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MARKETABILITY OF TITLES IN FLORIDA¹

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When we consider "marketability of title" in the sense that the words are usually used, *i.e.*, a title that will ordinarily enable the seller to cause a forfeiture of the initial purchase price deposit, or to enforce specific performance, if the purchaser declines to consummate the contract, we must note at the outset that the answer to the problem of what constitutes such a title largely depends upon the terms of the agreement between the seller and purchaser.¹

Although such terms usually are found in the option, or contract to sell, it is true that in every valid agreement to convey land, the law implies the conveyance of a good marketable title unless terms of the agreement exclude such implication.² An agreement to convey by good and sufficient warranty deed, likewise, implies a good title and not merely by instrument in proper form.³ But a good title implied by law does not necessarily mean a clear record title and matter in pais may be offered to cure record defects. Under such an agreement a title by unimpeachable adverse possession⁴ will be approved by the court.

There are many instances where the agreement of the seller is to furnish a clear record title or a title shown by the abstracts to be clear. Under such agreements the courts will usually determine the rights of the parties by the language employed in the agreement and, if the record title is not clear, enforcement cannot be had although the title may from a point of fact be perfectly good.⁵ If, however, the contract between the seller and purchaser

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1. The writer purposely cites or discusses only a few of the many cases in Florida that may be relevant to the propositions stated. Citations of other courts are intentionally meager. The outline presented and thoughts expressed indicate only a profile of the problems involved with the hope that it may be of some help or interest to the reader. No discussion of the remedies of seller and purchaser, where disagreement arises, is considered relevant to this article.

2. *Walker v. Close*, 98 Fla. 1103, 125 So. 521-524 (1929) citing *Wheeler v. Sullivan*, 90 Fla. 711, 106 So. 876 (1925), *Holland v. Holmes*, 14 Fla. 369 (1874). *Frazer v. Boggs*, 37 Fla. 307, 20 So. 245 (1896); *Taylor v. Day*, 102 Fla. 1006, 136 So. 701 (1931); See also *Ellas Investment Co. v. Nobles*, 102 Fla. 475, 135 So. 909 (1931), wherein it was held that the agreement of the parties indicated that the purchaser had agreed to accept such title as the seller had, and recovery of the option payment was denied.

3. *McCaskill v. Dekle*, 88 Fla. 285, 102 So. 252 (1924).

4. *Ibid.*; *Bowden v. Laing*, 103 W. Va. 733, 138 S.E. 449 (1927).

5. *DeHuy v. Osborne*, 96 Fla. 435, 118 So. 161 (1928), points out the distinctions between an agreement requiring vendor to convey a good and merchantable title of record, as distinguished from merely a good and merchantable title.

In *Barclay v. Bank of Osceola County*, 82 Fla. 72, 89 So. 357 (1921), the seller agreed to furnish an abstract showing a merchantable fee simple title. The Court refused

is that a perfect title only will be furnished⁶ the transaction may be enforceable, though the record title be defective.

We come now to the situation where, either by agreement of the parties or by implication of law, a marketable⁷ title is to be furnished. The Florida Supreme Court has approved the definition of marketable title.⁸ This pronouncement has been repeatedly cited by later cases and is clearly in line with what seems to be the clear weight of authority.⁹ But defining a problem and solving a problem are entirely two different things, as every practicing lawyer so well knows. If the contract, either in terms or by legal implication, requires a marketable title to be furnished, then it is very clear that such title need not be a perfect record title.¹⁰ As the definition states that a title to be marketable must be "free from reasonable doubt as to any question of fact or law necessary to its validity,"⁸ the problem is in no sense free from headaches. This is due, of course, to the fact that lawyers, apparently equally learned, may disagree as to what constitutes reasonable doubt. A motivating or contributing factor on the part of the purchaser in litigating the question, as to whether or not he is in law bound by his contract (and no legal criticism because of such litigation is suggested), may be the fact that the financial condition of the purchaser may have changed or the sup-

the offer of the seller to furnish affidavits of adverse possession allegedly sufficient to cure the record defect.

6. In *Felt v. Morse*, 80 Fla. 154, 85 So. 656 (1920), the distinction between "perfect titles" and "perfect record title" is noted, though the record defect was held to have been cured within a reasonable time.

7. "Merchantable" title, and "marketable" title, are ordinarily construed to mean the same. 26 WORDS AND PHRASES 542-543 (1940).

8. *Adams v. Whittle*, 101 Fla. 705, 713, 135 So. 152, 155 (1931), wherein the court, quoting with approval from 27 R.C.L. 489-490, said: "As a general rule a purchaser is not required to accept a conveyance if the title of the vendor is reasonably doubtful. The purchaser is entitled to what is termed a marketable title, and this means not merely a title valid in fact but a title that must be such as to make it reasonably certain that it will not be called in question in the future so as to subject the purchaser to the hazard of litigation with reference thereto and must be free from reasonable doubt as to any question of fact or law necessary to sustain its validity. It must be, as is sometimes said, a title which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence, and which is not subject to such a doubt or cloud as will affect its market value."

9. See WORDS AND PHRASES 534-544 (1940). In the annotation to *Garner v. Union Trust Co.*, 185 Md. 386, 45 A.2d 106 (1945), at 163 A.L.R. 437, "marketable title" is defined as follows: "Generally speaking, a marketable title is one which is free from reasonable doubt both as to matters of law and fact, and is one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would, in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. To be marketable, however, a title need not be absolutely free from every technical or possible suspicion and the mere possibility of a defect which, according to ordinary experience, has no probable basis, does not show an unmarketable title. Moreover, the hazard of litigation must be a reasonable probability to render the title unmarketable, and the mere possibility, or remote probability that there may be litigation with respect to the title is insufficient to render it unmarketable."

10. *McCaskill v. Dekle*, 88 Fla. 285, 102 So. 252 (1924); *Adams v. Whittle*, 101 Fla. 705, 135 So. 152 (1931).

posed values may have slumped between the date of the agreement and the date for consummation.¹¹

It is certain that if matters in pais are relied upon to assure marketability of title, the burden is upon the vendor to procure and furnish them.¹² The courts tell us that an objection to the title must be based on some substantial reason and cannot be visionary or capricious.¹³ To be marketable, the title must be such that there exists no reasonable expectation that the purchaser holding it will be exposed to the hazard of litigation;¹⁴ but if an encumbrance exists that cannot be discharged by the purchaser with a portion of the purchase price without undue trouble or expense on his part he need not accept it.¹⁵ The usual objection urged against an agreement providing for mere "marketable" title, *i.e.*, where matters in pais may be invoked, is that there exists no exact formula by which the rights and obligations of the seller and purchaser may be determined without litigation. This contention is worthy of respect. On the other hand, this type of title is one wherein a controversy, if it arises, is more likely to be settled on the merits of the title¹⁶ as distinguished from a construction of the language employed in the option or contract to sell—the indefeasibility of title not being considered.¹⁷

11. In *McCaskill v. Dekle*, 88 Fla. 285, 102 So. 252 (1924), there existed a stipulation of evidentiary matter indicating unquestioned title by adverse possession under color of title, if admissible. The obligation of the vendor was to convey by good and sufficient warranty deed. Obviously one of the points in litigation was the implied obligation of the vendor, under the wording of his contract. Equally obvious was the fact that since the date of the contract of purchase, values had shrunk considerably, and relief from the purchase would have been a considerable financial benefit.

12. *Adams v. Whittle*, 101 Fla. 705, 135 So. 152 (1931).

13. *DeHuy v. Osborne*, 96 Fla. 435, 118 So. 161 (1928). In *Ringling Estate, Inc. v. White*, 105 Fla. 581, 141 So. 884 (1932), the contract to sell was made in 1925. The abstract showed a 90 day option to purchase in 1911, and no suit or proceeding to enforce or consummate purchase. Objection on such ground was held insufficient to justify rejection by purchaser.

In *Board of Public Instruction v. McDonald*, 143 Fla. 377, 196 So. 859 (1940), it was held that a mortgage made by a complete stranger to the chain of title was not, under the facts and circumstances of that case, sufficient to justify rejection. The Court in *Winkler v. Neslinger*, 153 Fla. 288, 291, 14 So.2d 403, 404 (1943), said: "A marketable title is one free from reasonable doubt in law or fact as to its validity." *Walker v. Close*, 98 Fla. 1103, 125 So. 521, 126 So. 289 (1929); *Adams v. Whittle*, 101 Fla. 705, 135 So. 152 (1931). "The title in question is equal to this test. We think it reasonably certain that it will not be called in question. We mean by this that there is ample showing in this record that it is homestead property subject to all exemptions provided in the Constitution. It may be that those who enjoy the sport of shadow boxing or tinkering with probabilities will attempt to secure a judgment against it but in so far as its homestead character is concerned, the record here galvanizes it from assault."

Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. Supp. 371-374 (1st Dep't 1905) (possibility of action by city to remove encroachment was held to be too remote to effect marketability).

14. *Model Land Co. v. Crawford*, 155 Fla. 323, 20 So.2d 122 (1944).

15. *Taylor v. Day*, 102 Fla. 1006, 136 So. 701 (1931), *James V. Collneck*, 100 Fla. 829, 130 So. 450 (1930).

16. *McCaskill v. Dekle*, 88 Fla. 285, 102 So. 252 (1924); *Winkler v. Neslinger*, 153 Fla. 288, 14 So.2d 403 (1943).

17. "Where the parties have elected to contract with reference to the record title only, the question of title based in part upon adverse possession or other matters in pais is irrelevant to a determination of the rights and liabilities of the parties." *DeHuy v.*

CURATIVE STATUTES

No effort is made in this article to designate or discuss each of the various curative statutes, some of which have been on our books for many years and some of which are more recent. The Bar of Florida is familiar with most of the legislation of this nature. This legislation, which operates upon old defective instruments in the chain of title, would appear to be of real and definite value in promoting marketability regardless of the terms or language employed in the option or agreement of sale.¹⁸

In a Florida case,¹⁹ the court held a statute of repose²⁰ to be inoperative under the existing facts, at least to the extent of assuring marketability. The various and very important statutes providing the impregnable safeguard of adverse possession obviously invoke matters in pais for their efficacy and at once present the inherently difficult question as to when and to what extent the courts will permit reliance thereon in determining marketability because their efficacy may depend upon the terms of the option.²¹

One recent statute,²² intended to be helpful in the program of growing timber throughout the northern and north central portion of Florida, apparently has not yet been the subject of judicial interpretation. While the purpose is unquestionably commendable, the writer's conviction is that it should be relied upon only with great caution.²³

On the whole, our curative statutes have done an excellent and much needed job in promoting marketability and must always be borne in mind by the practitioner dealing with this problem.

TAX TITLES²⁴

It requires no citation of authorities to justify the statement that our earlier tax titles have had a very turbulent career in the jurisprudence of this

Osborne, 96 Fla. 435, 440, 118 So. 161, 162 (1928). To same effect is *Barclay v. Bank of Osceola County*, 82 Fla. 72, 77, 89 So. 357, 358 (1921), where the Court said: "The question is not whether appellant's title was in effect a good or merchantable title, it is whether the abstract of title furnished by him showed 'merchantable fee simple title'."

18. In *James V. Gollneck*, 100 Fla. 829, 130 So. 450 (1930), the reported decision leaves some doubt as to whether or not instruments in the chain of title were in fact charged with the defects claimed, but the court without question affirmed them to be cured, if existing, by Fla. Laws 1925, c. 10169, now FLA. STAT. § 95.26 (1951). The same statute was cited and its curative effect affirmed in *Pinckney v. Morton*, 30 F.2d 885 (5th Cir. 1929).

19. *Model Land Co. v. Crawford*, 155 Fla. 323, 20 So.2d 122 (1944).

20. FLA. STAT. § 95.23 (1951).

21. See note 5, *supra*.

22. FLA. STAT. § 95.25 (1951).

23. Compare *Drawdy Investment Co. v. Leonard*, 158 Fla. 444, 29 So.2d 198 (1947), as illustrative of related factual situations often involved. It will be noted that the statute does not require the co-operative fire control agreement therein referred to, to be made a matter of record.

24. The purpose of the writer is to merely indicate a definite trend toward favorable consideration by investors of tax titles under more recent laws as distinguished from earlier years. No discussion of earlier statutory provisions, and decisions of our courts construing them, is attempted. To do so would not only unduly prolong this article, but would provoke discussion now more or less moot, because the great majority of tax titles of any considerable age have been bulwarked by adverse possession or other curative statutes.

state.²⁵ The fact that regularity of proceedings from assessment to issuance of deed were subject to judicial scrutiny in considerable numbers, such defects being fatal, created a mortality rate sufficient to depreciate value in the field of general investment and thereby impair marketability. In any discussion of the marketability of title it is felt to be more than appropriate that notice should be taken that in more recent years the favor with which tax titles (at least, certain types) are received has improved immeasurably. This does not presume to say that tax titles of the last decade are now on an investors par with fee simple titles, but great and rapid advances to that end are clearly evident.

A definite era of change began in the year 1927, followed by the Futch Act in 1933.²⁶ Titles issuing from the State as result of forfeiture under the so-called Murphy Act²⁷ have met with very considerable favor from the courts. Titles issuing under the process of county foreclosure provided by the so-called Holland Act²⁸ have likewise been afforded a favorable reception by the courts. On the whole it can be safely said that the status of the tax title in Florida, as of today, has grown with remarkable rapidity toward commercial acceptance.²⁹

No case has been found from our court of early vintage wherein a seller, bound under his option to furnish a marketable title, offered his purchaser a tax title unaided by statutory adverse possession or other curative statute and sued for specific performance upon rejection. Such a case (assuming the tax title was in fact good) would raise the question of whether or not what might be called "class reputation" is an element of "marketability." It is easy to conceive that the decisions would have been adverse to the seller.³⁰

On the other hand, if the seller presented the purchaser with a deed under the Murphy Act, or under the Holland Act under facts as outlined above, what would be the attitude of the court today in a suit for specific performance? Though lacking authority the writer would be in no way surprised if the court gave the relief sought. It is certain that such titles are often insured by title insurance companies at this time.

EFFECT OF TITLE INSURANCE

Within the last 25 years the use of title insurance in the conveyancing

25. The prior chain of title can neither help nor prejudice the holder under a tax deed legally issued; it is either a valid legal title or it is a nullity. *Cronin v. Quigley*, 104 Fla. 133, 139 So. 383 (1932).

26. Fla. Laws 1933, c. 16252.

27. FLA. STAT. § 192.35 (1951). See *State ex rel. Hunter v. Culbreath*, 140 Fla. 634, 192 So. 814 (1939) and cases therein cited as to constitutionality and construction. See also *Young v. Ewing*, 151 Fla. 353, 9 So.2d 716 (1942).

28. FLA. STAT. § 192.21 (1951). For effect of Holland Act upon holder of certificates under Murphy Act see *Pinellas County v. Banks*, 154 Fla. 582, 19 So.2d 1 (1944).

29. Due primarily to the fact that in recent years, more statutory emphasis has been placed upon the idea that the right of ownership of property has, as a constant companion, the responsibility of payment of taxes.

30. One of the elements of marketability being that the title commands a full market value.

and mortgaging of real estate has grown very rapidly in Florida. In the writer's home county it is used almost exclusively. It appears that its use is very considerable in all the populous counties of the state and that its use in the less populous areas is increasing. The subject is mentioned because of its practical, as distinguished from its legal, significance. Unless the parties have contracted to accept a properly insured title, the subject of title insurance would appear to have no legal significance. It was mentioned that the seller had procured title insurance in one Florida case,³¹ but only in passing. There was nothing in the decision to indicate that the court attached significance to such fact nor should it have done so.

From the practical angle, the standpoint of the seller, and in the layman's mind it must be admitted that title insurance is making a definite contribution in the matter of marketability in the practical dealings between seller and purchaser. Departure in the option is being made from the old custom of requiring clear, or clear record, or marketable title to one requiring a properly insured title. As heretofore noted, when the record title is broken or marred, marketability inevitably depends, to some extent, upon the mental slant of the attorney. Lawyers of apparently equal learning and experience often disagree upon the difference between substance and shadow. In many instances title insurance, upon satisfactory affidavits of relevant facts, steps into the breach and accepts the danger, if any. It insures the risk and in many instances becomes a decisive factor in consummating the deal. It should be thus, for the existence of insurance of any sort implies the existence of some risk.³²

CONCLUSION

From the foregoing review of at least some of the problems involved in determining the inner qualities and the outside boundaries of the term "marketability" as applied to titles, it is patent that no clear and certain panacea is within the horizon. Since matters in pais, if relied upon, must of necessity be clear and convincing, a twilight zone still exists. For reasons above stated the writer has the feeling, and ventures the prediction, that the problem is becoming less and less litigious.

Decisions heretofore made have been of great help to the practitioner in settling many points. Efficacy of curative statutes is being judicially determined. While clouds will from time to time appear upon the firmament, the subject as a whole will continue to grow less troublesome.

31. *Winkler v. Neilinger*, 153 Fla. 288, 291, 14 So.2d 403, 404 (1943).

32. The hundreds upon hundreds of suits to quiet titles filed in Florida courts within the last 25 years wherein no defendants appeared are but one indication of the great number of apparently good titles, in point of fact, as distinguished from clear record titles. And in many instances the evidentiary facts are by *ex parte* affidavit made so abundantly clear that title insurance companies approve without delay.