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# Property -- Adverse Possession -- Color of Title -- Tax Foreclosure Deed to Property Held by Tenants in Common

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**Property—Adverse Possession—Color of Title—Tax Foreclosure Deed to Property Held by Tenants in Common**

In *Johnson v. McLamb*[1] the court reviewed the North Carolina law with respect to deeds as color of title for purposes of adverse possession.[2] This case points out that in North Carolina any written instrument, with one exception, is color of title which on its face professes to pass a title but which fails to do so, either from want of title in the person making it or from the defective mode of the conveyance employed.[3]

The only exception to the general rule set out above is that a deed made by one tenant in common to the entire tract of land is not sufficient to sever the unity of possession and does not constitute color of title as against the cotenants.[4] The registration of the deed in this case is held

[1] 247 N.C. 534, 101 S.E.2d 311 (1958).

[2] Adverse possession, to ripen into title within seven years, must be under color. N.C. GEN. STAT. § 1-38 (1953). Otherwise, a period of twenty years is required. N.C. GEN. STAT. § 1-40 (1953).

[3] 247 N.C. at 536, 101 S.E.2d at 312; First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946); Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941). The topic of this Note is limited primarily to the question of whether or not a tax foreclosure deed is good color of title as to the entire property where the foreclosure proceeding was against only one of the cotenants. However, it should be noted that there are certain requirements which must be met before any deed or other instrument will be color of title against the nonparticipating cotenants, since it is uniformly held that mere purchase of the undivided interest of one of the cotenants does not amount to a disseisin of the other cotenants. In such a case, the grantee is presumed merely to succeed to the title of his grantor. First, it is required that the grantee take actual possession of the land purportedly conveyed to him and that his acts be hostile to the rights of the other cotenants. Price v. Whisnant, 232 N.C. 653, 62 S.E.2d 56 (1950); Lewis v. Covington, 130 N.C. 541, 41 S.E. 677 (1902). Second, notice, either actual or constructive, must be given by the grantee to the cotenants of his adverse and hostile holding. In this respect, North Carolina has said that ordinarily an unregistered deed is not color of title as against parties claiming from the same source, except as between the original parties. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925). See also 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); Austin v. Staten, 126 N.C. 783, 36 S.E. 338 (1900).

[4] 247 N.C. at 536, 101 S.E.2d at 313. The theory of this exception is that the grantee from one tenant in common takes only his share and "steps in his shoes," becoming a tenant in common in his stead; and that therefore it requires twenty years adverse possession of the whole, under claim of ownership, to bar entry by the other tenants in common. See also Cox v. Wright, 218 N.C. 342, 11 S.E.2d 158 (1940). North Carolina is the only state so holding. Other jurisdictions hold that such a deed is color of title. See, *e.g.*, Akley v. Basset, 189 Cal. 625, 209 Pac. 576 (1922); Cook v. Rochford, 60 So. 2d 531 (Fla. 1952); Davis v. Harnesberger, 211 Ga. 625, 87 S.E.2d 841 (1955); Whittington v. Cameron, 385 Ill. 99, 52 N.E.2d 134 (1943); Sams v. Sampson, 255 S.W.2d 626 (Ky. 1953); Davis v. Gulf Ref. Co., 202 Miss. 281, 32 So. 2d 133 (1947), *rehearing granted*, 202 Miss. 808, 34 So. 2d 731 (1948); Stappenbeck v. Mather, 73 Misc. 434, 133 N.Y. Supp. 482 (County Ct. 1911); Medusa Portland Cement Co. v. Lamantina, 353 Pa. 53, 44 A.2d 244 (1945); McIntosh v. Kolb, 112 S.C. 1, 99 S.E. 356 (1919); Hood v. Cravens, 31 Tenn. App. 532, 218 S.W.2d 71 (1948); Easterling v. Williamson, 279 S.W.2d 907 (Tex. Civ. App. 1955); Cochran v. Hiden, 130 Va. 123, 107 S.E. 708 (1921); Laing v. Gauley Coal Land Co., 109 W. Va. 263, 153 S.E. 577 (1930).

not to affect this exception.[5] It has been the policy of the court, as illustrated by the *Johnson* case, to confine the exception to this class of cases.

In the *Johnson* case, there was a foreclosure sale to satisfy a judgment lien obtained against a tenant in common for unpaid taxes assessed against her interest in the property. The city secured the property by bidding in at the foreclosure sale and executed a tax foreclosure deed, which described the entire tract of land, to a stranger. Only the defaulting tenant was made a party to the foreclosure. The court held that such a deed was color of title and that seven years adverse possession of the entire tract, under claim of ownership, was sufficient to bar entry by the other tenants in common who were not made parties to the proceedings.[6]

Another illustration of the policy to confine the exception is found in a partition proceeding to sell land where less than the whole number of tenants in common have been made parties. Here, too, a deed made to a purchaser pursuant to an order of the court is color of title and seven years adverse possession thereunder will bar those tenants in common who were not made parties and who were not under a disability.[7]

Although the policy of the court is clear, it may be useful to consider other types of deeds in respect to color of title where the entire tract of land is conveyed to a stranger[8] but not all of the tenants in common have joined in the conveyance or participated in the proceedings from which the deed issues. North Carolina has not considered most of these other types of deeds. There is a split of authority as to whether or not a quitclaim deed purporting to convey the entire premises is color of title where the grantor owned only an undivided portion, but there was an entry and exclusive possession by the grantee.[9] The great ma-

[5] Bradford v. Bank of Warsaw, 182 N.C. 225, 108 S.E. 750 (1921); Hardee v. Weathington, 130 N.C. 91, 40 S.E. 855 (1902).

[6] *But cf.* Bailey v. Howell, 209 N.C. 712, 184 S.E. 476 (1936), where it was held that the title of tenants in common who are not made parties is not affected by a tax foreclosure suit and commissioner's deed executed in pursuance thereof. See also Howard v. Wactor, 41 So. 2d 259 (Miss. 1950), where one of the cotenants purchased the tax title and then sold to a stranger and it was held that the stranger became a cotenant.

[7] Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941); Roper Lumber Co. v. Richmond Cedar Works, 165 N.C. 83, 80 S.E. 982 (1913); McCulloh v. Daniel, 102 N.C. 529, 9 S.E. 413 (1889).

[8] Somewhat different rules apply where one tenant in common is claiming title to the whole as against his cotenants by adverse possession, or under color of title where he purchased the land at some foreclosure or tax sale or from a stranger to whom he had previously sold his interest. Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1953); Ange v. Owens, 224 N.C. 514, 31 S.E.2d 521 (1944); Winstead v. Wollard, 223 N.C. 814, 28 S.E.2d 507 (1944); Bailey v. Howell, 209 N.C. 712, 184 S.E. 476 (1936). The basic difference is in the presumption that the cotenant is holding for the benefit of all of the cotenants.

[9] It was held color of title in the following cases: Cook v. Rochford, 60 So. 2d

jority of cases found hold that a foreclosure deed at an execution sale purporting to convey land is color of title to the whole although in fact the title of all the cotenants did not pass.[10] Generally speaking, an executory contract to sell land by one of the cotenants and entry and possession of the same by the expectant grantee has been held to be color of title[11] except where a husband alone executes a contract to convey property held jointly with his wife.[12] Even a will may be color of title. For example, a husband and wife purchased lands as tenants in common and after the husband's death the wife remarried. She devised the property in whole to her stepdaughter, the daughter of her second husband by his first wife. It was held that the daughter acquired title by adverse possession under color of title as against the heirs of the first husband.[13] Generally, a mortgage deed to the whole by a tenant in common who is the only one in possession is not color of title from the time of the mortgage as against his cotenants and in favor of the mortgagee who later enters into possession unless there is an actual ouster of the other cotenants by the mortgaging tenant.[14] However, North Carolina seems to hold that in the latter case the mortgage deed is not color of title as against the cotenants on the ground that the mortgagee when he does get possession has stepped into the shoes of the mortgaging tenant.[15] But a purchase at a mortgage foreclosure sale

531 (Fla. 1952); Tillotson v. Foster, 310 Ill. 52, 141 N.E. 412 (1923); Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946); Morrison v. Hawksett, 64 N.W.2d 786 (N.D. 1954); Moore v. Slade, 194 Okla. 143, 147 P.2d 1006 (1944); Lloyd v. Mills, 68 W. Va. 241, 69 S.E. 1094 (1911). *Contra,* Liles v. Pitts, 145 La. 650, 82 So. 735 (1919); Edwards v. Bishop, 4 N.Y. 61 (1850).

[10] Call v. Phelps, 20 Ky. L. Rep. 507, 45 S.W. 1051 (1898); Westmoreland v. Curbello, 58 N.M. 622, 274 P.2d 143 (1954); Bradshaw v. Holmes, 246 S.W.2d 296 (Tex. Civ. App. 1951). *Contra,* Curtis v. Barber, 131 Iowa 400, 108 N.W. 755 (1906) (sheriff's deed).

[11] Rose v. Ware, 115 Ky. 420, 74 S.W. 188 (1903); Clapp v. Bromagham, 9 Cow. 530 (N.Y. 1827); Lloyd v. Mills, 68 W. Va. 241, 69 S.E. 1094 (1911).

[12] McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S.E. 508 (1903).

[13] Harriss v. Howard, 126 Ga. 325, 55 S.E. 59 (1906); Wallace v. McPherson, 187 Tenn. 333, 214 S.W.2d 50 (1949). *But see* Hicks v. Bullock, 96 N.C. 164, 1 S.E. 629 (1885), where land was left to a trustee to receive the profits and pay them over to one person during his life, and after his death to convey the legal estate to certain remaindermen. It was held that one of the remaindermen could not get a possession adverse to the trustee and his co-remaindermen by taking possession under a deed from the person entitled to receive the rents for life. Such possession does not become adverse until after the death of the person entitled to the rents for life; and even then, an adverse possession for twenty years by one tenant in common is necessary to bar his cotenants.

[14] Livingston v. Livingston, 210 Ala. 420, 98 So. 281 (1923); Harriss v. Howard, 126 Ga. 325, 55 S.E. 59 (1906); King v. Hill, 141 Tex. 294, 172 S.W.2d 298 (1943).

[15] In Bailey v. Howell, 209 N.C. 712, 184 S.E. 476 (1936), it was held that a mortgage executed on the entire tract by one tenant in common in possession was not color of title as against the cotenants. One tenant in common listed the land for taxes in her name and thereafter the land was sold for taxes and deed executed by the sheriff to defendant; but the sheriff's deed was void as being without authority of law. A few days after the execution of the sheriff's deed, defendant

under a deed purporting to convey the whole and entry and possession under such foreclosure deed constitute color of title.[16] No cases have been found which determine the question of whether or not a void deed of gift may be color of title.[17]

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**Railway Labor Act—Representation of Racial Minority Groups in Bargaining and Contract Administration Without Discrimination**

In *Conley v. Gibson*,[1] petitioners, Negro members of the Brotherhood of Railway and Steamship Clerks, were segregated into a separate local union. They brought a class action for themselves and other Negro employees similarly situated against the union, claiming rights arising under the Railway Labor Act.[2] The union had been designated as the exclusive bargaining representative under the act.

The collective bargaining agreement which had been negotiated by the union with the company contained among other provisions a uniform seniority clause; and a summary dismissal of an employee without cause would be a breach of the collective bargaining agreement which normally would be challenged by the union through the grievance procedure.

In substance petitioners alleged that they were discharged by the railroad in violation of the seniority agreement, ostensibly on the ground that their jobs were being abolished. They alleged that in reality their jobs were not abolished, but that the vacancies were immediately filled with white men with the exception of a few Negroes who were rehired for their old jobs with a loss of seniority. The company explained that after abolishing petitioners' jobs it found it necessary to "create" certain new positions. Petitioners alleged that the union failed to protest their discharge, protect their jobs, and process their grievances as they would have those of white employees, all "according to plan."

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reconveyed the land to the tenant in common and took a mortgage back in himself. Thereafter the mortgage was foreclosed and the property bid in by defendant. He transferred the land to a stranger who subsequently reconveyed it to him. The tenant in common listed the land for taxes and remained in possession of the land throughout. The cotenants instituted partition proceedings and defendant claimed sole seisin, basing his claim of title upon seven years adverse possession under color of title.

[16] Dew v. Garner, 207 Ala. 353, 92 So. 647 (1922); Bradshaw v. Holmes, 246 S.W.2d 296 (Tex. Civ. App. 1951); Schlarb v. Castaing, 50 Wash. 331, 97 Pac. 289 (1908). *But cf.* Bailey v. Howell, *supra* note 15.

[17] The court raised the question in Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953), but did not answer it since under the facts if it were color of title it would have been destroyed when claimant was made a cotenant under a will devising the property.

[1] 355 U.S. 41 (1957).

[2] 44 STAT. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1952).