow greater freedom of movement. . . . Furthermore, although working wives may sometimes reduce the readiness of their husbands to accept job transfers, in other cases wives may give their husbands greater opportunities to choose jobs according to criteria other than earning maximization, as was often the case in the past when the husband's job had to support a dependent wife and children.

Long and Hansen, *Americans on Wheels*, Soc'y, Mar.-Apr. 1980 at 83.

5. Conveyances executed by persons who are non compos mentis are void if the grantor has been adjudged insane and placed under guardianship prior to the execution of the deed and voidable if the execution occurs before an adjudication takes place. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943). *Beeson v. Smith*, 149 N.C. 142, 62 S.E. 888 (1908). Although records of judicial determinations are maintained in the county clerk's office, there will be no record of a grantor's incapacity where a formal adjudication or determination of capacity has not been made.

6. Although risks covered by a title insurance policy vary from one company to another, they insure "almost without exception risks not disclosed by a competent examination of the public records, such as the invalidity of recorded instruments which appear to be valid but are void because of forgery, nondelivery, or incapacity of the maker." BROWDER, CUNNINGHAM, JULIN & SMITH, *BASIC PROPERTY LAW* 963 (3rd ed. 1979).

7. See *infra* text accompanying notes 28-35.

8. See *infra* text accompanying notes 36-53.

trine and its significance with respect to the acquisition of title by adverse possession. After examining the two best-known attributes or advantages of color of title—a shorter statutory period and the doctrine of constructive possession—the section focuses on the effect of color of title in aiding a claimant to establish that his possession was, in fact, adverse or “hostile.” The second major section then addresses the question of when color of title exists, examining first the basic requirements and then the limitations which have been placed on it by the courts, with special emphasis on the unique North Carolina position that an instrument executed by a co-tenant which purports to convey sole title does not constitute color of title. The third and final section then raises several questions about the existence and operation of color of title which have as yet to be resolved by the courts, including the question of whether title acquired under an instrument which constitutes color of title and names as grantees two persons who are husband and wife results in their acquiring title as tenants in common or as tenants by the entirety.

Although the term “color of title” is used in several sections of the North Carolina General Statutes,⁹ its meaning and significance are in this state the product of the courts. The doctrine has been slowly evolving for over two hundred years and all the dust has still not settled. Thus, the reader would be well advised to settle back for a journey which has its share of twists and sometimes surprising turns.

PART ONE: ORIGINS AND SIGNIFICANCE

A. *Origins*

The precise origin of the doctrine of color of title is shrouded in the mists of the early history of this country, and attempts to pinpoint with accuracy the moment when the doctrine first emerged have met with little success.¹⁰ The term “color of title” appears to have been derived from the old English method of pleading known as “giving colour,”¹¹

9. N.C. GEN. STAT. § 1-35 (1969); § 1-38 (Supp. 1981); § 1-340 (1969); § 98-8 (1979).

10. Phipps, *Origin of Doctrine of Color of Title*, 22 ORE. L. REV. 188 (1943).

11. In an early North Carolina case Judge Henderson offered the following explanation of the derivation of the term:

Color of title, as applicable to the present subject is evidently the production of our own country. I would not, therefore, go abroad for an explanation. The name, I presume, was taken from what is called giving color in pleading, which is never used in this State, and not often, I believe, in England. . . . Giving color in pleading is giving your adversary a title which is defective, but not so obviously so that it would be apparent to one not skilled in the law. It must be such as would perplex a layman. It, therefore, draws the consideration of the question from the jury (the lay gents) to the court, which is the object of the pleading.

Tate's Heirs v. Southard, 10 N.C. (3 Hawks) 119, 120 (1824). For a more detailed discussion of “giving color” in pleading, see SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 350 (3d ed. 1923); PERRY, COMMON LAW PLEADING 273 (1897); 3 REEVES, HISTORY OF THE ENGLISH LAW 24 (2d ed. 1787).

but, as one writer has noted, "no English case has been found which admits and approves of the doctrine as we know it."¹² Thus, within the context of the law of adverse possession, color of title appears to have been the product of legislative and judicial responses to distinctly American economic and geographic realities.

The problems associated with the early settlement and development of this country which antedate the American Revolution appear to have provided the impetus for the doctrine. The territorial limits of the colonies were vast in comparison to England.¹³ In addition, the land was wild and uncultivated and tended to be granted and resold in large tracts.¹⁴ Thus the situation was ripe for both mistaken and fraudulent transactions in which the same tract would be sold and resold several times over to different persons.¹⁵ As a consequence, there was a great deal of uncertainty regarding title to land generally.

The situation in North Carolina in the early 1700's provides a vivid illustration of conditions which provided a climate suitable to the invention of the doctrine. Prior to 1715, no established and well-understood method for making inter vivos conveyances of land existed in the colony.¹⁶ As a result, many attempted title transactions were subsequently discovered to have been ineffectual. Additional title difficulties resulted from the fact that prior to the time that the boundary between Virginia and North Carolina was finally established,¹⁷ the Governor of Virginia had been granting patents to lands which in fact lay in North

12. Phipps, *supra* note 10, at 195.

13. "Land was a scarce commodity in England. . . . The colonies, on the other hand, though they were short of people, cattle, and hard money, had land to burn." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 52 (1973).

14. The most common method of acquiring land in a number of the early middle and southern colonies was by "head right." Under this system, "[a]nyone who had transported an emigrant to the colony acquired thereby a claim to fifty acres. . . . In practice the letter of the law was systematically evaded [and] two hundred acres were frequently obtained for one individual brought to the colony." H. FARNHAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860 45 (1938). The prevalence of large grants only increased when the still-new federal government attempted to provide for the settlement of the Northwest Territory. Under the Public Land Act of 1796, the *minimum* size parcel it would sell was set at 640 acres. Only after it became clear that at the price set (two dollars per acre) such a purchase was beyond the means of most settlers did the minimum size gradually begin to decline from 640 acres in 1796 until it reached 40 acres in 1832. *Id.* at 133.

15. Phipps, *supra* note 10, at 192.

16. "The English forms of deeds were not unknown, but the scarcity of conveyancers must have made them quite rare; and it appears that livery of seisin was not practiced for this was obsolete even in England. Transfers in various ways were attempted, of course, sometimes by the mere endorsement of the original patents. But however good sense this might seem to make in any age, it was not sufficient to convey title in North Carolina at the time." Cox, *History of the Adverse Possession Statutes of Tennessee*, 6 MEM. ST. U.L. REV. 673-674 (1976).

17. For an interesting account of the boundary dispute between Virginia and North Carolina, see W. BOYD, INTRODUCTION TO W. BRYD, HISTORIES OF THE DIVIDING LINE BETWEEN VIRGINIA AND NORTH CAROLINA (1929).

Carolina and often conflicted with patents issued by North Carolina.¹⁸ The result of such conditions, as one early court noted, was that "titles to lands became so doubtful that no person knew when he was safe in purchasing."¹⁹ Such a situation was of great concern to the legislature because it soon became clear that if settlement and development of the colony were to be encouraged, some method had to be found to "remove these obstacles to population."²⁰

The legislative response was the passage in 1715 of legislation which prescribed an exclusive method of voluntary conveyance for the future.²¹ Since this did not, of course, remedy any title problems which already existed with respect to grants and conveyances previously made, additional legislation was enacted that same year which confirmed and declared "good and legal"²² those titles under which possession was held for a period of seven years. Although the term "colourable title" did not appear in legislation until 1791,²³ cases decided in the late 1700's and early 1800's held that the 1715 statute dealt only with possession maintained under an instrument which constituted color of title.²⁴ Thus, as early as 1797, North Carolina courts were called upon to address the meaning and operation of the doctrine. As the remainder of this article will demonstrate, that task was neither short nor simple and questions still exist today with respect to the operation and significance of the doctrine. What remains clear, however, is that in light of the conditions that prevailed here, this country's early

18. [The boundary controversy originated] in the terms of the Carolina charters. That of 1663 declared the northern boundary to be 36°, but by the second charter the boundary was declared to run "from the north end of Currituck river or inlet upon a strait westerly line to Weyanote Creek which lies within or about the degrees of 36 and thirty minutes northern latitude. . . ." Thus a strip of land approximately thirty miles wide was added to Carolina. Living therein were people holding land grants from Virginia. . . . Until the boundary was officially established in accordance with the provisions of the second charter, a conflict of jurisdiction between North Carolina and Virginia was inevitable.

Id. at xvi-xvii.

19. *Stanley v. Turner*, 5 N.C. (1 Mur.) 14, 20 (1804).

20. Quoted from the observations of Judge Haywood on the case of *Armour v. White*, 3 N.C. (2 Hayw.) 69 (1798) and 3 N.C. (2 Hayw.) 87 (1799), reprinted today in a note to *Stanley v. Turner*, 5 N.C. (1 Mur.) 14, 26 (1804).

21. Ch. 38, 1715 N.C. ACTS.

22. Ch. 27, Sec. 2, 1715 N.C. ACTS.

23. Ch. 15, 1791 N.C. ACTS provided in part

where any person or persons . . . shall have been or shall continue to be in possession of any lands, tenements, or hereditaments whatsoever, under titles, derived from sales made either by creditors, executors or administrators of any person deceased, or by husbands and their wives, or by indorsement of patents or other *colourable title* for the space of twenty one years, all such possessions of lands, tenements or hereditaments, under such title, shall be and are hereby ratified, confirmed and declared to be a good and legal bar against the entry of any person or persons, under the right or claim of the state to all intents and purposes whatsoever. . . . (emphasis added).

24. See, e.g., *Tate's Heirs v. Southard*, 10 N.C. (3 Hawks) 119 (1824); *Stanley v. Turner*, 5 N.C. (1 Mur.) 14 (1804); *Armour v. White*, 3 N.C. (2 Hayw.) 87 (1799); *Grant v. Winborne*, 3 N.C. (2 Hayw.) 56 (1798); *Young v. Irvin*, 3 N.C. (2 Hayw.) 9 (1797).

legislatures and courts found the law of adverse possession as it had existed in England wanting in several respects. It is against this historical backdrop that the significance of the doctrine of color of title is best viewed because the benefits which accrue to an adverse possessor who has color of title are directly related to it.

B. *Significance*

The primary significance of color of title,²⁵ and the one addressed by this article, is its impact on the law of adverse possession. Greatly oversimplified, adverse possession is a method of acquiring title to land by the barring of the record owner's right to maintain an action to eject the wrongful occupant and regain possession of his property.²⁶ Not every possession of land will, however, have this effect. The litany familiar to any student taking a course in basic property law is that in order to acquire title the claimant must establish that his possession of the property in question was actual, exclusive, hostile, open and notorious, and continuous and uninterrupted for the entire statutory period applicable.²⁷ Although color of title does not obviate any of these requirements, it does to a greater or lesser degree, depending upon the jurisdiction involved, aid the adverse claimant in satisfying a number of them.

In North Carolina, color of title impacts on the acquisition of title by adverse possession in three significant respects. First, it affects the amount of time during which the claimant's possession must continue without interruption by making applicable a significantly shorter statute of limitations. Second, it affects the requirement of actual possession by making available the doctrine of constructive possession. Third, it appears to aid the claimant in establishing that his possession was "hostile" by insulating him from having to establish that his possession was maintained with a conscious intent to claim title.

25. In North Carolina, color of title also has significance under the "betterments" statute, N.C. GEN. STAT. § 1-340 (1969).

26. See generally 3 AMERICAN LAW OF PROPERTY § 15.3, at 765 (A.J. Casner ed. 1952); 7 R. POWELL, THE LAW OF REAL PROPERTY § 1013, at 713 (1979).

The form of [American] statutes of limitations varies; in some of them there are provisions expressly extinguishing the right to title of the former owner; most of them in terms merely bar the remedy by ejectment; but it is the almost invariable rule that the effect of the statute is not only to bar the remedy of ejectment, but also to take away all other remedy, right, and title of the former owner.

Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 139 (1918). The statutes of limitations in force in North Carolina specifically provide that the result of the requisite period of adverse possession is to give the possessor "a title in fee." See N.C. GEN. STAT. § 1-35 and § 1-40, *infra* notes 28 and 29.

27. 3 AMERICAN LAW OF PROPERTY, *supra* note 26, § 15.3, at 765.

1. Effect on the Statutory Time Periods

In North Carolina, the statutes which govern the acquisition of title by adverse possession distinguish between those situations in which title to the land in question is held by the state and those in which the title is held by private individuals. Adverse possession must be maintained for thirty years in order for a claimant to acquire title to land belonging to the state²⁸ and for twenty years when the land is privately owned.²⁹ When, however, the claimant's possession was maintained under an instrument which constitutes color of title, these statute of limitation periods are reduced to twenty-one years,³⁰ and seven years,³¹ respectively. Thus, color of title greatly enhances the likelihood that an adverse claimant will be able to remain in uninterrupted possession for a sufficient length of time to acquire title by substantially reducing the period of time during which the owner of the property can bring an action of ejectment against him.

Many jurisdictions provide for shorter statutory periods when the adverse claimant enters into possession under color of title.³² North Carolina's willingness to do so may be traced back to the early 1700's when, as previously noted, there was a great deal of insecurity about the validity of land titles. Adverse possession was certainly a legal concept familiar to the colony's early legislative body and, like a number of the older states, North Carolina appears to have been influenced by

28. N.C. GEN. STAT. § 1-35 (1969) provides in pertinent part:

The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right of title of the State to the same—

(1) When the person in possession thereof, or those under whom he claims, has been in adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

29. N.C. GEN. STAT. § 1-40 (1969) provides:

No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability.

30. N.C. GEN. STAT. § 1-35 (1969) provides in pertinent part:

The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the State to the same . . .

(2) When the person in possession thereof, or those under whom he claims, has been in possession under color of title for twenty-one years. . . .

31. N.C. GEN. STAT. § 1-38 (Supp. 1981) provides in pertinent part:

(a) When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same. . . .

32. See, e.g. ARIZ. REV. STAT. ANN. § 12.523 (1956); FLA. STAT. ANN. § 95.16 (West 1982); GA. CODE ANN. § 85-407 (West 1978); ILL. ANN. STAT. Ch. 83, § 6 (Smith-Hurd 1966).

the Statute of James I.³³ That statute, however, set the period of possession necessary to ripen title by adverse possession at twenty years³⁴ and very likely the legislature felt that if settlement and development of the colony were to be encouraged, a relatively short time period needed to be provided for the protection of settlers who had been induced to settle upon and improve land under instruments which purported to pass title but turned out to be defective.³⁵ Even with the passage of time and the development of the colony into a thriving state, the concept of providing additional protection to persons who based their claims on instruments which purported to grant them title remained.

2. Effect on the Requirement of Actual Possession

An important corollary to the requirement that the claimant must have been in actual possession of the land in question in order to acquire title to it by adverse possession is the rule that the title acquired is limited to the amount of land which was in the claimant's actual possession and control.³⁶ When, however, the claimant's possession is maintained under color of title, this rule is modified to the extent that his actual possession of a part of a tract will be "constructively" extended to the boundaries described in his title instrument.³⁷ As may be illustrated by the following hypothetical, the effect of the doctrine of constructive possession is likely to be of far more than academic interest both to the adverse claimant and to the record owner of the property.

Blackacre, a twenty-acre tract of land, is owned but not actually occupied by O. X enters into adverse possession of Blackacre but actually occupies and exerts dominion and control over only five acres of the tract. If X's possession is not under color of title, the title acquired by X at the expiration of the applicable statutory period will be limited to those five acres. However, if X's possession was maintained under an instrument that constitutes color of title and purports to convey the entire twenty acres to him, his actual possession of five acres will be constructively extended over the remainder of the tract and he will acquire title to all twenty acres.

33. See *Stanley v. Turner*, 5 N.C. (1 Mur.) 14, 21 (1804) in which the court compares the Act of 1715 with 21 Jac. I, Ch. 16.

34. 21 Jac. I, Ch. 16 (1623).

35. Chapter 27 of the Act of 1715 begins by acknowledging the title disputes that had already arisen due to the boundary controversy between Virginia and North Carolina and concludes by stating that the purpose of the Act was to prevent leaving "much land unpossessed and titles so perplexed that no man will know of whom to take or buy land."

36. *Carswell v. Town of Morganton*, 236 N.C. 375, 72 S.E.2d 748 (1952); *Anderson v. Meadows*, 162 N.C. 400, 78 S.E. 279 (1913); *Bynum v. Thompson*, 25 N.C. (3 Ired.) 578 (1843).

37. *Wachovia Bank and Trust Co. v. Miller*, 243 N.C. 1, 89 S.E.2d 765 (1955); *Ware v. Knight*, 199 N.C. 251, 154 S.E. 35 (1930); *Ray v. Anders*, 164 N.C. 312, 80 S.E. 403 (1913).

Given the antipathy with which adverse possession is often regarded,³⁸ the benefit of constructive possession may appear to be a bit surprising, since its effect is to deprive the true owner of title to a greater amount of land than would otherwise occur. Once again, however, history provides the explanation. A great many early settlers entered into possession of land under instruments which they mistakenly believed were effective to give them good title to the rather extensive tracts of land they described and began the long and arduous task of cultivating and improving the land. Because of the wild and primitive nature of the land involved, it could take years for a settler to establish actual dominion and control over any significant amount of acreage.³⁹ When these settlers later discovered that their instruments were defective and, therefore, had to rely upon adverse possession as a means of salvaging their claims, it is not surprising that the early courts were troubled by the prospect of having to apply a rule that would limit the title acquired merely to such acreage as a settler had been able to actually possess and control.⁴⁰ Such a rule may have been reasonable in light of the conditions that existed in England, but when viewed in the context of the conditions that prevailed here in the 1700's, it appeared exceedingly harsh.

The courts' desire to find a way to circumvent the application of a rule which would limit the title acquired to such acreage as had been actually possessed and controlled by a settler has been credited as providing the major impetus for the invention of the doctrine of color of

38. Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.

Ballantine, *supra* note 26 at 135 (1918). In a letter to William James written in 1907, Oliver Wendell Holmes noted that

truth, friendship, and the statute of limitations have a common root in time. The true explanation of title by prescription seems to me to be that a man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life. The law used to look with disfavor on the statute of limitations, but I have been in the habit of saying that it is one of the most sacred and indubitable principles that we have, which used to lead my predecessor Field to say that Holmes didn't value any title that was not based on fraud or force.

M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 417-18 (1943).

39. "The task of subduing the wild land and subjecting it to . . . actual occupancy was a slow process and had to be accomplished acre by acre." *Philbin v. Carr*, 75 Ind. App. 560, 575, 129 N.E. 19, 25 (1920).

40. Phipps, *supra* note 10, at 192-93. See also Note, *Limitations on the Doctrine of Constructive Adverse Possession*, 6 COLUM. L. REV. 582-83 (1906) in which the author notes that [t]he theory of the general doctrine [of constructive possession] is, that in an undeveloped country it would be impossible to reduce to possession the whole of the land which the deed purports to convey; and just as the true owner is deemed to be in possession of all the land through his deed, so the law will give to the adverse claimant constructive possession of all to which he has color of title.

title.⁴¹ The early courts were familiar with the legal theory of constructive possession⁴² but needed to find some basis that would render it applicable to an adverse claimant. As one court noted many years later, "the courts . . . seized upon the device of 'color of title' . . . to secure to [the settler] that which in good faith he sought to acquire and for which he had planned and toiled."⁴³

In North Carolina, as elsewhere, the operation of the doctrine of constructive possession is subject to certain qualifications or limitations.⁴⁴ First of all, constructive possession cannot, of course, apply unless the adverse claimant is in actual possession of at least some portion of the tract described in the instrument which constitutes color of title.⁴⁵ A correlative limitation based on this principle is that where the instrument constituting color of title describes and purports to convey title to two distinct tracts of land, the claimant's actual possession of one of the tracts will not be constructively extended to the other, even if they are contiguous.⁴⁶ Thus, if for example, A enters into possession under a deed which describes and purports to convey title to Lot 3 and to adjacent Lot 4, his actual possession of all or part of Lot 3 will not be constructively extended to the other lot. Therefore, at the expiration of the applicable statutory period, A will fail in an attempt to assert that he has acquired title to Lot 4 on the basis that he was never in possession of it.

A second important limitation on the doctrine of constructive possession is that it must give way in the face of another's actual possession.⁴⁷ For example, during the applicable statutory period, X is in actual possession of five acres under an instrument that constitutes color of title and which describes and purports to convey title to a twenty-acre tract. During the same period, Y, a stranger, is in actual possession of three acres of the same tract. The title acquired by X will be limited to seventeen acres: the five that were in his actual possession plus the twelve of which he is deemed to have had constructive possession. It should also be noted that if in the preceding example Y were not a mere stran-

41. Phipps, *supra* note 10, at 191-93.

42. *Id.* at 192-93.

43. Philbin v. Carr, 75 Ind. App. 560, 575-76, 129 N.E. 18, 25 (1920).

44. See generally Note, *supra* note 40, at 582.

45. Bumgardner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957); Wachovia Bank and Trust Co. v. Miller, 243 N.C.1, 89 S.E.2d 765 (1955); Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

46. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964); Loftin v. Cobb, 46 N.C. (1 Jones) 406 (1854). Cf. Alsworth v. Richmond Cedar Works, 172 N.C. 17, 89 S.E. 1008 (1916) (the fact that the land has been subdivided into lots on a map will not prevent constructive possession from extending to the entire tract when it previously had been conveyed as one large undivided tract).

47. Tredwell v. Reddick, 23 N.C. (1 Ired.) 56 (1840); Ring v. King, 20 N.C. (3 & 4 Dev. & Bat.) 301 (1838); Graham v. Houston, 15 N.C. (4 Dev.) 232 (1833).

ger without any claim to the property but were the true owner of the tract described in X's deed, his true title would be deemed to constructively extend his actual possession to all the property not actually possessed by another.⁴⁸ Therefore, under these facts, X would not be deemed to have had constructive possession of any of the tract and the title he acquires by adverse possession will be limited to the five acres he actually possessed.

A third and somewhat related limitation on the doctrine of constructive possession is to be found in the rules developed by the courts to deal with "lappage" cases—situations in which the deeds of two rival claimants contain descriptions which in part cover the same area. For example, suppose that O, the owner of a hundred-acre tract of land executes and delivers a deed to A which describes and conveys the western fifty acres of the original tract. O subsequently executes and delivers a deed to B which was intended to convey the remainder of the tract but which in fact describes and purports to convey the eastern *sixty* acres of the original tract. As a result, the deeds of A and B "lap" on each other for a ten-acre section. When a dispute later arises as to the ownership of the lappage, it often becomes necessary for the court to determine which of the claimants should be considered to have had constructive possession of it. The determination is based on a set of established rules that operate to give A, as the senior or superior title holder, a certain measure of preference. If neither claimant was in actual possession of the lappage, A will be deemed to have had constructive possession of it on the basis of his senior or superior title. If only one of the claimants is in actual possession of some part of the lappage, he will be deemed to have had constructive possession of all of it, regardless of whether he is the junior or senior claimant. If both claimants were in actual possession of part of the lappage, A will be deemed to have had constructive possession of any portion of the lappage that remained unoccupied on the basis of his superior title.⁴⁹

Unlike some states, North Carolina does not qualify the doctrine of constructive possession by requiring that the amount of land actually possessed bear some significant relation to the amount of acreage described in the instrument constituting color of title.⁵⁰ However, the courts of this state have long recognized the doctrine of "slight en-

48. *Vance v. Guy*, 224 N.C. 607, 31 S.E.2d 766 (1944).

49. *Price v. Tomrich Corp.* 275 N.C. 385, 167 S.E.2d 766 (1969); *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E.2d 101 (1950).

50. *Lenoir v. South*, 32 N.C. (10 Ired.) 237 (1849). The limitation, which appears to have first surfaced in a New York case, *Jackson v. Woodruff*, 1. Cow.276 (1823), has been severely criticized. Note, *supra* note 40, at 584. For a discussion of the limitation and a listing of cases from jurisdictions which do recognize it, see 7 R. POWELL, *supra* note 26, § 1017, at 738; 4 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 1155, at 819 (3d ed. 1939).

croachment" which can have the effect of defeating an adverse claimant's assertion of constructive possession when it is predicated upon an actual possession which was "insignificant" in area.⁵¹ The doctrine is invoked in cases in which the adverse claimant has good title to the land adjoining the property in dispute and actually encroached upon and occupied only a small area across his true boundary. In such cases, the presumption that due to constructive possession the adverse claimant acquired a title coextensive with the boundaries described in his color of title instrument can be rebutted if the jury determines that such a minor encroachment was equivocal in nature and thus would have been overlooked even by a vigilant owner.⁵²

A final significant limitation on the operation of constructive possession can result from words or conduct by a claimant during the statutory period which indicate that he disclaims any intent to claim title beyond a line which is later discovered to fall short of the boundary described in the instrument that constitutes color of title.⁵³ For example, if A enters into possession of a tract of land whose northern boundary is described in a deed which constitutes color of title as lying at a particular place but during the statutory period A and the owner of the property which adjoins A's tract on the north agree upon a boundary line which in fact falls short of the one described in A's deed, A will not thereafter be deemed to have been in constructive possession beyond the line agreed upon.

Despite the various limitations or qualifications to which the doctrine of constructive possession is subject, it remains a potentially significant benefit to an adverse possessor and continues to be an attribute of color of title which is recognized in every state.

3. Effect on the Requirement of Hostile Possession

a. In General

Since the essence of the acquisition of title by adverse possession is the barring of the owner's cause of action to eject, it is clear that in order to start the statute of limitations running, the owner must have a cause of action stemming from another's possession of his property that is inconsistent with and "hostile" to his rights.⁵⁴ Like most jurisdic-

51. *Vanderbilt v. Chapman*, 175 N.C. 11, 94 S.E. 703 (1917); *Waldo v. Wilson*, 173 N.C. 689, 92 S.E. 692 (1917); *Blue Ridge Land Co. v. Floyd*, 171 N.C. 543, 88 S.E. 862 (1916); *King v. Wells*, 94 N.C. 344 (1886); *Green v. Harman*, 15 N.C. (4 Dev.) 158 (1833).

52. *McLean v. Smith*, 106 N.C. 172, 11 S.E. 184 (1890).

53. *Pennell v. Brookshire*, 193 N.C. 73, 135 S.E. 257 (1927); *Haddock v. Leary*, 148 N.C. 378, 62 S.E. 426 (1908). *Cf. Anderson v. Meadows*, 162 N.C. 400, 78 S.E. 279 (1913). ("Adverse possession does not extend beyond the claim, although this may fall short of the lines of a deed, under which one is in possession." 162 N.C. at 403, 78 S.E. at 280).

54. A large number of cases refer to the requirement that the possession be hostile *and* under

tions, North Carolina adheres to the view that possession of property is presumed to be in subordination to the rights of the true owner⁵⁵ and thus requires that the adverse possessor establish that his possession was hostile in nature.⁵⁶ This subsection of the article examines the effect of color of title on the ability of a claimant to meet this burden.

"Hostility" in the context of the law of adverse possession does not mean ill will or animosity;⁵⁷ rather, it signifies that the adverse claimant must have been in possession of the property in dispute claiming it exclusively and in his own right and not in subordination to the rights of the true owner.⁵⁸ Most jurisdictions utilize what has been termed an "objective"⁵⁹ approach to the issue of hostility since the focus is upon the claimant's actions, rather than upon his actual intent or state of mind. Under this approach, proof by the claimant that he occupied the property in dispute without the permission of the owner and that he made such actual, open and exclusive use of it as would an average owner establishes that his possession was hostile.⁶⁰ Even under the objective approach, color of title has frequently been considered of benefit to an adverse claimant on the basis that it lessens the quantum of proof he would otherwise have to supply with respect to the notoriety and frequency of his acts as "owner," since it is a circumstance that in itself tends to show that possession was not taken in subordination to the rights of the true owner.⁶¹

North Carolina, while placing the burden on the adverse possessor of

"claim of right" or "claim of title." However, most of the cases do not mean that the occupant must actually assert during the statutory period that he is in fact the owner.

In most of the cases asserting this requirement, it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.

3 AMERICAN LAW OF PROPERTY, *supra* note 26, § 15.4 at 776.

55. *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953); *Gibson v. Dudley*, 233 N.C. 255, 63 S.E.2d 630 (1951). This view is codified in N.C. GEN. STAT. § 1-42 (1969) which provides in pertinent part:

In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title. . . .

56. *Thomas v. Hipp*, 223 N.C. 515, 27 S.E.2d 528 (1943); *Barrett v. Williams*, 217 N.C. 175, 7 S.E.2d 383 (1940); *Berry v. McPherson*, 153 N.C. 4, 68 S.E. 892 (1910).

57. *State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70 (1969); *Dulin v. Faires*, 266 N.C. 257, 145 S.E.2d 873 (1965); *Brewer v. Brewer*, 238 N.C. 607, 78 S.E.2d 719 (1954).

58. *Garris v. Butler*, 15 N.C. App. 268, 189 S.E.2d 809 (1972); *State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70 (1969); *Brewer v. Brewer*, 238 N.C. 607, 78 S.E.2d 719 (1954).

59. G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, § 2548, at 630 (repl. ed. 1979); 7 R. POWELL, *supra* note 26, § 1015, at 726-732.

60. 3 AMERICAN LAW OF PROPERTY, *supra* note 26, § 15.4, at 776-77.

61. *Vick v. Berg*, 251 Ark. 573, 473 S.W.2d 858 (1971); *Land Clearance for Redevelopment Authority of City of St. Louis v. Zitko*, 386 S.W.2d 69 (1964). See also 3 AMERICAN LAW OF PROPERTY, *supra* note 26, § 15.4(a) at 785; 4 H. TIFFANY, *supra* note 50, § 1148 at 800-801.

establishing that he was in possession of the property in question with an intent to hold it in opposition to the rights or claims of all others, appears to subscribe to the objective approach in cases that do not involve disputes between adjoining land owners⁶² by allowing such an intent to be inferred from the actions of the adverse possessor during the statutory period. Thus, proof of actual, exclusive and open acts of possession and control that afford "unequivocal indication to all persons that [the claimant] is exercising thereon the dominion of owner"⁶³ may help him to establish that he had the requisite hostility.⁶⁴

Despite the fact that a claimant's burden of establishing that his possession was not held in subordination to the rights of the true owner is somewhat lightened when the possession is predicated upon an instrument that constitutes color of title, the existence of color of title is not essential to his success. As a result, the doctrine's true significance does not emerge until one examines North Carolina's approach to hostility in cases which involve disputes between adjoining land owners as to the ownership of a strip of land that lies along the adverse claimant's true boundary and onto which he entered into possession under the mistaken belief that he owned it.

b. In Mistaken Boundary Cases

In cases which involve an assertion of title by adverse possession to a strip of land along the claimant's true boundary, North Carolina continues to subscribe to a subjective approach to hostility under which the claimant must establish that he was in possession with the intent to lay claim to land known by him to belong to someone else. Under this

62. As demonstrating that North Carolina does not subscribe to a subjective approach to hostility in adverse possession cases which do not involve boundary disputes, see *Battle v. Battle*, 235 N.C. 499, 70 S.E.2d 492 (1952). In *Battle*, the claimants went into possession of a tract of land under the mistaken belief that it had in fact been conveyed to them. However, due to an error not discovered at the time, the description in the deed did not include the tract in dispute. In evaluating the character of the claimants' possession, the court noted that "[t]his was not a case of *mistaken boundary*, but on the contrary, plaintiffs' evidence tended to show *claim of title* as owners of a particular lot under known and visible boundaries." (emphasis added) *Id.* at 501, 70 S.E.2d at 494.

63. *Locklear v. Savage*, 159 N.C. 236, 238, 75 S.E. 347, 348 (1912).

64. Like other jurisdictions, North Carolina recognizes that the relationship between the occupant and the owner of the property in dispute may affect the conduct required to establish hostile possession. Thus, when the legal or familial relationship between the occupant and the owner is such that the occupant's open and exclusive possession would not be deemed to be inconsistent with or antagonistic to the owner's right or title, his possession will not trigger the running of the statute of limitations unless and until he clearly and unequivocally repudiates the owner's right and title in such a way as to give him notice that he is asserting a claim hostile to his title. *J. WEBSTER, supra* note 1, § 289, at 313-314. See, e.g., *Watson v. Chilton*, 14 N.C. App. 7, 187 S.E.2d 482 (1972) (parent and child); *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964) (cotenants); *Hancock v. Davis*, 179 N.C. 282, 102 S.E. 269 (1920) (husband and wife when they are living together); *Miller v. Bingham*, 36 N.C. (1 Ired.) 423 (1841) (trustee and *cestui que trust*).

"conscious intent"⁶⁵ approach, a possession that is premised merely upon a mistaken belief of ownership is not "hostile" and will not ripen into title no matter how long continued.⁶⁶ It is indeed unfortunate that North Carolina continues in such cases to adhere to an approach to the issue of hostility that has been severely criticized⁶⁷ as illogical,⁶⁸ an evidentiary nightmare,⁶⁹ and as having the effect of rewarding the conscious "landgrabber" while penalizing the honestly mistaken possessor.⁷⁰ However, an extended analysis of the many weaknesses inherent in the subjective approach is beyond the scope of the present

65. The term "conscious intent" is derived from *Gibson v. Dudley*, 233 N.C. 255, 63 S.E.2d 630 (1951). See *infra* note 66. The late Professor James Webster, a recognized authority on North Carolina property law, used the term to denote this variety of subjective approach. J. WEBSTER, *supra* note 1, § 293, at 320.

66. *Gibson v. Dudley*, 233 N.C. 255, 63 S.E.2d 630 (1951) vividly illustrates the operation of this approach to the issue of hostility. In *Gibson*, the plaintiff and defendant owned adjoining lots separated by a driveway. A dispute arose as to the ownership of the driveway and an examination of their respective deeds revealed that the driveway in fact lay part on the plaintiff's lot and part on that of the defendant. Thus, the plaintiff had neither title nor color of title to the strip of driveway in dispute. Undaunted, the plaintiff filed suit, contending that he was entitled to sole ownership of the entire driveway by virtue of more than twenty years of open, exclusive and adverse possession. The turning point in the case appears to have occurred when the plaintiff testified that at the time he purchased his lot in 1924, he thought that his deed covered the whole of the driveway, including the portion in dispute. Referring to this testimony, the court noted that even if the plaintiff's possession were "exclusive, open and notorious, as he now contends, no one regarded it as hostile or adverse, not even the plaintiff himself, for he was not conscious of using his neighbor's land." *Id.* at 258, 63 S.E.2d at 631. The court then proceeded to apply the rule that "every possession of land is presumed to be under the true title . . . and if the possession is by mistake . . . and not with the intent to claim against the true owner, it is not adverse." *Id.*, 63 S.E.2d at 632.

67. See e.g., 3 AMERICAN LAW OF PROPERTY, *supra* note 26, § 15.5 at 789; Bordwell, *Mistake in Adverse Possession*, 7 IOWA L. BULL. 129 (1922); Day, *The Validation of Erroneously Located Boundaries by Adverse Possession and Related Doctrines*, 10 U. FLA. L. REV. 245, 255-257 (1957); Note, *Adverse Possession—Intent as a Requisite in Mistaken Boundary Cases*, 33 N.C. L. REV. 632 (1955); Note, *Adverse Possession in Boundary Cases*, 4 WIS. L. REV. 41 (1926).

68. The objection on the basis of logic stems from the fact that irrespective of the occupant's state of mind, he is still subject to an action of ejectment brought by the owner. "[S]urely a mistaken occupation of another's land is as much an usurpation of his dominion as one without mistake. Either is adequate to sustain trespass *quare clausum fregit* or *ejectment*." Note, *Adverse Possession in Boundary Cases*, 4 WIS. L. REV. 41 (1926).

69. With respect to evidentiary considerations, there are two interrelated objections. First, there is the difficulty of adducing satisfactory evidence of mental attitude. As one leading case noted, when the focus moves from the question of visible and exclusive possession to the claimant's state of mind, there is a departure from a "plain and easy standard of proof . . . and invisible motives of the mind are to be explored." *French v. Pearce*, 8 Conn. 439 (1831). Secondly there is the problem of the reliability of the evidence. As one writer on the subject has noted:

In most instances the possessor has during the running of the statutory period given no thought to the nature of his claim. Even when he is innocent of conscious perjury, however, he usually makes the response both on direct and cross-examination that advances his cause—at least if he has been thoroughly instructed on the intricacies. . . . With reference to such indefinite matters it is easy to believe as one desires. Such testimony is not of the highest order of credibility.

Day, *supra* note 67, at 259.

70. 3 AMERICAN LAW OF PROPERTY, *supra* note 26, § 15.5 at 789; Bordwell, *supra* note 67, at 132.

article and the relevant question at this juncture is whether a claimant's mistaken belief of ownership is fatal when the belief was induced by the fact that he has an instrument that describes and purports to convey a tract that includes the strip in dispute, i.e., he was in possession of it under color of title. The answer appears to be an almost unqualified "no."⁷¹

An examination of "lappage cases"⁷², the color of title equivalent of the mistaken boundary dispute, reveals only two types of situations in which an adverse possessor's assertion of title to the strip in dispute has been defeated on the ground that he lacked an intent to claim title to it. The first such situation involves an attempt to assert title when the strip in dispute, although described in the claimant's title instrument, lay beyond a line previously agreed upon as the boundary of his tract.⁷³ Although the court predicated its denial of his claim on the basis that his conduct evidenced a lack of intent to claim title to the land in dispute, the result is also, and more justifiably, explainable on the equitable ground of estoppel.⁷⁴ Even under the objective approach to hostility, words or conduct on the part of an adverse claimant which amount to a virtual disclaimer of any intent to claim title are held to estop him from subsequently asserting title by adverse possession on the ground that such conduct tends to induce the true owner to refrain from taking legal action to protect his rights to the property in dispute.⁷⁵

The second situation in which an adverse possessor's lack of an intent to claim title has been the basis for denying his assertion of title involves cases in which the doctrine of "slight encroachment" is invoked. As previously discussed,⁷⁶ such cases involve situations in which the adverse possessor's actual possession of the strip in dispute amounts to an "insignificant" amount of acreage beyond his true boundary. Several cases refer to the doctrine of slight encroachment as being premised on the notion that such a small amount of wrongful occupancy allows a jury to presume that the possession was not taken with an intent to claim title but was inadvertent and, therefore, not

71. See e.g., *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E.2d 101 (1950) in which an adverse claimant who had color of title to the strip in dispute was allowed to prevail despite the fact that her testimony established that she had occupied it under the mistaken belief that she in fact had good title to it.

72. See *supra* text accompanying note 49.

73. *Haddock v. Leary*, 148 N.C. 378, 62 S.E. 426 (1908).

74. In fact, the court in *Haddock* quoted with approval a Georgia case in which that state's highest court had declared that "possession of land under color of title, however long continued, will not ripen into a prescriptive title if, instead of being attended with a claim of right, such right be expressly *disclaimed* pending possession." *Id.* at 382-383, 62 S.E. at 428 (emphasis added).

75. See 3 AMERICAN LAW OF PROPERTY, *supra* note 26, § 15.4 at 775 and § 15.5 at 789.

76. See *supra* text accompanying notes 51-52.

hostile.⁷⁷ However, the result in such cases can be justified on the basis that occupancy of a very small amount of acreage across the true boundary fails to meet the requirement of being "open and notorious,"⁷⁸ and, in fact, a number of the cases acknowledge that aspect.⁷⁹

Almost all persons who enter into possession of land under color of title do so in the mistaken belief that the instrument upon which their claim is premised was effective to convey title to the tract that it describes and only later discover that it was not. This was, in fact, the situation confronting many early settlers whose plight provided the major impetus for the development of the doctrine of color of title in North Carolina.⁸⁰ The effect of applying a "conscious intent" or "mistake is fatal" subjective approach in such cases would be to destroy the doctrine of adverse possession under color of title for all practical purposes since a claimant could prevail only when he could establish that he knew all along that his title instrument was defective.⁸¹ As one early court noted,

If every man who is induced by an honest misunderstanding as to the sufficiency of a title that purports upon its face to convey land to enter into possession were denied the benefit of his open, notorious adverse occupancy until he should take the laboring oar and satisfy a jury that he did not make a mistake, the difficulty of proving the actual intent entertained by one under whom claim is made, in first entering on the land, would often destroy titles acquired by possession and universally recognized as good. Indeed, the doctrine of color of title is founded

77. See, e.g., *Vanderbilt v. Chapman*, 175 N.C. 11, 94 S.E. 703 (1918); *Waldo v. Wilson*, 173 N.C. 689, 92 S.E. 693 (1917); *Currie v. Gilchrist*, 147 N.C. 648, 61 S.E. 581 (1908); *King v. Wells*, 94 N.C. 344 (1886).

78. The requirement of "open and notorious" possession is designed to provide the owner of the land with an opportunity to learn of the existence of the occupant's claim and take action to protect his rights. 4 *TIFFANY*, *supra* note 50, § 1140, at 727; 3 *AMERICAN LAW OF PROPERTY*, *supra* note 26, § 15.3(a) at 768. The nature and location of the land is often said to affect the question of whether the possession is open and notorious and there are many North Carolina cases that declare that the possession "must be decided and notorious as the nature of the land will permit." *Locklear v. Savage*, 159 N.C. 236, 237-238, 74 S.E. 347, 348 (1912). See also *Vance v. Guy*, 223 N.C. 409, 27 S.E.2d 117 (1943); *McKay v. Bullard*, 207 N.C. 628, 178 S.E. 95 (1935); *Holmes v. Carr*, 172 N.C. 213, 90 S.E. 152 (1916); *Loftin v. Cobb*, 46 N.C. (1 Jones) 406 (1854).

79. "[W]hen the portion into which the actual entry is made, and possession taken is very minute, . . . an owner of reasonable diligence and ordinary vigilance, might remain ignorant that it included his land. . . ." *Green v. Harman*, 15 N.C. (4 Dev.) 158, 164 (1833). "We do not think the actual possession of so minute a part of a 640 acre tract. . . . was of itself necessarily notice to defendants that plaintiffs claimed adversely the entire tract." *Waldo v. Wilson*, 173 N.C. 689, 692, 92 S.E. 692, 693-94 (1917). "The quantity of land taken into the enclosure is not so insignificant that a vigilant man would have overlooked the trespass. . . ." *McLean v. Smith*, 106 N.C. 172, 179, 11 S.E. 184, 186 (1890).

80. See *supra* text accompanying notes 13-24.

81. See 2 *DEMBITZ, LAND TITLES*, 1397 (1895) in which the author notes that "[i]f possession through mistake were held not to be adverse, very little room would be left for the statute of limitations, for almost every man who buys land under a bad title labors under the mistaken idea that his deed is good and effectual."

upon the idea of entering upon land⁸² in the reasonable belief that one is the true owner.

Thus, both history and logic lead to the conclusion that the greatest significance of color of title with respect to an adverse possessor's ability to establish that his possession was "hostile" lies in its ability to insulate him from the necessity of establishing that his possession of the property in dispute was the result of a conscious intention to lay claim to his neighbor's land. It thus has the laudable effect of allowing the parties in the case and the trier of fact to focus upon whether the claimant's possession was actual, exclusive, open and notorious for the applicable statutory period, rather than upon attempting to ascertain the claimant's "invisible motives."⁸³

PART TWO: WHAT CONSTITUTES COLOR OF TITLE

When a participant in a title transaction discovers that it was ineffective to actually transfer title to him, he is often left with no alternative than to assert that he has acquired the title by adverse possession. In light of the benefits that may accrue when possession is maintained under color of title, it is not surprising that the claimant will try to assert that the ineffective transaction constitutes color of title. The definition of color of title⁸⁴ alludes to two distinct, although not mutually exclusive, categories of defective title transactions as sources of color of title. One such category might be labelled "substantively" defective because the invalidity of the transfer stems from either the transferor's lack of title or his lack of capacity to transfer the title in question due to minority⁸⁵ or insanity.⁸⁶ The other category, which might be labelled "procedurally" defective, is composed of transactions which are ineffective to transfer title because the parties failed to observe all the formalities required by the particular mode of conveyance utilized. However, not every transaction which is ineffective to transfer title will qualify as color of title.

By way of illustration, it might be helpful to visualize all putative title transactions as comprising a spectrum. At one extreme are those which meet all substantive and procedural requirements and actually do effectuate a transfer of the title in question. At the other extreme are

82. 106 N.C. at 177, 11 S.E. at 185-86.

83. *French v. Pearce*, 8 Conn. 439 (1831).

84. *See supra* note 1.

85. Deeds executed by minors are voidable and may be disaffirmed within three years after reaching majority. *Baggett v. Jackson*, 160 N.C. 26, (1912). N.C. GEN. STAT. § 48A-1 (1976), abrogates the common-law definition of minority and N.C. GEN. STAT. § 48A-2 (1976) defines it as being under the age of eighteen. These sections became effective July 5, 1971. *See also* N.C. GEN. STAT. § 39-13.2 (1976 & Supp. 1981) which governs the validity of deeds executed by married persons who are under the age of eighteen.

86. *See supra* note 5.

those which are deemed so defective that not only do they fail to actually transfer the title in question, but they also fail to constitute color of title. In between these two extremes lie transactions which are in fact defective and fail to transfer the title in question but which nonetheless constitute color of title. The line of demarcation between those defective transactions which constitute color of title and those which do not is the focus of this section. The first part consists of a discussion of three requisites of an effective title transfer which are also generally considered to be indispensable to color of title. The second part then assesses the impact of three other matters on the question of when an ineffective title transaction can serve as color of title in North Carolina.

A. *Basic Requirements*

Despite the variety of recognized methods by which title to land may be transferred, there are three requisites of an effective transfer which are not only common to all⁸⁷ of them but which are also generally considered to be indispensable to color of title: (1) a writing; (2) which purports to pass title; (3) to a definitely described tract. Thus in most jurisdictions, any transaction which fails to meet these requirements will not only be ineffective to actually transfer title but will also fail to constitute color of title.

The proposition that a writing is indispensable to the existence of color of title should be prefaced with an acknowledgement that statements to the effect that a writing is not essential can frequently be found in adverse possession cases.⁸⁸ Although there are, in fact, a few jurisdictions which genuinely adhere to the view that under certain circumstances color of title can consist of oral declarations,⁸⁹ most such statements are merely the result of an unfortunate tendency by courts to use the term "color of title" and "claim of title" as if they were interchangeable.⁹⁰ They are not. When used in its technical sense, "claim of title," and its true synonym "claim of right," refer to the necessity that an occupant establish that his possession was adverse or hostile and not in subordination to the rights of the true owner. Since in most jurisdictions this can be shown by words or conduct and does not need a written basis,⁹¹ it is easy to see how the careless use of the term "color

87. Excluded are transfers of title resulting by intestate succession which occur by operation of law rather than by action of the parties or the courts.

88. *Brown v. Norvell*, 96 Ark. 609, 132 S.W. 922 (1910); *Lebanon Mining Co. v. Rogers*, 8 Colo. 34, 5 P. 661 (1884); *Cooper v. Ord*, 60 Mo. 420 (1875); *Green v. Kellum*, 23 Pa. 254 (1854).

89. *Nelson v. Johnson*, 189 Ky. 815, 226 S.W. 94 (1920); *Brooks-Scanlon Co. v. Childs*, 113 Miss. 246, 64 So. 146 (1917).

90. *Roe v. Doe*, 162 Ala. 151, 50 So. 230 (1909); *Philbin v. Carr*, 75 Ind. App. 560, 129 N.E. 19 (1920), *reh'g denied*, 75 Ind. App. 560, 129 N.E. 706 (1921); *Morrison v. Linn*, 50 Mont. 396, 146 P. 166 (1915); *Fitschen Bros. Commercial Co. v. Noyes' Estate*, 76 Mont. 175, 246 P. 773 (1926).

91. *Barrett v. Brewer*, 153 N.C. 547, 69 S.E. 614 (1910) ("The term, 'color of title', is not

of title" in this context results in confusion.

North Carolina very early held a writing to be indispensable to color of title⁹² and the rule has never seriously been questioned. Any controversies which have arisen with respect to this requirement have confined themselves to whether a particular writing constituted color of title. It is at this point that the second requirement of purporting to pass title comes in and confines the operation of color of title to transactions which by their nature are capable of not merely affecting title to land but of transferring it. Under this test, writing such as leases,⁹³ letters,⁹⁴ and transfers of liens⁹⁵ have all been held not to constitute color of title. On the other hand, writings such as deeds, both private⁹⁶ and official,⁹⁷ wills,⁹⁸ judgments,⁹⁹ and mortgages¹⁰⁰ have been held to constitute color of title since, by their very nature, they are capable of effectuating a transfer of title from one party to another. Even bonds for title or executory contracts to convey land have been approved by the North Carolina courts on the basis that they should be considered instruments that purport to convey at least an equitable interest.¹⁰¹

There is an additional ramification of the requirement of purporting to convey title which deserves mention. Not only does an instrument

synonymous with 'claim of title,' as used in the statutes of some states. To constitute color of title there must be a paper title to give color to the adverse possession, whereas a claim of title may be constituted wholly by parol." *Id.* at 548, 69 S.E. at 615.)

92. *Barrett v. Brewer*, 153 N.C. 547, 69 S.E. 614 (1910); *Tate's Heirs v. Southard*, 10 N.C. (3 Hawks) 119 (1824).

93. *Sparrow v. Dixie Leaf Tobacco Co.*, 232 N.C. 589, 61 S.E.2d 600 (1950).

94. *Young v. Pittman*, 224 N.C. 175, 29 S.E.2d 551 (1944).

95. *Turner v. Neisler*, 141 Ga. 27, 80 S.E. 461 (1913).

96. *Lofton v. Barber*, 226 N.C. 481, 39 S.E.2d 263 (1946); *Vance v. Guy*, 223 N.C. 409, 27 S.E.2d 117 (1943).

97. *Campbell v. Campbell*, 221 N.C. 257, 20 S.E.2d 53 (1942) (sheriff's deed); *Ruark v. Harper*, 173 N.C. 249, 100 S.E. 584 (1919) (tax deed); *Kron v. Hinson*, 53 N.C. (8 Jones) 347 (1860) (grant from the state). A 1963 proviso to N.C. GEN. STAT. § 1-38 (1969) specifically declares that "commissioner's deeds in judicial sales and trustee's deeds under foreclosure shall also constitute color of title."

98. *Chambers v. Chambers*, 235 N.C. 749, 71 S.E.2d 57 (1952), *reh'g denied*, 236 N.C. 766, 72 S.E.2d 8 (1952); *McConnell v. McConnell*, 64 N.C. 342 (1861); *Trustees of the University v. Blount*, 4 N.C. (Car. L. Rep.) 455 (1816).

99. *See, e.g., United States v. Chatham*, 208 F. Supp. 220 (W.D.N.C. 1962), *aff'd in part*, 323 F.2d 95 (4th Cir. 1963) (condemnation decree); *Burns v. Stewart*, 162 N.C. 360, 78 S.E. 321 (1913) (quiet title action); *Lindsay v. Beaman*, 128 N.C. 189, 38 S.E. 811 (1901) (record in partition proceeding). *Cf. Canter v. Chilton*, 175 N.C. 406, 95 S.E. 660 (1918) (partition decree not color of title when it fails to sufficiently describe the land in question); *Keener v. Goodson*, 89 N.C. 273 (1883) (assignment of homestead not color of title because it did not profess to pass title but merely attached an exemption from sale under execution to the defendant's existing estate).

100. *Stewart v. Lowdermilk*, 147 N.C. 583, 61 S.E. 523 (1908).

101. Note, however, that "as against the vendor, the possession of the vendee, occupying under such a contract, does not, as a rule, become hostile or adverse until something has occurred that places one of the parties in the position of resistance to the claim of the other. . . ." *Knight v. John L. Roper Lumber Co.*, 168 N.C. 452, 453, 84 S.E. 705, 706 (1915); *Betts v. Gahagan*, 212 F. 120 (4th Cir. 1914).

which constitutes color of title serve to define the physical extent, or acreage, of the occupant's claim,¹⁰² it also serves to define the nature of the interest acquired by adverse possession maintained under it. Thus, if for example, the occupant's deed purports to convey merely a life estate¹⁰³ or an undivided fractional interest,¹⁰⁴ the title he acquires by adverse possession will be limited to the interest which his deed purported to convey.

Even when armed with a writing which purports to pass title, an adverse possessor who wishes to avail himself of the benefits of color of title must demonstrate that the writing meets the further requirement of describing the property in question.¹⁰⁵ The rationale for this requirement is the previously discussed doctrine of constructive possession.¹⁰⁶ It can readily be seen that without a definite description the doctrine could not operate because there would be no clearly defined boundaries out to which the claimant's actual possession could be constructively expanded.¹⁰⁷

The requirement of a sufficient description is met when the instrument either describes the property in question in such a manner that it can be located and distinguished from other property or else refers to something extrinsic, such as another deed or a plat, which furnishes the means for so identifying it.¹⁰⁸ Since the criteria of what constitutes a sufficient description remain the same whether an instrument is asserted as valid title or merely as color of title,¹⁰⁹ a significant ramification of this requirement is that a title transaction which is ineffective due to the lack of an adequate description is *ipso facto* ineffective as color of title as well.¹¹⁰

It would be wonderful if the line of demarcation between those transactions which constitute color of title and those which do not could be drawn simply on the basis of the three requirements just dis-

102. *Berryman v. Kelly*, 35 N.C. (13 Ired.) 269 (1852).

103. *McRae v. Williams*, 52 N.C. (7 Jones) 430 (1860).

104. *Dorman v. Goodman*, 213 N.C. 406, 196 S.E. 352 (1938).

105. *Peterson v. Sucro*, 101 F.2d 282 (4th Cir. 1939); *Katz v. Doughtrey*, 198 N.C. 393, 151 S.E. 879 (1930); *Barker v. Southern Railway Co.*, 125 N.C. 596, 34 S.E. 701 (1899).

106. See *supra* text accompanying notes 36-53.

107. *Dickens v. Barnes*, 79 N.C. 490 (1878).

108. *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965); *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E.2d 101 (1950); *Hayden v. Hayden*, 178 N.C. 259, 100 S.E. 515 (1919).

109. *Katz v. Doughtrey*, 198 N.C. 393, 151 S.E. 879 (1930).

110. *Carrow v. Davis*, 248 N.C. 740, 105 S.E.2d 60 (1958); *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953); *Thomas v. Hipp*, 223 N.C. 515, 27 S.E.2d 528 (1943). It is at least arguable that in jurisdictions, like North Carolina, where an equally significant benefit of color of title is a substantially shorter statute of limitations, a defective description should only deprive the claimant of the logically related benefit of constructive possession. The courts, however, appear to view color of title as an "all or nothing" proposition and therefore have never taken such a bifurcated approach.

cussed. Unfortunately the matter is not that simple. It is true that if these three requirements are not met, a transaction cannot constitute color of title, but the converse, that one which does meet all of them will always constitute color of title, is not. Although, unlike some jurisdictions, North Carolina does not impose limitations based on the claimant's good faith belief in the validity of the instrument¹¹¹ or adhere to the view that a forged¹¹² or fraudulent¹¹³ instrument cannot serve as color, there are three limitations which must be examined before a true picture of what constitutes color of title in North Carolina emerges.

B. *Limitations on Color of Title*

1. "Obvious" Defects

An examination of North Carolina cases frequently finds appended to the definition of color of title the qualifying phrase that the defect which renders the instrument ineffective to actually transfer title must not be "so obvious that no man of ordinary capacity could be misled by it."¹¹⁴ The phrase made its appearance in early cases in which the courts were attempting to give meaning and direction to the doctrine of color of title.¹¹⁵ This section examines the meaning of the phrase and the question of whether it constitutes a significant limitation on the ability of a title transaction which meets the three basic requirements to serve as color of title.

When the doctrine of color of title was first adopted in this state, a good faith belief in the validity of the instrument was held to be essential¹¹⁶ and the "obvious defect" limitation may have originated as an expression of this requirement. However, the courts very early held that the phrase did not mean that an instrument was disqualified from serving as color of title simply on the basis that it was subject to a patent defect.¹¹⁷ The adjective "obvious" had to be viewed in conjunction with the standard contained within the phrase itself—a person of "ordinary capacity." Therefore, the standard that was held to be applicable was "that of a layman, unskilled in the law" and the court must

111. *Knight v. John L. Roper Lumber Co.*, 168 N.C. 452, 84 S.E. 705 (1915); *Reddick v. Leggat*, 7 N.C. (3 Mur.) 539 (1819).

112. *Fisher v. Toxaway Co.*, 165 N.C. 663, 81 S.E. 925 (1914).

113. *Berry v. Richmond Cedar Works*, 184 N.C. 187, 113 S.E. 772 (1922); *Seals v. Seals*, 165 N.C. 408, 81 S.E. 613 (1914); *Pickett v. Pickett*, 14 N.C. (3 Dev.) 6 (1831); *Hoke v. Henderson*, 14 N.C. (3 Dev.) 12 (1831).

114. *Ipock v. Gaskins*, 161 N.C. 673, 77 S.E. 843 (1913); *Bond v. Beverly*, 152 N.C. 56, 67 S.E. 55 (1910); *Williams v. Scott*, 122 N.C. 545, 29 S.E. 877 (1898).

115. *Tate's Heirs v. Southard*, 10 N.C. (3 Hawks) 119 (1824).

116. *Burns v. Stewart*, 162 N.C. 360, 78 S.E. 321 (1913); *Reddick v. Leggat*, 7 N.C. (3 Mur.) 539 (1819).

117. *McConnell v. McConnell*, 64 N.C. 342 (1870).

exclude the presumption, generally applicable, that every man is presumed to know the law"¹¹⁸ Applying this standard, procedural defects such as the omission of a seal,¹¹⁹ the lack of a privy exam,¹²⁰ the unconstitutionality of a statute,¹²¹ and the failure to make all owners of the property parties to a suit in which a judgment affecting the title is rendered¹²² have all been held no obstacle to the instrument's ability to serve as color of title.

Despite the fact that the "obvious defect" limitation appears to have originated as an expression of the subsequently abandoned good faith requirement, even recent cases continue to append it to the definition of color of title.¹²³ However, such cases do not appear to use it as an independent basis for disqualifying a written instrument which meets the requirements of purporting to convey title and having an adequate description. Thus, it does not appear to represent a very significant limitation on the ability of a title transaction which meets the three basic requirements to serve as color of title. The same cannot be said of the two limitations which follow.

2. Recordation Limitation

The first truly significant limitation on the ability of an instrument which purports to convey title by definite boundaries to constitute color of title is the result of statutes which govern the recordation or registration of instruments such as deeds,¹²⁴ wills,¹²⁵ mortgages¹²⁶ and contracts to convey land.¹²⁷ Despite early cases which held that a will which had not been probated could not serve as color of title,¹²⁸ prior to 1885 deeds did not have to be registered in order to do so.¹²⁹ However, passage that year of the Connor Act with its provision that "no deed . . . shall be valid to pass any property interest against a purchaser for a valuable consideration but from the registration thereof"¹³⁰

118. *Greenleaf v. Bartlett*, 146 N.C. 495, 500, 60 S.E. 419, 421 (1908); *McConnell v. McConnell*, 64 N.C. 342 (1870).

119. *Avent v. Arrington*, 105 N.C. 377, 10 S.E. 991 (1890).

120. *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027, *aff'd*, 171 N.C. 752, 88 S.E. 226 (1915); *Norwood v. Totten*, 166 N.C. 648, 82 S.E. 951 (1914).

121. *Episcopal Church v. Newbern Academy*, 9 N.C. (2 Hawks) 233 (1922).

122. *John L. Roper Lumber Co. v. Cedar Works*, 165 N.C. 83, 80 S.E. 982 (1914); *Amis v. Stephens*, 111 N.C. 172, 16 S.E. 17 (1892).

123. *United States v. Chatham*, 208 F. Supp. 220 (W.D.N.C. 1962), *aff'd in part* 323 F.2d 95 (4th Cir. 1963); *Adams v. Severt*, 40 N.C. App. 247, 252 S.E.2d 276 (1979).

124. N.C. GEN. STAT. § 47-18 (1976).

125. *Id.* § 31-39.

126. *Id.* § 47-20.

127. *Id.* § 46-18.

128. *Callender v. Sherman*, 27 N.C. (5 Ired.) 711 (1845).

129. *Hardin v. Barrett*, 51 N.C. (6 Jones) 159 (1858); *Campbell v. McArthur*, 9 N.C. (2 Hawks) 33 (1822).

130. Ch. 147, Laws of N.C. (1885).

inevitably gave rise to the question of whether its application also extended to instruments asserted merely as color of title.

The issue was first addressed in *Austin v. Staten*,¹³¹ a case in which the plaintiff and the defendant had each received deeds covering the property in dispute from the same grantor. Although the defendant's deed had been executed almost eight years before that of the plaintiff, it had not been recorded for nine years, a year after the plaintiff's had been recorded. It seemed clear that if the plaintiff could establish that he was a purchaser for value he had the superior title, since he had recorded his instrument first. Undaunted, the defendant advanced the somewhat ingenious argument that although his deed had been registered subsequent to that of the plaintiff and therefore he could not prevail on the theory that his deed was "good," it nonetheless constituted color of title. Since it had been admitted that he had been in open and notorious possession of the property for more than seven years prior to the time the deed to the plaintiff had been executed and recorded, the defendant contended that he had a superior title based on adverse possession. As later cases have noted,¹³² the court could have disposed of the case on the basis that until the deed to the plaintiff had been recorded the defendant's deed was valid and effective and thus he had not been in adverse possession under an instrument that constituted color of title for seven years by the time the action was filed. Instead, the court chose to go straight to the heart of the matter and focus on the fact that to adopt the defendant's argument would be to destroy the efficacy of the recording act.¹³³ On this basis, the court held that an unregistered deed did not constitute color of title. This was, however, merely the first step in the courts' attempt to define the extent to which the goals and policies underlying the recording act affected the ability of an instrument to serve as color of title.

Three years after *Austin*,¹³⁴ the court noted that the rule announced in that case "may be broader than was necessary"¹³⁵ and made the first major qualification on the requirement of recordation by holding that except for cases in which the rival party was a purchaser for value who had duly recorded his deed "the rights acquired by adverse possession under color of title are not disturbed or affected by the act of 1885."¹³⁶ Thus, a deed did not have to be recorded in order to serve as color of

131. 126 N.C. 783, 36 S.E. 338 (1900).

132. *Justice v. Mitchell*, 238 N.C. 364, 78 S.E.2d 122 (1953); *Janney v. Robbins*, 141 N.C. 400, 53 S.E. 863 (1906).

133. 126 N.C. at 790, 36 S.E. at 340.

134. *Collins v. Davis*, 132 N.C. 106, 43 S.E. 579 (1903).

135. *Id.* at 111, 43 S.E. at 581.

136. *Id.* at 111-112, 43 S.E. at 581.

title where the rival party was merely a donee.¹³⁷ Later cases added the further qualification that even when the rival party was a purchaser for value, the requirement of recordation did not apply where the adverse claimant and the rival party derived their title instruments from independent sources.¹³⁸ For example, if X executes a deed which purports to convey title to Blackacre to A and later O executes a deed which purports to convey title to B, a purchaser for value, A's deed may serve as color of title despite the fact that it was not recorded before the deed to B, since the parties derived their title instruments from different sources. If on the other hand, O had executed both the deed to A and the one to B, A's deed could not serve as color of title unless and until it was recorded.

It was also necessary for the courts to determine the requirement of recordation with respect to another group of persons whose interests were entitled to protection under the recording act—lien creditors.¹³⁹ Subsequently it was decided that an adverse claimant could not acquire a title that was free of the lien asserted by a creditor of the adverse claimant's transferor unless the instrument relied upon as color of title had been recorded prior to the docketing of the creditor's judgment.¹⁴⁰ Thus, the fact that the claimant had been in possession of the property in question for seven years under an unrecorded deed which purported to convey title was held not to bar an execution sale premised on a lien docketed against the claimant's transferor.¹⁴¹

The requirement of recordation is not an absolute limitation on the ability of an instrument to serve as color of title. Not only has the court qualified it by restricting the requirement to cases which involve disputes in which the rival party is a purchaser for value or a lien creditor who derives his rights from the same source as those asserted by the adverse claimant, the court has even held that the existence of an unregistered instrument in the adverse claimant's chain of title will not prevent his assertion of color of title based on subsequent instruments which have been recorded.¹⁴² Nonetheless, even this qualified requirement of recordation constitutes a significant limitation on the ability of

137. *Klutz v. Klutz*, 172 N.C. 622, 90 S.E. 769 (1916); *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027 (1915).

138. *Anderson v. Walker*, 190 N.C. 826, 130 S.E. 840 (1925); *Gore v. McPherson*, 161 N.C. 638, 77 S.E. 835 (1913); *Janney v. Robbins*, 141 N.C. 400, 53 S.E. 863 (1906).

139. N.C. GEN. STAT. § 46-18 (1976).

140. *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925); *But cf. Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928) in which the adverse possessor prevailed over the grantor's judgment creditor despite the fact that his conveyance had not been recorded on the basis that he had been in possession for over twenty years and therefore did not base his claim on seven years of possession under an instrument constituting color of title.

141. *Pickett v. Pickett*, 14 N.C. (3 Dev.) 6 (1831).

142. *Glass v. Lynchburg Shoe Co.*, 212 N.C. 70, 192 S.E. 899 (1937). *See Note, Adverse Possession—Color of Title*, 16 N.C. L. REV. 149 (1938).

an instrument to constitute color of title. It appears, however, that in light of the policies underlying the recording act and the fact that under it notice by the prospective purchaser that someone other than his grantor is in possession of the property is deemed irrelevant in establishing priority of titles,¹⁴³ some limitation was necessary. The one ultimately developed by the court may be viewed as merely refusing to allow a claimant to totally circumvent the requirement of recordation and still have the benefit of the relatively short color of title statute of limitations period. On balance, the recordation limitation is both justifiable and reasonable in scope. Unfortunately, the same cannot be said with respect to the third and final limitation.

3. Cotenant Limitation

Since a person cannot transfer title to a greater interest in property than that which he in fact owns,¹⁴⁴ it is clear that when a tenant in common executes an instrument which describes the common property and purports to convey total undivided ownership of it, the instrument is effective only as to the transferor's fractional interest. A line of North Carolina cases starting in 1914¹⁴⁵ contain statements by the courts that an instrument which is subject to this particular "substantive" defect does not constitute color of title with respect to the interests of the nonparticipating cotenants. This rule represents a significant limitation on the existence of color of title and an examination of its evolution and application reveals that there appears to be very little justification for its existence.

Any attempt to examine the rationale and significance of the limitation, that an instrument which is executed by a cotenant and purports to convey sole ownership does not constitute color of title, must begin with a brief look at North Carolina's overall approach to the question of adverse possession among cotenants, since the roots of the limitation are inextricably bound up with the general rules and concepts. Like other jurisdictions, North Carolina recognizes that it is possible for a cotenant to acquire sole ownership of the common property by adverse possession but requires that notice must in some manner be given to the cotenants who are out of possession that their rights are being repudi-

143. *Bourne v. Lay Co.*, 264 N.C. 33, 140 S.E.2d 769 (1965); *Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939).

144. *Lovett v. Stone*, 239 N.C. 206, 79 S.E.2d 479 (1954).

145. *See, e.g., Young v. Young*, 43 N.C. App. 419, 259 S.E.2d 348 (1979); *Cox v. Wright*, 218 N.C. 342, 11 S.E.2d 158 (1940); *Bailey v. Howell*, 209 N.C. 712, 184 S.E. 476 (1936); *Bradford v. Bank of Warsaw*, 182 N.C. 225, 108 S.E. 750 (1921); *John L. Roper Lumber Co. v. Richmond Cedar Works*, 165 N.C. 83, 80 S.E. 982 (1914).

ated.¹⁴⁶ This requirement stems from the inherent right of every cotenant to occupy and possess the common property¹⁴⁷ which carries with it the presumption that a cotenant's mere possession, even if open and exclusive, is not wrongful or hostile and thus does not trigger the running of the statute of limitations on the other co-owners' action for ejectment.¹⁴⁸

The term used to denote conduct which amounts to a sufficient repudiation of the rights of the cotenants out of possession to trigger the running of the statute of limitations is "ouster" and it is commonly defined as "some clear, positive and unequivocal act equivalent to an open denial of [the cotenants' rights], and putting [them] out of seisin."¹⁴⁹ However, instances of "actual" ousting are rare and on the basis of "public policy, to prevent stale claims, as [well as] to protect the tenant in possession from the loss of evidence from length of time,"¹⁵⁰ the courts as early as 1833,¹⁵¹ recognized the doctrine of "presumptive" or "constructive" ouster. Under this doctrine, the sole and uninterrupted possession of the common property by one cotenant, when allowed to continue for a long period of time without interference from or claim by the cotenants out of possession, gives rise to the presumption that an actual ouster did occur.¹⁵² Twenty years was eventually settled upon by the courts as a sufficiently long time period to warrant a presumption of ouster.¹⁵³ Thus, if A, B and C are tenants in common of Blackacre, each owning an undivided one-third interest, and A is allowed to remain in exclusive possession of the property for twenty years, without acknowledging the rights of B and C, and without their making any demand or claim for rents, profits or possession, the presumption arises that at the inception¹⁵⁴ of the twenty-year period an

146. *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952); *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906).

147. [U]nity of possession is the characteristic attribute of a tenancy in common. In the absence of special facts the possession by one cotenant is deemed a possession by all cotenants [and] a corollary of this basic generalization [is] that one cotenant is permitted to use and enjoy the whole property in the same manner as if he were the sole owner.

4A R. POWELL, *supra* note 26, § 603, at 606-607.

148. *Id.* at 608.

149. *Morehead v. Harris*, 262 N.C. 330, 343, 137 S.E.2d 174, 186 (1964) quoting *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906).

150. *Black v. Lindsay*, 44 N.C. (Busb.) 467, 468 (1853).

151. *Thomas v. Garvin*, 15 N.C. (4 Dev.) 223 (1833).

152. *Collier v. Welker*, 19 N.C. App. 617, 199 S.E.2d 691 (1973); *Brewer v. Brewer*, 238 N.C. 607, 78 S.E.2d 719 (1953); *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906).

153. *Caldwell v. Neely*, 81 N.C. 114 (1879); *Covington v. Stewart*, 77 N.C. 148 (1877); *Black v. Lindsay*, 44 N.C. (Busb.) 467 (1853).

154. For a discussion of the doctrine of presumptive ouster, see Note, *Adverse Possession Between Tenants in Common and the Rule of Presumptive Ouster*, 10 WAKE FOREST L. REV. 300 (1976) where the author notes the inconsistency inherent in a rule that provides that "even though the presumption will not arise until the end of a twenty-year period, once it has arisen the ouster is presumed to have occurred at the beginning of the twenty-year period."

ouster occurred and on this basis A acquires the interests of B and C by adverse possession. It is against this backdrop that one must examine the limitation that an instrument executed by a cotenant which purports to convey sole title does not constitute color of title.

The earliest case to have involved a question of the effect of seven years of exclusive possession under an instrument which was executed by a cotenant and purported to convey sole ownership appears to be *Burton v. Murphy*,¹⁵⁵ decided in 1818. Although the court in that case did not directly address the status and effect of a deed executed by the owner of a one-fifth undivided interest, its decision was based on a tacit recognition that the deed constituted color of title and that the transferee's entry and possession thereunder amounted to an ouster.¹⁵⁶ Later cases, however, adopted the position that not only did possession maintained under such an instrument not constitute an ouster in itself¹⁵⁷ but that the instrument did not even have the effect of aiding the claimant by reducing the twenty-year period required for presumptive ouster.¹⁵⁸ The basis given for this rule was that the effect of such an instrument was to make the transferee a tenant in common and "in contemplation of law his possession conforms to his *true* and not to his *pretended* title."¹⁵⁹ Thus, the transferee is subject to the same requirements with respect to adverse possession as any other cotenant irrespective of the fact he may not even realize that he is one. Interestingly enough, however, the early cases which discussed the effect, or more accurately the lack of effect, of such instruments continued either expressly or impliedly to recognize that they constituted color of title.¹⁶⁰ Not until *John L. Roper Lumber Co. v. Cedar*,¹⁶¹ decided in 1914, did a court actually state that an instrument executed by a cotenant which purported to convey sole title did not constitute color of title and even in that case it was dictum which cited as support earlier cases which had not, in fact, recognized such a limitation.¹⁶²

155. 4 N.C. (2 Mur.) 684 (1818), opinion at 6 N.C. (2 Mur.) 339 (1818).

156. Despite the fact that there was no evidence of an actual ouster of the cotenant-grantor's other co-owners, the court said that the possession of the grantee under the deed "from 1800 to July, 1809, . . . forms a perfect title . . . under the statute of limitations." *Id.* at 340.

157. *Day v. Howard and Baker*, 73 N.C. 1 (1875); *Cloud v. Webb*, 14 N.C. (3 Dev.) 317 (1832).

158. *Hicks v. Bullock*, 96 N.C. 164, 1 S.E. 629 (1887); *Ward v. Farmer and Southerland*, 92 N.C. 93 (1885); *Caldwell v. Neely*, 81 N.C. 114 (1879).

159. *Caldwell v. Neely*, 81 N.C. 114, 117 (1879), citing *Day v. Howard and Baker*, 73 N.C. 1.

160. *Bullin v. Hancock*, 138 N.C. 198, 50 S.E. 621 (1905); *Breeden v. McLaurin*, 98 N.C. 307, 4 S.E. 136 (1887); *Hicks v. Bullock*, 96 N.C. 164, 1 S.E. 629 (1887); *Cloud v. Webb*, 14 N.C. (3 Dev.) 317 (1832).

161. 165 N.C. 83, 80 S.E. 982 (1914).

162. The court cited five cases: *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906); *Bullin v. Hancock*, 138 N.C. 198, 50 S.E. 621 (1905); *Breeden v. McLaurin*, 98 N.C. 307, 4 S.E. 136 (1887); *Hicks v. Bullock*, 96 N.C. 164, 1 S.E. 629 (1887); and *Cloud v. Webb*, 14 N.C. (3 Dev.) 317 (1832). The *Dobbins* case makes no mention of color of title; in *Cloud*, the court, at 14 N.C. at 325, says "admitting that deed to be color of title;" in *Hicks* and *Breeden*, the court repeatedly

Later cases picked up on the dictum contained in *Roper* and there are now a substantial number of them which have reiterated this limitation and relied upon it as a basis for denying a claimant's assertion of title based on seven years possession of the common property.¹⁶³ The explanation for the ready acceptance of this limitation may lie in the fact that color of title ordinarily carries with it the notion that possession maintained under it is not in subordination to the rights of another¹⁶⁴ and perhaps it was felt that allowing such an instrument to be labelled color of title created a conflict with the already established rule that the possession of a cotenant is presumed not to be hostile to his co-owners' rights.

In light of the refusal of the courts of this state to view the entry and possession of a transferee under an instrument executed by a cotenant as constituting actual ouster or shortening the period required for presumptive ouster, the significance of refusing to call such an instrument color of title even when it meets the requirements of purporting to convey sole title and adequately describes the common property is probably more theoretical than real.¹⁶⁵ It is, however, symptomatic of the illogic and inconsistency inherent in a rule which refuses to recognize possession maintained under such an instrument as amounting to an ouster when the transferee who enters into possession is a "stranger," i.e., someone who was not already a cotenant at the time the deed was executed.

The present rule ignores that when the transferee in possession is not one of the original cotenants, the very fact of his possession should serve as notice to the others that their rights may be in jeopardy and prompt them to at least make inquiry as to the basis and extent of the right or title the occupant is claiming.¹⁶⁶ That the courts already have

refers to the deed executed by a cotenant as color of title; and in *Bullin*, the court, at 138 N.C. at 201, 50 S.E. at 622, says "conceding that the deed is color of title."

163. *Young v. Young*, 43 N.C. App. 419, 259 S.E.2d 348 (1979); *Cox v. Wright*, 218 N.C. 342, 11 S.E.2d 158 (1940); *Bailey v. Howell*, 209 N.C. 712, 184 S.E. 476 (1936); *Bradford v. Bank of Warsaw*, 182 N.C. 225, 108 S.E. 750 (1921).

164. See *supra* text accompanying notes 56-61.

165. Several early cases and one relatively recent case allude to a situation in which the status of the deed as color of title could make a difference, i.e., where the grantee actually does oust the other co-owners soon after receiving the deed. For example, if X enters into possession of the common property under a deed from A which purports to convey sole ownership, and soon thereafter X actually does oust his transferor's former cotenants, B and C, by resisting their demands to be let into possession, he should be able to acquire their interests by adverse possession in seven years, rather than twenty, if his deed from A constitutes color of title. Since, however, it is highly unlikely that once X actually repudiates their rights B and C will refrain from taking legal action to enforce and protect their interests for seven years, the significance of the status of the deed is still probably more theoretical than real. *Watson v. Chilton*, 14 N.C. App. 7, 187 S.E.2d 482 (1972); *Tharpe v. Holcomb*, 126 N.C. 365, 35 S.E. 608 (1900); *Breeden v. McLaurin*, 98 N.C. 307, 4 S.E. 136 (1887).

166. "The possession [of a person other than an original cotenant] is notice to the cotenants

reservations about the present rule is evidenced by their refusal to extend it to situations where the instrument under which the transferee entered into possession was executed pursuant to a judicial sale for partition¹⁶⁷ or foreclosure¹⁶⁸ but was defective due to the failure to make all the cotenants parties to the action. In such cases, the instrument is deemed to constitute color of title and allows the transferee to acquire sole title in seven years despite the fact that his possession in such a case is no more subjectively "hostile" and provides no greater notice to the non-participating cotenants than when it is maintained under an instrument voluntarily executed by a cotenant.

Unlike the previously discussed "recordation limitation," a rule which denies a deed executed by a cotenant the force and effect of color of title even when it purports to convey sole ownership does not seem justifiable. An approach which restricts a finding of ouster to those cases in which the claimant in possession under such an instrument is not one of the original cotenants, or so closely identified with one of them that his possession could reasonably be relied upon by the others as being consistent with and not hostile to their rights, would appear to adequately meet any justifiable concern about protecting the interests of the cotenants who are not in possession. The mere fact that property is owned in common, rather than individually, is not a sufficient basis for continuing to adhere to a rule that arose when the methods of travel and communication available to the average person made it somewhat reasonable for a cotenant to remain absent for years on the assumption that his co-owner neither would nor could jeopardize his interest by some unilateral action less than twenty years in duration. Today there appears to be no real reason not to adopt the majority position and thus require a cotenant to discover that the possession of his property has fallen into the hands of a "stranger" and take the necessary steps to protect his interest before a period of seven, rather than twenty years has elapsed.

out of possession sufficient to put them upon inquiry and to charge them with the knowledge that would have been received from such inquiry." *West v. Evans*, 29 Cal.2d 414, 175 P.2d 219, 221 (1947). See also 4 H. TIFFANY, *supra* note 50, § 1185, at 932.

167. *Amis v. Stephens*, 111 N.C. 172, 16 S.E. 17 (1892); *McCulloh v. Daniel*, 102 N.C. 529, 9 S.E. 413 (1889).

168. *Johnson v. McLamb*, 247 N.C. 534, 101 S.E.2d 311 (1958). In the *Johnson* case, the court noted that North Carolina "stands alone" in its adherence to the rule that a deed executed by a cotenant which purports to convey sole ownership does not constitute color of title such that possession thereunder constitutes an ouster of the other co-owners. The court went on to state that this rule should not

be carried beyond the necessities of the particular class of cases to which it has been applied, but confined strictly within its proper limits; otherwise we may destroy titles by a too close attention to technical considerations growing out of this particular relation of tenants in common, and more so, we think than is required to preserve their rights.

Id. at 537, 101 S.E.2d at 313, quoting *John L. Roper Lumber Co. v. Richmond Cedar Works*, 165 N.C. 83, 85, 80 S.E. 982, 983 (1914).

PART THREE: SOME UNRESOLVED QUESTIONS

Despite the multitude of cases dealing with various aspects of the doctrine of color of title, it is clear that not all the questions have as yet been resolved with respect to the doctrine's meaning and operation. The final section of this article briefly examines three such questions. The first is whether a deed of gift which has been rendered void due to its failure to be recorded within two years of its making may be asserted as color of title. The second is whether a quitclaim deed may be asserted as color of title. The final question to be addressed deals not with the existence of color of title but with its effect upon the type of concurrent estate acquired by adverse possession when an instrument which constitutes color of title purports to convey title to grantees who are husband and wife.

As a general rule, registration of a deed is required only to protect the grantee from the claims of purchasers from and lien creditors of the grantor and is not essential to the validity of the deed as between the grantor and the grantee.¹⁶⁹ However, North Carolina by statute¹⁷⁰ requires that a deed of gift be recorded within two years of its making or it becomes absolutely void, even as between the grantor and the grantee.¹⁷¹ A question that has arisen, but has yet to be definitely resolved, is whether a deed of gift that ultimately becomes void due to a failure to be timely recorded may constitute color of title so as to enable the grantee to acquire title by seven years of adverse possession. In a 1953 case, *Justice v. Mitchell*,¹⁷² the court after "conceding, but not deciding, that the unregistered deed of gift after it became void was color of title as between the grantor and the grantee"¹⁷³ was able to side-step the question on the basis that the grantee had been in adverse possession of the property in dispute for less than seven years.

Although the *Justice* case did not resolve the question of whether a void deed of gift could constitute color of title, the court did make it quite clear in that case that, until two years had elapsed after the deed was made, it could not be considered color of title and the grantee's possession thereunder was not adverse because during such time the deed was valid and, therefore, the grantor had no cause of action in ejectment against his grantee.¹⁷⁴ With that logical and reasonable limitation in mind, there does not appear to be any serious objection to the

169. *Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939); *Glass v. Lynchburg Shoe Co.*, 212 N.C. 70, 192 S.E. 899 (1937).

170. N.C. GEN. STAT. § 47-26 (1976).

171. *Muse v. Muse*, 236 N.C. 182, 72 S.E.2d 431 (1952); *Turlington v. Neighbors*, 222 N.C. 694, 24 S.E.2d 648 (1943).

172. 238 N.C. 364, 78 S.E.2d 122 (1953).

173. *Id.* at 367, 78 S.E.2d at 125.

174. *Id.* at 366, 78 S.E.2d at 124.

grantee's ability to assert a void deed of gift as color of title. It is true that it is the failure of the grantee to record that results in his need to base a claim of ownership on adverse possession, but since the deed would still be subject to the limitation that an unrecorded deed cannot be asserted as color of title against purchasers for value from the same grantor who have recorded or against the grantor's lien creditors,¹⁷⁵ the rights of such third parties would not be further jeopardized by allowing a void deed of gift to constitute color of title.

A second question which has arisen with respect to the existence of color of title is whether a quitclaim deed may constitute color of title.¹⁷⁶ The first time the case of *Price v. Whisnant*¹⁷⁷ was before the state supreme court, the court was concerned with the issue of constructive possession by the plaintiff and directly referred to his quitclaim deed as "color of title."¹⁷⁸ However, as a result of an error in the trial court's charge dealing with the burden of going forward and the issue of constructive possession, a new trial was ordered. After the new trial again resulted in a verdict of title by adverse possession in the plaintiff, the court was again faced with an appeal by the defendant.¹⁷⁹ This time, the court held that the defendant's motion for a nonsuit should have been granted on the basis that the adverse claimant had failed to establish that his possession of the property described in his quitclaim deed was continuous and uninterrupted for a seven-year period. This finding made it unnecessary to consider and determine "whether a quitclaim deed that merely releases and quitclaims any interest the grantors may have in the described premises (and not purporting to convey anything), is or is not color of title."¹⁸⁰ The court went on to note that its statements in the prior appeal to the effect that the quitclaim deed was color of title were not determinative and a ruling on the question was reserved until it was necessary to the decision of a case.

North Carolina does not have a history of regarding quitclaim deeds as inferior to warranty deeds as a means of effectuating transfers of title. Not only have they consistently been held effective to convey valid title,¹⁸¹ but they have also been held effective to give a title superior to that of a prior warranty deed when the grantee under the quit-

175. See *supra* text accompanying notes 124-143.

176. The view adhered to in many jurisdictions is that a quitclaim deed may constitute color of title. See e.g., *Whitehead v. Bennett*, 92 Colo. 549, 22 P.2d 168 (1933); *Miles v. Blanton*, 211 Ga. 754, 88 S.E.2d 273 (1955); *Thurmond v. Espalin*, 50 N.M. 109, 171 P.2d 325 (1946); *Morrison v. Hawksett*, 64 N.W.2d 786 (N.D. 1954); *Graniteville Co. v. Williams*, 209 S.C. 112, 39 S.E.2d 209 (1946); *Porter v. Wilson*, 389 S.W.2d 650 (Tex. 1965).

177. 232 N.C. 653, 62 S.E.2d 56 (1950).

178. "The quitclaim deed was color of title to 64.4 acres of land." *Id.* at 648, 62 S.E.2d at 59.

179. 236 N.C. 381, 72 S.E.2d 851 (1952).

180. *Id.* at 388, 72 S.E.2d at 856.

181. *Hayes v. Ricard*, 245 N.C. 687, 97 S.E.2d 105 (1957).

claim deed is a subsequent purchaser for value who records first.¹⁸² There is even authority that under some circumstances a grantee under a quitclaim deed can invoke the doctrine of estoppel by deed.¹⁸³ Thus, there appears to be some basis for believing that when the issue is finally resolved, North Carolina will adopt the majority view that a quitclaim deed constitutes color of title. However, the language of the court in the *Price* case indicates that in reaching that decision, the court may well differentiate between quitclaim deeds whose operative words of conveyance include the terms "bargain and sell" or "convey" and those whose operative words are limited to "release, remise and quitclaim," allowing only the former to constitute color of title.¹⁸⁴

The most interesting question with respect to the doctrine of color of title which remains to be resolved deals not with its existence but with its effect on the type of title acquired by adverse possession. Although the concurrent estate known as tenancy by the entirety is no longer recognized in many states,¹⁸⁵ it continues to exist and, in fact, thrive in North Carolina. Due to the presumption in this state that a conveyance or devise of land to persons who are husband and wife creates a tenancy by the entirety,¹⁸⁶ it constitutes the most common form of land ownership among married couples.¹⁸⁷ Thus, the final question addressed in this section is whether the title acquired by adverse possession under an instrument which constitutes color of title and names as grantees two persons who are husband and wife should be deemed to be held by them as tenants in common or tenants by the entirety.¹⁸⁸

182. *Id.* at 692, 97 S.E.2d at 109.

183. *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 158 S.E.2d 7 (1967); *Harrell v. Powell*, 251 N.C. 636, 112 S.E.2d 81 (1959).

184. This distinction is alluded to in *Justice v. Mitchell*, 238 N.C. 364, 78 S.E.2d 122 (1953). The rationale would appear to be that in the absence of words of conveyance such a deed would fail to meet the requirement of purporting to convey title. See *supra* text accompanying notes 92-101.

185. "The jurisdictions, besides North Carolina, recognizing tenancy by the entirety are: Arkansas, Delaware, District of Columbia, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming," 2 R. LEE, NORTH CAROLINA FAMILY LAW, § 112, at 36, n.7 (1980). However, only Massachusetts and Michigan continue to recognize it in its pure common-law form. Comment, *Real Property—Tenancy by the Entirety in North Carolina: An Idea Whose Time Has Gone?*, 58 N.C. L. REV. 997 (1980) [hereinafter cited as Comment, *Real Property*].

186. *Freeze v. Congleton*, 276 N.C. 178, 171 S.E.2d 424 (1970); *Jernigan v. Stokely*, 34 N.C. App. 358, 238 S.E.2d 318 (1977).

187. It has been estimated that ninety percent of the married couples owning homes in North Carolina hold title as tenants by the entirety. See LEE, *supra* note 185, s 112, at 37.

188. See *Preston v. Smith*, 41 Tenn. App. 222, 293 S.W.2d 51 (1956) in which the court affirmed the Chancellor's decree that the estate acquired by the joint adverse possession (without color of title) of a husband and wife was a tenancy in common, rather than a tenancy by the entirety. The rationale for the decision was that due to the requirement of "unity of title," an estate by the entirety "could not arise by operation of the statutes of limitation but . . . only from devise, deed or other instrument." 41 Tenn. App. at 245, 293 S.W.2d at 61.

As one writer noted, *Preston* was the first case "to present the problem of the concurrent estate

On purely technical grounds, there appears to be no obstacle to resolving the question in favor of tenancy by the entirety. In addition to the unity of possession¹⁸⁹ which is inherent in any form of concurrent ownership,¹⁹⁰ the other four unities required for a tenancy by the entirety¹⁹¹ would appear to be met when title is acquired by adverse possession under color of title. The transferees will acquire title at the same time, the expiration of the statutory period which bars the owner's ejectment action; they will derive their title from the same source, the instrument which constitutes color of title and forms the basis of their claim; they will have identical interests in the property and they will have unity of person by virtue of the marital relationship.

Although there have been serious policy questions raised with respect to North Carolina's continued adherence to the tenancy by the entirety in its common-law form,¹⁹² the legislature has never seen fit to abolish it.¹⁹³ A statute enacted in 1982,¹⁹⁴ which equalizes the rights of the parties with respect to possession, rents and profits,¹⁹⁵ makes no attempt to modify or abolish two of the most significant incidents of the

acquired by joint adverse possession of husband and wife." 55 MICH. L. REV. 1192 (1957). Perhaps because of this, the case has generated a great deal of comment, most of it critical. See e.g., Note, *Real Property: Cotenancy: Husband and Wife: Adverse Possession*, 43 CORNELL L. REV. 134 (1957); Note, *Real Property: Adverse Possession-Tenancy in Common or Tenancy by Entirety?* 24 TENN. L. REV. 892 (1957); Note, *Real Property, Adverse Possession by Husband and Wife Does Not Ripen into a Tenancy by the Entirety*, 10 VAN. L. REV. 460 (1957).

189. Unity of possession is the common right of every cotenant to possess and enjoy the property. 2 AMERICAN LAW OF PROPERTY, *supra* note 26, § 6.1, at 6. Despite the requirement of "exclusive possession," two persons can acquire title by adverse possession if they claim title jointly. *Preston v. Smith*, 293 S.W.2d 51, 41 Tenn. App. 222 (1956); *Conneaut Lake Park v. Klingensmith*, 362 Pa. 592, 66 A2d 828 (1949); *Patten v. Rodgers*, 417 S.W.2d 837 (Tex. Civ. App. 6th Dist. 1967).

190. 2 AMERICAN LAW OF PROPERTY, *supra* note 26, § 6.1, at 6.

191. In addition to unity of possession, a tenancy by the entirety requires the unities of time, title, interest and person. *Id.* at 23-25.

192. See, Comment, *Real Property supra* note 185, at 999-1006, in which the author criticizes North Carolina's continued adherence to the common-law form of tenancy by the entirety and advocates legislative or judicial action to abolish or modernize the estate.

193. Not only has the legislature never attempted to abolish tenancy by the entirety, but in June, 1982, it enacted a statute which codifies the existing presumptions in favor of the estate by providing that

A conveyance of real property, or any interest therein, to a husband or wife vests title in them as tenants by the entirety when the conveyance is to:

- (1) a named man "and wife," or
- (2) a named woman "and husband," or
- (3) two named persons, whether or not identified in the conveyance as husband or wife, if at the time of conveyance they are legally married.

N.C. GEN. STAT. § 39-13.6(b) (1982).

194. *Id.*

195. Prior to the enactment of N.C. GEN. STAT. § 39-13.6, North Carolina had followed the common law view that the husband has the exclusive right to possession, rents and profits from property held as tenants by the entirety. See, e.g., *Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973); *Hodge v. Hodge*, 12 N.C. App. 574, 183 S.E.2d 800 (1971); *Lewis v. Pate*, 212 N.C. 253, 193 S.E. 20 (1937).

estate—the right of survivorship¹⁹⁶ and the protection of the property from the claims of the individual creditors of either spouse.¹⁹⁷ As a result, these incidents continue to exist and make the question of the estate acquired by adverse possession highly significant. If the action of the legislature may be interpreted as a tacit recognition that such incidents are still desirable as affording a certain degree of extra protection to the real property most commonly owned by a married couple, their home, it appears that the title acquired by adverse possession maintained under an instrument which had it not been defective would have created a tenancy by the entirety should also qualify for such incidents.

CONCLUSION

Color of title is not an outdated historical curiosity. In light of the benefits which accrue to an adverse claimant when he can establish that his possession was maintained under an instrument which constitutes color of title, the complexities of the doctrine are well worth mastering by attorneys involved in title transactions. Although this article has attempted to point out the various limitations and qualifications on the doctrine and to suggest certain changes which would give added utility and coherence to it, adverse possession under color of title even in its present form represents a significant method of curing defective titles whose potential should not be overlooked. A tiny seed planted by the legislature and nurtured by the courts as a means of promoting the settlement and development of a new colony on the vast and rugged shores of the New World, the doctrine of color of title has taken root and flourished. For almost 200 years the courts of this state have labored to define the doctrine and its operation and for the most part have very good reason to be proud of their handiwork.

196. In *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924), perhaps the most outstanding North Carolina case on tenancy by the entirety, the court explained the operation of the right of survivorship as meaning that

[u]pon the death of one, either the husband or wife, the whole estate belongs to the other by right of purchase under the original grant or devise . . . because he or she was seized of the whole from the beginning, and the one who died had no estate which was descendible or devisable. It does not descend upon the death of either, but the longest liver, being already seized of the whole, is the owner of the entire estate.

Id. at 204-205, 124 S.E. at 568 (citations omitted).

197. Although joint creditors of a married couple can reach property held as tenants by the entirety by executing upon a judgment procured against both spouses on a joint obligation, the individual creditors of either spouse may not do so. *J. WEBSTER, supra* note 1, § 126. See, e.g., *L. & M. Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E.2d 23 (1968); *Edwards v. Arnold*, 250 N.C. 500, 109 S.E.2d 205 (1959); *Johnson v. Leavitt*, 188 N.C. 682, 125 S.E. 490 (1924). Cf. *Lewis v. Pate*, 212 N.C. 253, 193 S.E. 20 (1937).