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TITLES—TAX DEEDS—MARKETABILITY

Plaintiff purchasers sued to recover earnest money and other expenses and to rescind a contract for the purchase of realty because the abstract showing marketable title could not be delivered as agreed. Plaintiffs appealed from a judgment for the defendant vendor. *Held*, the vendor's abstract, which included only a bare tax deed and did not show prior proceedings on which it was based, was a breach of the covenant to furnish an abstract showing marketable title. *Alexander v. Cleveland*, 79 So.2d 852 (Fla. 1955).¹

A marketable title is one free from liens or encumbrances and dependent for its validity on no doubtful question of law or fact;² it is a title either of record, or, if dependent on facts extrinsic to the record, dependent only upon facts certain to be easily accessible to a vendee at all times in the future should his title be attacked.³ The test of marketability is whether a person of reasonable prudence, familiar with the facts and apprised of the questions of law involved, would, in the ordinary course of business, accept such a title as one which can again be sold to a reasonable purchaser.⁴

The terms of the contract for the purchase of land determine whether the vendor will furnish "marketable title" or "marketable title of record,"⁵ and where the contract requires an abstract showing good and marketable

1. Justices Mathews, Terrell and Roberts dissented.

2. *Shriner v. Fountain*, 157 Fla. 698, 26 So.2d 809 (1946); *Myrick v. Austin*, 141 Kan. 778, 44 P.2d 266 (1925); *Sullivan v. F. E. Atteaux & Co.*, 284 Mass. 515, 187 N. E. 906 (1933); *Bartos v. Czerwinski*, 323 Mich. 87, 34 N.W.2d 566 (1948); *Ogg v. Herman*, 71 Mont. 10, 227 Pac. 476 (1924); *Webster-Art & Strength Building and Loan Ass'n v. Armondo*, 128 N.J. Eq. 219, 15 A.2d 890 (1940); *Pyramid Motor Freight Corp. v. T. Baum & Co.*, 114 N.Y.S.2d 614 (1948); see 55 AM. JUR., *Vendor and Purchaser* § 166 (1946).

3. *VanGundy v. Shewey*, 90 Kan. 253, 133 Pac. 720 (1913); *Buswell v. O. W. Kerr Co.*, 112 Minn. 388, 128 N.W. 459 (1910); *Lampros v. Tenore*, 393, 60 A.2d 80 (1948); *Crocker Point Ass'n v. Gourand*, 224 N.Y. 343, 120 N.E. 737 (1918); *Scott v. Stanley*, 149 Wash. 29, 270 Pac. 110 (1928). Note that this definition distinguishes between marketable title of record, which can not be dependent on matters *in pais*, and marketable title, which may be. Hence a title may be marketable without being of record. But where the vendor has gained his title by adverse possession, and he agrees to furnish marketable title of record, the abstract must contain a quit claim deed from the former record owner or a quiet title suit. On this point see *Willingham Loan and Trust Co. v. Moor*, 160 Ga. 550, 128 S.E. 751 (1925).

4. *Boylan v. Wilson*, 202 Ala. 26, 79 So. 364 (1918); *Adams v. Whittle*, 101 Fla. 705, 135 So. 152 (1931); *Eggers v. Busch*, 154 Ill. 609, 39 N.E. 619 (1895); *Cappel v. Potts*, 192 Iowa 661, 185 N.W. 148 (1921); *Zulver Realty Co. v. Snyder*, 191 Md. 374, 62 A.2d 276 (1948); *Jones v. Hickson*, 204 Miss. 373, 37 So.2d 625 (1948); see 55 AM. JUR., *Vendor and Purchaser*, § 167 (1946).

5. *Mesa Market Co. v. Crosby*, 90 C.C.A. 70, 174 Fed. 96 (1909); *Gwin v. Calegaris*, 139 Cal. 384, 73 Pac. 851 (1903); *Bernstein v. Shain*, 263 Mass. 188, 160 N.E. 671 (1928); *Rabinowitz v. Darnall*, 2 S.W.2d. 930 (Tex. Civ. App. 1928); *Sachs v. Owings*, 121 Va. 162, 92 S.E. 997 (1917).

title, the vendor is obligated to furnish a marketable title of record.⁶ Generally, a title resting in whole or in part upon parol proof of marketability is insufficient to satisfy such a contract.⁷ However, resort may be had to affidavits of creditable persons having personal knowledge of the facts in order to explain apparent breaks or defects in the record chain of title.⁸

The subject of tax deed titles has been treated completely elsewhere.⁹ For the purposes of this note, it is only necessary to point out that a tax deed is valid only after certain statutory requirements¹⁰ have been met.

The existence of a tax deed in the vendor's chain of title does not of itself render the vendor's title unmarketable where no defects in the proceedings leading up to the issuance of the deed are shown.¹¹ An

6. *Alpha Cement Co. v. Slirk*, 142 C.C.A. 424, 227 Fed. 966 (1915), *aff'd* *San Mateo Land Co. v. Elem*, 293 F. 874 (1923); *McDennis v. Finch*, 197 Ala. 76, 72 So. 352 (1916); *Geithman v. Eicher*, 265 Ill. 579, 107 N.E. 180 (1914); *Barclay v. Bank of Osceola County*, 82 Fla. 72, 89 So. 357 (1921); *Constantine v. East*, 8 Ind. App. 291, 35 N.E. 844 (1893); *Eller v. Newell*, 159 Iowa 711, 141 N.W. 52 (1913); *Beeler v. Sims*, 91 Kan. 757, 139 Pac. 371 (1911) and 93 Kan. 213, 144 Pac. 237 (1914); *Lake Erie Land Co. v. Chilinski*, 197 Mich. 214, 163 N.W. 929 (1917); *Bushwell v. Kerr Co.*, 112 Minn. 388, 128 N.W. 459 (1910); *St. Clair v. Hellweg*, 173 Mo. App. 660, 159 S.W. 17 (1913); *Henning v. Smith*, 151 N.Y.S. 444 (1915); *Annand v. Austin*, 86 Ore. 403, 167 Pac. 1017 (1917); *Mauk v. Lee*, 66 Wash. 184, 119 Pac. 185 (1911); see 55 *AM. JUR.*, *Vendor and Purchaser* § 181 (1946).

7. *Ibid.*

8. The affidavits must show as matter of fact that the record presents continuous transfers of the different title owners down to the present vendor provided the affidavits disclose sufficient facts to show that the record title is in fact complete. See: *Clark v. Jackson*, 222 Ill. 13, 78 N.E. 6 (1906) (To show the subsequent grantors were the sole heirs at law); *Jaeger v. Harr*, 62 Ore. 16, 128 Pac. 61 (1912) (To identify the grantor); *Singer v. Guy Investment Co.*, 60 Wash. 674, 111 Pac. 886 (1910) (To show marital status).

9. See *Tax Titles in Florida*, 6 U. Fla. L. Rev., 1-76 (1953) and *Florida Tax Deed Titles*, 6 *MIAMI L.Q.*, 497-509 (1952).

10. FLA. STAT. § 192.21 (1955). Valid assessment necessary to create lien of taxes, FLA. STAT. § 194.16 (1955). Notice and form of application for obtaining a tax deed by the holder (other than the county) of a tax certificate; FLA. STAT. § 194.17 (1955). Proof of publication of notice for the tax deed holder (other than county); FLA. STAT. § 194.18 (1955). A notice is required to be mailed to the owner; FLA. STAT. § 194.18 (1955). Requirements for sale at public auction; FLA. STAT. § 194.47 (1955). The necessary proceedings to vest title to delinquent lands in the county; FLA. STAT. § 194.51 (1955). The owner of the property is mailed a notice where the county holds the tax certificate; *Compare*; *Iowa Stat. § 446.04* (1946). Notice of annual sale of delinquent property; *Iowa Stat. § 446.9* (1946). Service of notice of sale by publication; *Iowa Stat. § 446.12* (1946); certificate of publication required; *Iowa Stat. § 446.19* (1946). Conditions and procedure to allow the county to be the purchaser; *Iowa Stat. § 447.1* (1946). Terms of redemption; *Iowa Stat. § 447.9* (1946). Notice that delinquent owner's right of redemption has expired two years and nine months after the sale.

11. *Smith v. Biddle*, 171 Ark. 644, 286 S.W. 801 (1926); *Giammatteo v. Penna.*, 17 Del. Ch. 25, 147 Atl. 250 (1929); *Plummer v. Kennington*, 149 Iowa 419, 128 N.W. 552 (1910); *Van Grundy v. Shewey*, 90 Kan. 253, 133 Pac. 720 (1913); *Finnegan v. Summers*, 28 Ky. L. Rep. 1180, 91 S.W. 261 (1906); *Eisenhut v. Marion De Vries*, 150 Misc. 804, 269 N.Y.S. 483 (1934); *Gates v. Parmly*, 93 Wis. 294, 67 N.W. 739 (1896).

objection may be raised, however, where the abstract shows only the tax deed but does not show any judgment, precept or affidavit upon which the tax deed is based.¹² Regarding such deeds, where the statutory requisites as to the service of notice of redemption are not met, the former owner's right of redemption does not expire, and a tax deed issued without such notice is void as to him.¹³ Where the abstract does not show that notice of redemption was served in accordance with the statutes, the purchaser is justified in fearing that he might have to defend his title against former record owners; therefore, the vendor has not tendered marketable title as required.¹⁴ It is important to distinguish between a voidable tax deed,¹⁵ where a defect in the *service* of notice of redemption cannot be questioned after the statutory period of limitations has run,¹⁶ and a void tax deed,¹⁷ where failure to fulfill the *substantive* statutory requirements is not cured by the running of the statute of limitations.¹⁸

In the instant case, until the notice of service of sale to the former record owner is proved, the title which the defendant purports to convey is subject to be defeated. Under such circumstances, marketable title of record can only be substantiated by a quiet title suit or by a recorded quitclaim deed from the record owner at the time of the tax sale. This case brings Florida within the majority, and in this author's opinion, the better view, which is that any doubt concerning statutory compliance with tax deed laws, especially in the service of notice, is not removed by the bare tax deed in the vendor's abstract.

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12. Koch v. Streuter, 233 Ill. 594, 83 N.E. 1072 (1908); Smith v. Huber, 224 Iowa 817, 277 N.W. 557 (1938); Voss v. Zetzman, 166 La. 190, 116 So. 847 (1928); Safe Deposit & Trust of Baltimore, 125 Md. 519, 94 Atl. 93 (1915); Philbrick v. McDonald, 37 N.D. 16, 163 N.W. 538 (1917); Saphir v. Herlihy, 131 Misc. 422, 226 N.Y.S. 255 (1927); Gates v. Parmly, note 11 *supra*.

13. See note 12 *supra*, especially Smith v. Huber; Tracker v. Biggers, 48 So.2d 750 (Fla. 1950).

14. *Ibid.*

15. Plant v. Sanders, 209 Ark. 108, 189 S.W.2d 720 (1945); Reed v. Stinson, 188 So. 509 (La. App. 1939); McLoud v. Mackie, 175 Mass. 355, 56 N.E. 714 (1900); Detroit Life Ins. Co. v. Fuller, 228 Mich. 191, 199 N.W. 699 (1924); Boenig v. Hegeman, 220 N.Y. 118, 115 N.E. 447 (1917).

16. *Ibid.*

17. Helvey v. Sax, 38 Cal.2d 21, 237 P.2d 269 (1951); Clark v. Hollingworth, 138 Fla. 2, 188 So. 827 (1939); Smith v. Swisher, 109 Ind. App. 654, 36 N.E.2d 945 (1941); *In re Shechy*, 119 La. 608, 44 So. 315 (1907); Van Wonderberg v. Valentine, 136 N.E. 209, 7 A.2d 623 (1939); Mayer v. Ranum, 75 N.D. 548, 30 N.W.2d 608 (1948); Umatilla County v. Williams, 138 Ore. 548, 6 P.2d 879 (1932).

18. See note 17 *supra* and FLA. STAT. § 192.48 (1955) (one year limitation period on bringing suits under the Murphy Act or three years for secondary grantees;) FLA. STAT. § 196.06 (1955) (recovery of land in possession of a tax deed holder limited to four years by former owner or other adverse claimant. This limit also applies to the tax deed holder if the property is being held adversely.)