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NOTES

MARKETABILITY OF TITLE BY ADVERSE POSSESSION
IN NEW YORK

Introduction

“Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it.” Frequently, the most exhaustive explanation of the public policy necessitating prescription statutes, fails to convince the layman of the stability of a title acquired in this manner. This skeptical attitude often induces prospective purchasers of realty to by-pass a prescriptive title for one of record. The prospective vendee’s reluctance is not without basis. Whereas record titles and their histories are readily available for inspection in the public registry, an adverse possessor’s title, and the proof thereof, is recorded only in the files of human memory. Thus as the length of the adverse possession extends, the probability of proving a valid title thereby is proportionately weakened.

The vendor’s title may factually meet all the criteria necessary to move a court of equity to declare his title marketable and thus grant specific performance but mustering sufficient proof thereof may border on impossibility. However, while the court may stamp such title marketable, the reluctant purchaser will, in all probability, be unable to market it with facility.

The most pertinent questions which present themselves to both parties are: 1. What circumstances influence the court in its determination of a title’s marketability? 2. Is there any method by which outstanding dormant claims to the property may be determined and the proof of the adverse possessor’s title perpetuated?

Acquiring a Marketable Title

Of paramount importance in determining a title’s marketability, is the establishment of the facts upon which the title is allegedly based. Although it would seem that the requisites for acquiring

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1 Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918).
2 The purpose of the adverse possession doctrine is not to reward the diligent or penalize the negligent but rather to “... automatically ... quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.” *Ibid*.
3 Titles held by adverse possession are in disfavor with prospective purchasers of real property. *See Crocker Point Ass'n v. Gouraud*, 224 N. Y. 343, 350, 120 N. E. 737, 738 (1918).
4 The possession must be continuous, open, notorious and hostile to the claim of the true owner. *See Belotti v. Bickhardt*, 228 N. Y. 296, 127 N. E. 239 (1920); *Walsh, The Law of Real Property* 784 (2d ed. 1937). A title by adverse possession must be clearly shown to have complied with all these conditions before it can be marketable. *See Bliss v. Johnson*, 94 N. Y. 235, 241 (1883).
title under the ancient doctrine of adverse possession would, by this
time, be well established, judicial dispute remains. A recent Court
of Appeals decision, by a four to three vote, revitalized a heretofore
present but neglected element for acquiring a prescriptive title, viz.,
claim of right. The result in that case tends to complicate matters
concerning the facts necessary to be present to establish that statu-
tory requisite. When a determination of the elements necessary to
constitute an effective adverse possession foments a vigorous dissent
in the highest court of a state, it is easily understandable why the
prescriptive owner suffers from a feeling of "title insecurity."

Assuming that the adverse possessor has fulfilled all the require-
ments, and he is now invested with a good title, does it follow that
this title is marketable? Prior to the merger of law and equity there
existed an important distinction between a good title and a marketable
title. In a suit at law, to recover a down payment made pursuant
to a contract for the purchase of real property, a judgment would
be rendered for the defendant-vendor if he could show good title in
himself. At law it was the actual validity or invalidity of the ven-
dor's title which governed; the presence of invalid claims to the
reality did not detrimentally affect the defendant's title.

6 Under the early New York law, "claim of title" was an essential ele-
ment to a valid adverse possession in addition to the other require-
ments. Smith v. Burtis, 9 Johns. 174 (N. Y. 1812). Later cases, however, presumed the
"claim of right" from the existence of the ordinary elements, open, notorious
cultivation, etc. See La Frambois v. Jackson, 8 Cow. 589, 603 (N. Y. 1826).
In the recent case of Van Valkenburgh v. Lutz, supra note 5, the court has
revived the old rule requiring "claim of right" as a separate element, without
defining "claim of right."

7 Baker v. Oakwood, 123 N. Y. 16, 25 N. E. 312 (1890); see Millard v.
McMullin, 68 N. Y. 345, 350 (1877). Since a "lost" grant is presumed in
these cases, title founded upon adverse possession is sufficient to enable its
holder to maintain ejectment even against the record or former owner. See
Barnes v. Light, 116 N. Y. 34, 37, 22 N. E. 441, 442 (1889). Many states
have a "vesting" type statute which expressly takes the title from the true
owner and vests it in the adverse possessor. In New York, however, the gov-
erning statute is merely a statute of limitations cutting off the true owners
remedy after 15 years. But case law in New York has given the same effect
to adverse possession as those states which have a "vesting" type statute. See

to the merger of law and equity, a good title, at law, meant one against which
there existed no valid claim. If a claim against the property could be shown
to be invalid the title would be good and the purchaser could not recover his
down payment. But in equity the actual validity or invalidity of the claim
did not control since equity would not compel a purchaser to take a title
which might involve him in future litigation, regardless of the probable out-
come of the dispute. See Brokaw v. Duffy, 165 N. Y. 391, 398, 59 N. E. 196,
198 (1901); WALSH, EQUITY 381 (1930); CLARK, PRINCIPLES OF EQUITY
172 (2d ed. 1948).

9 See The Methodist Episcopal Church Home v. Thompson, 108 N. Y.
618, 622, 15 N. E. 193, 195 (1888), citing Romilly v. James, supra note 8 at
1040. CLARK, PRINCIPLES OF EQUITY, supra note 8.
Equity courts, however, recognized a distinction between good and marketable titles. Notwithstanding the actual validity of the title, an equity court would deny a vendor's bill for specific performance if it reasonably appeared that the purchaser might subsequently become embroiled in litigation. Although the probability that the purchaser would be successful in the litigation was great, it did not enhance the title's marketability, since it was felt that equity should not compel a vendee to purchase a lawsuit. Thus, it became apparent that a title may be good in fact, and yet not marketable. The rule established, subsequent to the merger of law and equity, is well settled. If nothing is stated to the contrary, a contract for the sale of land is not fully performed unless the vendor tenders a title which is both good and marketable.

Establishing Marketability

The first task facing the plaintiff-vendor in his action for specific performance is that of proving his title. Clear proof of adverse possession for the requisite number of years, absent any outstanding claim or suspicion of a claim, makes a title which a purchaser may not refuse. Stronger, clearer proof of a prescriptive title is required of the vendor, in these suits, than would be necessary for him to produce in defending an action of ejectment brought by the record owner. Concerning the quantum of the evidence required of the vendor in his suit for specific performance, one court has said, "... the proof should be so clear, as to the ability of the vendor to convey the title, as to render it the duty of a court to instruct a jury to find the fact of its existence." In the extreme cases, where marketability or unmarketability is patent, there is little divergence of opinion. Thus, where adverse

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12 Ibid.
13 Id. at 597, 22 N. E. at 236; Irving v. Campbell, 121 N. Y. 353, 358, 24 N. E. 821, 822 (1890); see also note 8 supra.
14 See The Methodist Episcopal Church Home v. Thompson, supra note 9.
17 See Carey v. Riley, 121 Misc. 234, 236, 201 N. Y. Supp. 151, 153 (Sup. Ct. 1923); Ottinger v. Strasburger, 33 Hun 466, 469 (N. Y. 1884), aff'd, 102 N. Y. 692 (1886).
possession for forty-five years was clearly shown with no outstanding claim or suspicion of a claim, the title was held marketable. But, where a vendor of property claimed a fourteen-foot strip by adverse possession, the fact that the record owner still claimed title and purported to hold a lease given by the vendor's wife, cast the title into such doubt that it was held unmarketable. It is in the middle areas, where the titles' marketability is latent, that most of the dissension occurs.

Where the adverse possessor formerly held the property as a joint tenant or a tenant in common, an objection frequently raised to his title is the possibility of a co-tenant's claim to the property remaining. In Kielbinski v. Sitko, it was held that the mere fact that the plaintiff's testator, who was formerly a tenant in common, had been in exclusive possession for more than twenty-eight years did not, per se, render his title marketable. When one seeks to establish adverse possession against his co-tenants, he must show either an ouster in fact or one presumed from an exclusive possession under claim of full ownership of which all the co-tenants have knowledge. Since there exists a presumption that a tenant occupies the property with the permission of his co-tenants, in order to establish a title by adverse possession, the former's hostile occupancy would have to be known to the latter.

Usually, where a faulty description in the deed offered by the plaintiff-vendor can only be cured by parol evidence that he has adversely possessed the omitted or misdescribed parcels for the requisite period, the title will be unmarketable. This result follows logically from the rule that the extent of a claim of title under a written instrument is measured by the description therein.

Further Difficulties

As previously noted, a marketable title is one which is reasonably free from the risk of future litigation. Therefore, where it is

21 A recent amendment to the Civil Practice Act, to enhance the marketability of titles claimed by former co-tenants, has limited this presumption of dual occupancy to fifteen years. Thus, apparently thirty years of exclusive possession would seem to destroy the possibility of co-tenant's claims to the property remaining. N. Y. CIV. PRAC. ACT § 41-a. See 1949 LEG. DOC. NO. 5(J), REPORT, N. Y. LAW REVISION COMMISSION 709 (1949).
23 N. Y. CIV. PRAC. ACT § 37.
established that remaindermen, heirs or devisees were in existence at the time the record owner lost his title to the land to the vendor by reason of that person's adverse possession, the onus is upon the vendor to show that these persons are barred from asserting their claims, either by death or by operation of law. In New York, the real property statute of limitations does not begin to run against infants until they have reached their majority. Thus, the vendor assumes a burden in attempting to show that there is no one presently under disability, who may present a legal claim to the property in the future. This task frequently defies accomplishment. However, the impossibility of proof does not excuse its failure.

In the leading New York case of Simis v. McElroy, remainder interests in the property in question were limited to the heirs of the record owner in his will. It did not appear that the mesne conveyances to the plaintiff's remote grantor included the interest of all the remaindermen. Holding the title to be unmarketable, the court reasoned that since the statute of limitations does not begin to run against heirs, taking title by will or descent, until their right of entry has accrued or while they were under any disability, nor against remaindermen until the termination of the prior estate, a mere showing of thirty years adverse possession would not negate the possibility of future litigation. Thus, the doubt cast upon the plaintiff's title must be dispelled by showing that the objections of the defendant have no probable basis.

The case of Freedman v. Oppenheim illustrates the type of proof required to quiet these doubts. In that case the plaintiff produced deeds from four of the five record owners plus strong evidence.

25 See Fleming v. Burnham and Sternberger, 100 N. Y. 1, 2 N. E. 905 (1885); Simis v. McElroy, supra note 24.
27 See note 7 supra.
31 See Simis v. McElroy, supra note 29.
32 Schriver v. Schriver, 86 N. Y. 575, 584 (1881).
33 160 N. Y. 156, 54 N. E. 674 (1899).
34 Id. at 163, 54 N. E. at 675.
35 Id. at 163, 164, 54 N. E. at 675, 676. In explaining the harshness of this requirement, the court points out that the vendor may always describe the title he holds to the vendee, and if he agrees to take it, he will be bound.
36 187 N. Y. 101, 79 N. E. 841 (1907).
that the fifth owner, who was an infant, and might possibly assert a claim against the property, had died.\(^\text{37}\) This removed any reasonable doubt affecting the marketability of the title. Other cases, in determining the legal effect to be given prescriptive titles, have, by a process of mathematical calculations, declared them to be marketable when it appeared that the passage of time negated the possibility of an assertable claim outstanding.\(^\text{38}\) Of course, this discretionary rule is carefully guarded and exercised only where the case is free from all reasonable doubt.\(^\text{39}\)

In an early New York case, fifty-two years of adverse possession was held not sufficient, by itself, to negate the possibility of future claims arising from formerly disabled persons.\(^\text{40}\) The court felt that since the question was one of fact, its solution must be doubtful and a purchaser should not be compelled to take a title in respect to which such a doubt exists.\(^\text{41}\) The general dissatisfaction of the court with such titles was expressed in these words: "[w]here all things are unknown, who can say that anything is improbable?"\(^\text{42}\) Experience shows that titles based upon adverse possession have been subject to dispute from unexpected quarters because the claimant was previously under some disability which had tolled the statute of limitations.\(^\text{43}\) Similarly, where it appears that heirs or remaindermen were in existence during the alleged adverse possession, the plaintiff's burden of showing a marketable title becomes infinitely heavier.

"Absolute certainty is seldom attainable in human affairs; in titles to land almost never."\(^\text{44}\) But public policy demands that alienation of land be facilitated whenever possible.\(^\text{45}\) Therefore, the courts in deciding that a vendor's title, acquired by adverse possession, is marketable, have considered as de minimis a vendee's objection founded upon some "... remote contingency, which, according to

\(^{37}\) Id. at 102, 79 N. E. at 842.

\(^{38}\) Sixty-one years of adverse possession had "... cut the heart out of the possibility of renewal..." Norwegian Evangelical Free Church v. Milhauser, 252 N. Y. 186, 189, 169 N. E. 134, 135 (1929). Where a woman took title to the land at the age of twenty-one and had raised no objection to the vendor's possession for eighty-five years, the court held the title marketable since in all probability she was dead. This, and other considerations, prompted the court to rule that no doubt existed as to the validity of plaintiff's title. Forsyth v. Leslie, 74 App. Div. 517, 77 N. Y. Supp. 826 (4th Dep't 1902); see Hamershlag v. Duryea, 58 App. Div. 288, 292, 68 N. Y. Supp. 1061, 1064 (1st Dep't 1901), aff'd mem., 172 N. Y. 622, 65 N. E. 1117 (1902).

\(^{39}\) See Norwegian Evangelical Free Church v. Milhauser, supra note 38; Ferry v. Sampson, 112 N. Y. 415, 418, 20 N. E. 387, 389 (1889).


\(^{41}\) Id. at 78.

\(^{42}\) Ibid.

\(^{43}\) Ibid.

\(^{44}\) Grady v. Ward, 20 Barb. 543, 546 (N. Y. 1855).

\(^{45}\) Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135 (1918).
ordinary experience, has no basis..." The doubt necessary to render the title unmarketable must be more than a "... mere suspicion ending in a suspicion." What constitutes a reasonable doubt cannot be reduced to fixed and definite principles, for it varies with the circumstances of each case, and it is sufficient to justify the court in withholding this peculiar relief [specific performance] that upon close scrutiny the title seems doubtful.

Marketable in Fact?

The court in Wanser v. DeNyse, refusing to grant specific performance, declared that "[t]he purchaser... should not be compelled to take a title that will not be accepted by an ordinarily prudent man when the property is again offered for sale or as security for a loan." Apparently this test has not been strictly followed in later cases which have declared prescriptive titles marketable, in spite of the fact that experience indicates that this class of titles is not looked upon with favor by trustees of savings banks or insurance companies, nor by prospective purchasers of real property. The phrase, "marketable title," has apparently acquired a dual meaning. The equity court's declaration does not affect the actual marketability of the title. Neither the record owner nor those claiming under him are bound by any finding of marketability at the specific performance proceeding. Furthermore, the method frequently employed to induce the "reasonably prudent man" to purchase property acquired by adverse possession indicates the unpopularity of these titles. The nature of the vendor's title is not revealed until the day of title closing and, should the vendee, upon learning the true facts, refuse to perform, a bill is instituted in equity to compel him to do so.

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46 See Ferry v. Sampson, supra note 39.
48 Id. at 584.
50 188 N. Y. 378, 80 N. E. 1088 (1907).
51 Id. at 380, 80 N. E. at 1088.
54 Neither the person holding record title nor those claiming under him are parties to the specific performance action and therefore they are not precluded from suit by the determination in that action. See Simis v. McElroy, 160 N. Y. 156, 161, 54 N. E. 674, 675 (1899); Fleming v. Burnham and Sternberger, 100 N. Y. 1, 10, 2 N. E. 905, 907 (1886); Battle v. Calavitta, 132 Misc. 48, 50, 228 N. Y. Supp. 624, 628 (Sup. Ct. 1928). See Pound, The Progress of the Law, 33 Harv. L. Rev. 929 (1920).
55 The vendee does not know the nature of the title he has contracted for until the closing day. At that time, he is given affidavits as proof of this title and perhaps a few other details concerning its validity. See Crocker Point
Insurance

Insurance has become an increasingly popular form of title protection in recent years. Contract clauses requiring an "insurable title" from the vendor are not necessarily satisfied by what an equity court considers a marketable title; it must be one which a designated or recognized title company will insure. The refusal of a title company to insure gives the vendee a right to recover his down payment. Since a title insurance company has a right to choose its own risks, it is doubtful whether it will insure a title acquired by adverse possession, resting as it does upon parol evidence and questions of fact. The fact that a title is uninsurable detracts from its actual marketability.

Solution—§§ 500-509 Real Property Law

There are four major factors which may obstruct the actual marketability of titles acquired by adverse possession: 1. The existence of a title on record, valid on its face, inconsistent with the vendor's claim of title. 2. The absence of any recordable proof of vendor's title. 3. The gnawing suspicion of outstanding claims accruing to heirs or remaindermen against whom the statute of limitations has not run. 4. The absence of a method for perpetuating the testimony and proof of the adverse possession.

The most comprehensive solution to these problems may be found in Sections 500-509 of the Real Property Law, under which an action to determine claims to real property may be brought.

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Ass'n v. Gouraud, supra note 53. The evidence collected and ready to accompany the title should be clear and cogent. Trimboli v. Kinkel, 226 N. Y. 147, 151, 123 N. E. 205, 206 (1919). How is the vendee to know that the evidence is "clear and cogent" until he has had time to investigate? His first real assurance of its probative value arrives with the unfavorable decree of specific performance. See Wildove v. Papa, 223 App. Div. 211, 217, 228 N. Y. Supp. 211, 218 (3d Dep't 1928) (dissenting opinion).


Friedman v. Handelman, 300 N. Y. 188, 90 N. E. 2d 31 (1949).

Gilchrest House, Inc. v. Guaranteed Title and Mortgage Co., supra note 56.

Title insurance companies usually prefer title of record which they can search with comparative ease. Adverse possession under color of title might suffice.

N. Y. REAL PROP. LAW §§ 500-509.

Formerly, ejectment was the classic method of trying titles. See Porcher v. Frueauf, 82 N. Y. S. 2d 10, 11 (Sup. Ct. 1948), aff'd mem., 95 N. Y. S. 2d 603 (1st Dep't 1950), appeal dismissed, 302 N. Y. 697, 98 N. E. 2d 489 (1951). An action in ejectment to try title, however, would not preclude heirs, remaindermen, idiots, infants, etc. See note 54 supra. The Torrens
These sections were enacted as "... a medium by which one in possession under claim of title may 'smoke out' a threatening but otherwise inactive adverse claimant and force him to his proof, to the end that, if such adverse claimant fails to show good title in himself, he is forever silenced." The judgment rendered in this action, determining who has title to the property, is conclusive upon each party to the action and every person claiming from, through or under him. It has the additional advantage of being conclusive upon infants and idiots. The statute contains provisions for service by publication, similar to those relating to mortgage foreclosure, thereby permitting the action to be commenced against persons known or unknown. At the conclusion of the action the plaintiff, if successful, has a court adjudication establishing his title which he may put on record.

The statute, in its present form, leaves a few details to be desired. There are no provisions for clearing the record of a prior invalid deed in the same action. It is infrequently utilized for the determination of titles to land held by adverse possession, perhaps because the statute does not readily indicate its availability for this purpose. In 1948 an addition was made to Section 500 which provides for the cancellation of mortgages invalidated by the statute of limitations. A similar amendment, clarifying the procedure for determining outstanding claims to realty held by adverse possession and incorporating therein a provision for the cancellation of invalid...
titles on record, would be a helpful addition to the law of real property.

Equity courts should take cognizance of the fact that the best evidence of a title's actual marketability is a judgment pursuant to Sections 500-509. Specific performance should be denied where the vendor fails to produce such evidence. While this may seem unduly harsh, it must be remembered that the vendor could have avoided litigation by revealing and describing his title in the contract of sale.\(^7\) He should not now be permitted to foist a title upon the vendee which that person would probably not have contracted for had he known all the facts. The equitable maxim, "He who seeks equity must do equity," should act as a guide to the court in its determination of these cases.

\(^{7}\)See Simis v. McElroy, 160 N. Y. 156, 163, 54 N. E. 674, 676 (1899).