

# Marketability of Title by Adverse Possession in New York

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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."<sup>1</sup> Frequently, the most exhaustive explanation of the public policy necessitating prescription statutes,<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Although it would seem that the requisites for acquiring

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<sup>1</sup> Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918).

<sup>2</sup> 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.*

<sup>3</sup> 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).

<sup>4</sup> 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,<sup>5</sup> by a four to three vote, revitalized a heretofore present but neglected element for acquiring a prescriptive title, *vis.*, *claim of right*.<sup>6</sup> The result in that case tends to complicate matters concerning the facts necessary to be present to establish that statutory 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 requirements, and he is now invested with a *good* title,<sup>7</sup> 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.<sup>8</sup> At law it was the actual validity or invalidity of the vendor's title which governed; the presence of invalid claims to the realty did not detrimentally affect the defendant's title.<sup>9</sup>

<sup>5</sup> Van Valkenburgh v. Lutz, 304 N. Y. 95, 106 N. E. 2d 28 (1952).

<sup>6</sup> Under the early New York law, "claim of title" was an essential element to a valid adverse possession in addition to the other requirements. 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."

<sup>7</sup> 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 governing 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 WALSH, THE LAW OF REAL PROPERTY 783 (2d ed. 1937).

<sup>8</sup> See Romilly v. James, 6 Taunt. 274, 128 Eng. Rep. 1035 (1815). Prior 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 outcome 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).

<sup>9</sup> See The Methodist Episcopal Church Home v. Thompson, 108 N. Y. 618, 620, 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> Thus, it became apparent that a title may be good in fact, and yet not marketable.<sup>13</sup> 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.<sup>14</sup>

### *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.<sup>15</sup> 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.<sup>16</sup> 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."<sup>17</sup>

In the extreme cases, where marketability or unmarketability is patent, there is little divergence of opinion. Thus, where adverse

<sup>10</sup> See Pound, *The Progress of the Law*, 33 HARV. L. REV. 929, 933 (1920); Note, 22 NOTRE DAME LAW. 127, 129 (1946).

<sup>11</sup> See *Moore v. Williams*, 115 N. Y. 586, 592, 22 N. E. 233, 234 (1889).

<sup>12</sup> *Ibid.*

<sup>13</sup> *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*.

<sup>14</sup> See *The Methodist Episcopal Church Home v. Thompson*, *supra* note 9. "Why should a purchaser be compelled to pay for a title he is not bound to take?" *Moore v. Williams*, *supra* note 11 at 597, 22 N. E. at 236. See also *Brokaw v. Duffy*, 165 N. Y. 391, 398, 59 N. E. 196, 198 (1901); *Burwell v. Jackson*, 9 N. Y. 535, 542 (1854).

<sup>15</sup> See *Wilkinson v. Schwartz*, 217 App. Div. 797, 216 N. Y. Supp. 771 (3d Dep't 1926); *Condon v. Quigley*, 209 App. Div. 362, 204 N. Y. Supp. 611 (1st Dep't 1924); *Lewine v. Gerardo*, 60 Misc. 261, 112 N. Y. Supp. 192 (Sup. Ct. 1908); *Grady v. Ward*, 20 Barb. 543, 546 (N. Y. 1855).

<sup>16</sup> See *Carey v. Riley*, 121 Misc. 234, 236, 201 N. Y. Supp. 151, 153 (Sup. Ct. 1923).

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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*,<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup>

### *Further Difficulties*

As previously noted, a marketable title is one which is reasonably free from the risk of future litigation.<sup>24</sup> Therefore, where it is

<sup>18</sup> *Grady v. Ward*, 20 Barb. 543 (N. Y. 1855).

<sup>19</sup> *Battle v. Calavitta*, 132 Misc. 48, 228 N. Y. Supp. 624 (Sup. Ct. 1928).

<sup>20</sup> 194 Misc. 408, 87 N. Y. S. 2d 277 (Sup. Ct. 1949).

<sup>21</sup> 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).

<sup>22</sup> See *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527 (1895). Compare *Hartley v. James*, 50 N. Y. 38, 42 (1872), with *Ottinger v. Strasburger*, 33 Hun 466, 469 (N. Y. 1884), *aff'd*, 102 N. Y. 692 (1886).

<sup>23</sup> N. Y. CIV. PRAC. ACT § 37.

<sup>24</sup> See *McAndrew v. Lanphear*, 280 App. Div. 6, 9, 111 N. Y. S. 2d 238, 242 (4th Dep't 1952); *Holdridge v. Roberts*, 195 Misc. 646, 647, 89 N. Y. S. 2d 619, 621 (Sup. Ct. 1949); *Simis v. McElroy*, 160 N. Y. 156, 162, 54 N. E. 674, 675 (1899).

established that remaindermen,<sup>25</sup> heirs or devisees<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup> In New York, the real property statute of limitations does not begin to run against infants until they have reached their majority.<sup>29</sup> 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.<sup>30</sup> This task frequently defies accomplishment. However, the impossibility of proof<sup>31</sup> does not excuse its failure. ". . . [I]f after the vendor has produced all the proof that he can, a rational doubt still remains, a title is not marketable."<sup>32</sup>

In the leading New York case of *Simis v. McElroy*,<sup>33</sup> 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.<sup>34</sup> Thus, the doubt cast upon the plaintiff's title must be dispelled by showing that the objections of the defendant have no probable basis.<sup>35</sup>

The case of *Freedman v. Oppenheim*<sup>36</sup> 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

<sup>25</sup> See *Fleming v. Burnham and Sternberger*, 100 N. Y. 1, 2 N. E. 905 (1885); *Simis v. McElroy*, *supra* note 24.

<sup>26</sup> See *Fuhr v. Cronin*, 82 App. Div. 210, 81 N. Y. Supp. 536 (1st Dep't 1903); *Kahn v. Mount*, 46 App. Div. 84, 61 N. Y. Supp. 358 (1st Dep't 1899); *Ferry v. Sampson*, 112 N. Y. 415, 20 N. E. 387 (1889).

<sup>27</sup> See note 7 *supra*.

<sup>28</sup> *Carolan v. Yoran*, 104 App. Div. 488, 491, 93 N. Y. Supp. 935, 937 (1st Dep't 1905), *aff'd*, 186 N. Y. 575, 79 N. E. 1102 (1906).

<sup>29</sup> N. Y. CIV. PRAC. ACT § 43; see *Simis v. McElroy*, 160 N. Y. 156, 163, 54 N. E. 674, 675 (1899).

<sup>30</sup> *Carolan v. Yoran*, 104 App. Div. 488, 93 N. Y. Supp. 935 (1st Dep't 1905), *aff'd*, 186 N. Y. 575, 79 N. E. 1102 (1906).

<sup>31</sup> See *Simis v. McElroy*, *supra* note 29.

<sup>32</sup> *Schrivver v. Schrivver*, 86 N. Y. 575, 584 (1881).

<sup>33</sup> 160 N. Y. 156, 54 N. E. 674 (1899).

<sup>34</sup> *Id.* at 163, 54 N. E. at 675.

<sup>35</sup> *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.

<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> Of course, this discretionary rule is carefully guarded and exercised only where the case is free from all reasonable doubt.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> 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?"<sup>42</sup> 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.<sup>43</sup> 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."<sup>44</sup> But public policy demands that alienation of land be facilitated whenever possible.<sup>45</sup> 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

<sup>37</sup> *Id.* at 102, 79 N. E. at 842.

<sup>38</sup> 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 *Hamer-slag 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).

<sup>39</sup> See *Norwegian Evangelical Free Church v. Milhauser*, *supra* note 38; *Ferry v. Sampson*, 112 N. Y. 415, 418, 20 N. E. 387, 389 (1889).

<sup>40</sup> *Shultz v. Rose*, 65 How. Prac. 75 (N. Y. 1883).

<sup>41</sup> *Id.* at 78.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Grady v. Ward*, 20 Barb. 543, 546 (N. Y. 1855).

<sup>45</sup> *Ballantine, Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918).

ordinary experience, has no basis. . . ." <sup>46</sup> The doubt necessary to render the title unmarketable must be more than a ". . . mere suspicion ending in a suspicion." <sup>47</sup> What constitutes a reasonable doubt cannot be reduced to fixed and definite principles, for it varies with the circumstances of each case, <sup>48</sup> and it is sufficient to justify the court in withholding this peculiar relief [specific performance] that upon close scrutiny the title seems doubtful." <sup>49</sup>

### *Marketable in Fact?*

The court in *Wanser v. DeNyse*, <sup>50</sup> 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." <sup>51</sup> 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, <sup>52</sup> nor by prospective purchasers of real property. <sup>53</sup> 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. <sup>54</sup> 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. <sup>55</sup>

<sup>46</sup> See *Ferry v. Sampson*, *supra* note 39.

<sup>47</sup> See *Schrivver v. Schriver*, 86 N. Y. 575, 583 (1881).

<sup>48</sup> *Id.* at 584.

<sup>49</sup> See *Shultz v. Rose*, 65 How. Prac. 75, 76 (N. Y. 1883).

<sup>50</sup> 188 N. Y. 378, 80 N. E. 1088 (1907).

<sup>51</sup> *Id.* at 380, 80 N. E. at 1088.

<sup>52</sup> See *Heller v. Cohen*, 15 Misc. 378, 381, 36 N. Y. Supp. 668, 670 (Sup. Ct. 1895), *aff'd*, 154 N. Y. 299, 48 N. E. 527 (1897).

<sup>53</sup> See *Crocker Point Ass'n v. Gouraud*, 224 N. Y. 343, 350, 120 N. E. 737, 738 (1918); *Lincoln Savings Bank v. Schneider*, 105 Misc. 530, 534, 174 N. Y. Supp. 529, 531 (Sup. Ct. 1919).

<sup>54</sup> 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).

<sup>55</sup> 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;<sup>56</sup> it must be one which a designated or recognized title company will insure.<sup>57</sup> The refusal of a title company to insure gives the vendee a right to recover his down payment.<sup>58</sup> Since a title insurance company has a right to choose its own risks,<sup>59</sup> it is doubtful whether it will insure a title acquired by adverse possession, resting as it does upon parol evidence and questions of fact.<sup>60</sup> 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,<sup>61</sup> under which an action to determine claims to real property may be brought.<sup>62</sup>

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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).

<sup>56</sup> See *Gilchrest House, Inc. v. Guaranteed Title and Mortgage Co.*, 277 App. Div. 788, 789, 97 N. Y. S. 2d 226, 228 (2d Dep't 1950), *aff'd mem.*, 302 N. Y. 852, 100 N. E. 2d 46 (1951).

<sup>57</sup> *Weiss v. Sachs*, 112 N. Y. S. 2d 97 (Sup. Ct. 1952).

<sup>58</sup> *Friedman v. Handelman*, 300 N. Y. 188, 90 N. E. 2d 31 (1949).

<sup>59</sup> *Gilchrest House, Inc. v. Guaranteed Title and Mortgage Co.*, *supra* note 56.

<sup>60</sup> Title insurance companies usually prefer title of record which they can search with comparative ease. Adverse possession under *color of title* might suffice.

<sup>61</sup> N. Y. REAL PROP. LAW §§ 500-509.

<sup>62</sup> Formerly, ejectment was the classic method of trying titles. See *Porcher v. Frueauff*, 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<sup>63</sup> 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,<sup>64</sup> he is forever silenced."<sup>65</sup> 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.<sup>66</sup> It has the additional advantage of being conclusive upon infants and idiots.<sup>67</sup> The statute contains provisions for service by publication,<sup>68</sup> similar to those relating to mortgage foreclosure, thereby permitting the action to be commenced against persons known or unknown.<sup>69</sup> At the conclusion of the action the plaintiff, if successful, has a court adjudication establishing his title which he may put on record.<sup>70</sup> No longer must the adverse possessor wait until his title is challenged in order to have its validity adjudicated. By instituting an action pursuant to Sections 500-509, the testimony supporting the validity of his title can be reduced to a final judgment.<sup>71</sup>

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.<sup>72</sup> In 1948 an addition was made to Section 500 which provides for the cancellation of mortgages invalidated by the statute of limitations.<sup>73</sup> 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

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system of title registration presents another possible solution to this problem but the system, as adopted in New York, is in general disfavor and is inadequate for its intended purposes. See Current Comment, 15 N. Y. U. L. Q. Rev. 545 (1938).

<sup>63</sup> See note 6 *supra*.

<sup>64</sup> The person claiming an interest in the land cannot prevail merely by showing the weakness of the plaintiff possessor's title. See *George v. People*, 267 App. Div. 575, 577, 47 N. Y. S. 2d 681, 683 (2d Dep't 1944).

<sup>65</sup> *Id.* at 577, 47 N. Y. S. 2d at 683.

<sup>66</sup> N. Y. REAL PROP. LAW § 507.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Id.* § 505.

<sup>69</sup> *Id.* § 500.

<sup>70</sup> *Id.* § 297-b.

<sup>71</sup> By this method the proof of the title by adverse possession, with its boundaries and testimonies is perpetuated. Thus, the proof of title no longer depends upon fallible memory or *ex parte* affidavits.

<sup>72</sup> One of the few cases involving an action pursuant to §§ 500-509 of the N. Y. Real Property Law, where the plaintiff's title rested on adverse possession is *Park Acres, Inc. v. City of New York*, 36 N. Y. S. 2d 458 (Sup. Ct. 1942), *aff'd mem.*, 266 App. Div. 849, 42 N. Y. S. 2d 236 (2d Dep't 1943).

<sup>73</sup> N. Y. REAL PROP. LAW § 500(4).

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.<sup>74</sup> 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.

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<sup>74</sup> See *Simis v. McElroy*, 160 N. Y. 156, 163, 54 N. E. 674, 676 (1899).