TITLE EXAMINATIONS AND CLOSINGS*

By GEORGE A. PINDAR**

A. INTRODUCTORY

§ 26-1. Why titles are examined

A wise purchaser never invests in land without obtaining satisfactory evidence of title in the form of an attorney's certificate or a policy of title insurance. This is true even though title is warranted by a thoroughly solvent vendor, since liability on a warranty is difficult to enforce, does not cover costs of litigation, and is limited to the original purchase price (not covering subsequent improvements or value increases).[1] The danger to the purchaser is not confined to possible loss of possession in favor of some claimant with a better title, but the existence of some "cloud" upon the title which presents the possibility of future litigation even though not apparently valid or meritorious. Such a situation may make the title unacceptable to future purchasers, so that the owner will be saddled with an unsalable asset.[2]

§ 26-2. Status of title examiner

The function of a title attorney is defined by statute in this state as (a) the rendering of opinions as to the validity or invalidity of titles, (b) the preparation of legal instruments of all kinds whereby a legal right is secured, and (c) conveyancing,[3] a term which includes both (a) and (b), but also title investigations generally.[4] A corporation may examine titles, prepare abstracts, and issue title policies,[5] and furnish information and

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** Title Officer, Lawyers Title Insurance Corp., 1945-1971; Prelegal Studies and LL.B. (now J.D.) Mercer University; general practice of Law, Macon, Georgia, 1927-1941; Land Acquisition Department, Tennessee Valley Authority, 1941-1944; Chattanooga Title & Guaranty Co., 1944-1945; Professor of Law, Mercer University School of Law, 1928-1930; Professor of Real Property Law, Georgia State College, 1951-1961; member of Georgia and Tennessee Bars.

1. *See* G. PINDAR, GEORGIA REAL ESTATE LAW §§ 19-169, 19-172 [hereinafter cited PINDAR].

2. Marketability in general, *see* PINDAR § 18-16. *See also* PINDAR §§ 7-13, 7-172.

3. GA. CODE ANN. § 9-301 (1935).

4. BLACK, LAW DICTIONARY (4th ed. 1951).

5. GA. CODE ANN. § 9-403 (1935). In 1930 the state supreme court held that a title company was not prohibited from examining, certifying and guaranteeing titles to real estate, nor from preparing papers in connection therewith. Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S.E. 455

clerical services to lawyers,[6] but the lawyer must maintain full and direct professional responsibility to his client for such information and services.[7] The title attorney is bound to maintain inviolate the confidence, and, at every peril to himself, preserve the secrets of his client,[8] and is prohibited from encouraging litigation from motives of passion or interest.[9] He has a retaining lien on all papers of his client in his possession,[10] and on all suits brought by him for the recovery of land.[11] Notice to the examining attorney of a defect in the title will be imputed to the purchaser or lender who employs him.[12] A title attorney, like his brothers at the bar, must bring to the exercise of his profession a reasonable degree of care and skill, and may be liable in damages for failure to do so.[13] Thus an attorney who failed to report an outstanding lien appearing of record against the land was held liable for negligence to the extent of the loss suffered by his client.[14] Similarly, an attorney who reported that the vendor had a good title in fee simple was responsible in

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(1931). The court said "the restrictions upon the right to practice law refer to practice in the courts." In 1931 the court refused to interfere with a contract under which a superior court clerk permitted a title company to occupy quarters in his offices for examination of titles. Atlanta Title & Trust Co. v. Tidwell, 173 Ga. 499, 160 S.E. 620 (1931). In *Ga. Bar Ass'n v. Lawyers Title Ins. Corp.*, 222 Ga. 657, 151 S.E.2d 718 (1966), title company practices were again reviewed by the court, which pointed out

> that the policy of Lawyers Title Insurance Corporation from its incorporation had been to cooperate with lawyers and encourage the employment of lawyers by persons desiring title insurance through the corporation. Outside of the Atlanta area the corporation issues policies of title insurance only on certificates of title furnished by lawyers not in the regular employ of the corporation, who have either applied for title insurance for a client, or have been employed by the corporation to examine title to property of a customer of the corporation seeking title insurance. In the Atlanta area the corporation maintains a title plant and can determine for itself, without the services of an independent lawyer, the risk involved in insuring a particular title. If a person in the Atlanta area does not wish to be represented by a lawyer, the corporation may determine the insurability of the title through its employees who are lawyers, and it is this type of business that is referred to as 'walk-in business.' . . . The trial judge . . . held that the evidence adduced on the trial does not reveal any activities of the title corporation prohibited by the law of Georgia . . . except the so-called 'walk-in' business and the advertisements encouraging it.

The decree was affirmed by a divided court.

6. GA. CODE ANN. § 9-404 (1935).

7. *Id.*

8. *Id.* at § 9-601(3).

9. *Id.* at § 9-601(5).

10. *Id.* at § 9-613. An attorney has no lien on real property for services confined to examination of title. Woodward v. Lawson, 225 Ga. 261, 167 S.E.2d 660 (1969).

11. GA. CODE ANN. § 9-613(3) (1935).

12. Citizens Bank of Vidalia v. Citizens & Southern Bank, 160 Ga. 109, 127 S.E. 219 (1925).

13. Lilly v. Boyd, 72 Ga. 83 (1883). Such cases are rare in the law books, perhaps because many reputable title attorneys are quick to make amends for default.

14. Hill v. Cloud, 48 Ga. App. 506, 173 S.E. 190 (1933).

damages where the client was subsequently evicted under a superior claim to a four-fifths interest.[15] But the liability runs from the date of the approval of the title, not from the discovery of the defect,[16] and is barred in four years if suit is brought upon an unwritten contract,[17] or six years if suit is brought on a simple contract in writing.[18]

§ 26-3. Peculiarities of Georgia Title Practice

An attorney new to this state, or new to title work in general, should be reminded of certain peculiarities of the title scene in this state which differ from other states.

One of the principal differences in Georgia real estate practice is that husband and wife are not required to join in the execution of deeds.[19] If title is in either one, the other is not required nor expected to sign. The wife cannot pledge her property for her husband's debts, directly or indirectly, and cannot go surety for the debt of her husband.[20]

The security deed, commonly called a loan deed, is used in Georgia instead of the mortgage on realty.[21] What is called a mortgage generally is a chattel mortgage. The old real estate mortgage gave only a lien, whereas the security deed passes title, leaving only an equity of redemption.[22]

The rule as to descriptions in Georgia varies from that in other states in that a "more or less" description may render a deed void where there is nothing else to fix the location of the corners.[23]

The year's support is something peculiar to Georgia, although a few other states have something similar. A widow and minor children are

15. 72 Ga. 83.

16. *Id. See also* Crawford v. Gaulden, 33 Ga. 173 (1862).

17. GA. CODE ANN. §§ 3-706, 3-711 (Rev. 1962); Gould v. Palmer & Read, 96 Ga. 798, 22 S.E. 583 (1895).

18. GA. CODE ANN. § 3-705 (Rev. 1962); Buchanan v. Huson, 39 Ga. App. 734, 148 S.E. 345 (1929).

19. *See* § 26-17, *infra*, and PINDAR § 26-147. *See also* PINDAR § 19-40.

20. *Id.* The legislature (Ga. Laws, 1969, p. 72) attempted to limit the ban against the wife's suretyship to tangible personalty, but the constitution still prohibits all liability of the wife's separate estate for debts of the husband. GA. CODE ANN. § 2-2801 (Rev. 1948). The act is effective however, to allow a wife to encumber her realty or intangible personalty to secure the debts of third persons other than the husband. It is referred to but not applied in *Collins v. Freeman*, 226 Ga. 610, 176 S.E.2d 704 (1970).

21. *See* PINDAR § 20-3.

22. *Id.*

23. *See* PINDAR § 19-154.

entitled to be awarded an amount in money or property, including real estate sufficient for their support during the first year after the death of the husband. In practice this may include all the real estate owned by the deceased.[24]

The handling of estates of deceased persons varies considerably in Georgia from other states. Where there is a will, title vests in the executor until he makes an assent to the devise, and we generally need a deed of assent for this purpose.[25]

Adverse possession is not as reliable a panacea for title defects in Georgia as in many other states, because of the rule that the running of prescription may be interrupted by the inception of new disabilities even after it has started to run. Thus proof must be made not only that the prescribees were sui juris at the beginning of the twenty-year or seven-year period, but that they continued so until the end of the period.[26]

B. Mechanics Of Title Examination

§ 26-4. In general

The title attorney's work begins with the record search,[27] leading into the preparation of an abstract of title,[28] followed by an opinion or certificate of title,[29] clearance of objections,[30] preparation of closing papers,[31] closing of the transaction,[32] and issuance of a final certificate[33] or title policy.[34] The attorney should be furnished at the start with a description of the land in question and the name of the person claiming to be the present owner, together with all title papers available to the client, including deeds, recorded or not, maps and surveys,[35] prior title certificates or abstracts, etc. The description must first be carefully analyzed in order that the identity of the land and its boundaries may be borne constantly in mind throughout the ensuing investigation.

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24. *See* PINDAR ch. 17. *See also* PINDAR §§ 26-123-135.
25. *See* PINDAR § 26-120.
26. *See* PINDAR ch. 12. *See also* § 26-11, *infra.*
27. *See* § 26-5, *infra.*
28. *See* § 26-7, *infra.*
29. *See* § 26-9, *infra.*
30. *See* § 26-1, *infra.*
31. *See* PINDAR §§ 26-140-144.
32. *See* PINDAR § 26-136 *et seq.*
33. *See* § 26-9, *infra.*
34. *See* PINDAR § 26-159 *et seq.*
35. *See* § 26-8, *infra.*

§ 26-5. *The record search*

Except in counties where tract indices or title plants exist, record searches must be made from the name index system maintained by the superior court clerk's office, supplemented by searches in the court of ordinary for estates and in the tax commissioner's office for ad valorem tax items. Any name known to be involved in the title, whether of the present or a former owner, can be *grantored* or "checked out" by examining the index of grantors; or *granteed* or "checked in" by examining that of grantees. In this way a chain of title can be assembled extending back through the necessary period of search.[36] Once the chain has been put together, it is then necessary to *grantor* or "check out" each name in the chain to find any adverse instruments such as mortgages, liens, judgments, and sell-offs.[37] Where the examiner finds a

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36. Most lenders and title companies in the past have required a sixty-year search, but the Title Standards adopted by the Georgia Bar in 1966 [*See* GA. CODE ANN. § 85-2 app. 2.1 (Rev. 1970)] shorten the period to fifty years. But in tracing the chain of title back, the examiner should not stop at the oldest link beyond the fifty-year period unless it is

a. a warranty deed, or

b. one or more quitclaim deeds supported by reasonable proof that they convey title, or

c. a grant from the state, or

d. a probate proceeding in which the property is reasonably identifiable, or

e. a security deed if subsequently regularly foreclosed, or

f. any other instrument which shows of record reasonable probability of title and possession thereunder.

Another caveat imposed by the Bar Standards is that where instruments are found within the search period which refer to or indicate prior defects in the title, an additional search should be made.

37. For a further description of the process, *see* 1 ENCYCLOPEDIA OF GEORGIA LAW *Abstracts of Title*. *See also* AM. LAW OF PROPERTY § 18.1 *et seq*. The following are among the record books to be searched in the office of the superior court clerk:

a. Deed Indices and Records.

b. Mortgage Books (if separate).

c. Lis Pendens Docket.

d. Bench or Bar Docket.

e. Motion Docket (some clerks enter condemnations here).

f. Federal Tax Lien Docket (some clerks use the general execution docket for federal tax liens).

g. General Execution Docket.

h. Attachment Docket.

The following are among the record books to be searched in the office of the court of ordinary:

a. Homestead Docket.

b. Will Book.

c. Letters of Administration.

d. Bond Books.

e. Letters of Guardianship.

f. Insanity Commitments.

g. Year's Support Docket.

See PINDAR §§ 19-117, 19-128, 19-129 *et seq*.

reference to other instruments he must search for them also, since he is charged with notice by such a reference.[38] He should check out names even subsequent to their elimination from the title in order to pick up clearances or possible repudiatory instruments, although there is a question as to whether he is charged with notice of such matters.[39] Breaks in the chain may necessitate a search in the ordinary's office for estates, or field investigations.[40]

§ 26-6. Breaks in the title

All too often in this state the record search will come to a frustrating halt when no title can be found of record into some prior owner, or none can be found of record out of him. When all efforts fail, the abstract should show a "dummy" conveyance, "A to B," using the names of the last previous grantee and the next grantor, with the statement that nothing is found of record divesting the title of A nor vesting title in B. But before taking this step an effort should be made to supply the missing link. Many apparent breaks in the title are due to the death of the record owner, followed by a will or an intestate administration of some type, which may be found in the court of ordinary in the county of his residence. In other cases there may be no will or administration, but the heirs may have assumed possession and conveyed title; or the record owner may have conveyed out in a different name from that in which title was vested, usually because of marriage, and a field investigation would be necessary to discover these facts. An apparent break may be due to defective indexing,[41] or a simple failure to record a deed. Whether a break in the title may be waived without being properly filled or explained will depend on other facts. Proof of twenty years' adverse possession may be legally sufficient, but a question of marketability may still be involved.[42]

38. Talmadge Bros. & Co. v. Interstate Building Loan Ass'n, 105 Ga. 550, 31 S.E. 618 (1898). But a "wild" deed (one not in the chain) is not notice. C.&S. Bank v. Farr, 164 Ga. 880, 139 S.E. 822 (1927). *See also* the 1966 Ga. Bar Standards [GA. CODE ANN. § 85-2 app. 2.3 (Rev. 1970)]. A deed to one as trustee for certain persons is not notice that he held as trustee under a will which named him as trustee for such persons. Peavy v. Dure, 131 Ga. 104, 62 S.E. 47 (1908). *See* PINDAR § 19-127.

39. *See* PINDAR § 19-130.

40. *See* § 26-6 *infra.*

41. The quality of indexing varies over the state. Some counties have no overall deed index.

42. *See* § 26-11, *infra.*

§ 26-7. Abstracts of title

The day of the formal abstract voluminously setting forth the entire history of the title back to antebellum days is rapidly fading away, but even an assemblage of the untyped courthouse notes of the examiner may be considered to be an abstract of the title, and should be carefully examined as such. The finished abstract should be a complete showing in more or less abbreviated form of all instruments appearing of record in any way affecting the title, either adversely or beneficially; and should be so presented that the attorney can by careful study of its pages determine the present condition of the title and advise his client what must be done to render it marketable, or whether it should be rejected entirely.

§ 26-8. Examination of surveys

The attorney must carefully scrutinize all recorded surveys showing the property under investigation, together with any unrecorded surveys available. Such a study should reveal any conflict between the possession lines and the deed lines, encroachments, visible easements, improvements erected near or on the boundary lines, available access, overlaps, and disputed boundaries.[43] An attorney should not rely upon a survey unless it is made by a registered land surveyor who certifies it in accordance with the minimum standards of the Georgia Association of Registered Land Surveyors, or in accordance with the statute.

There are acts of 1960[44] and 1961[45] which establish rules governing the recording of surveys in all counties having all or part of a city within their bounds with a population of 13,500 or more. Under these acts no map or plat can be filed or recorded by the clerk unless it bears the certificate of a registered land surveyor that in his opinion it is a correct representation of the land platted, and has been prepared in conformity with the minimum standards and requirements of law. The certificate must be signed by the surveyor actually making or supervising the survey and drawing; and his seal must be affixed.

The clerk is not responsible for determining whether the plat meets the requirements of the acts so long as the certificate is made. But the requirements which must be certified to by the surveyor are set forth in great detail in the acts and must be followed.

Special attention is called to several of the requirements. If the

43. *See* PINDAR ch. 13.

44. Ga. Laws, 1960, p. 3197.

45. Ga. Laws, 1961, p. 105; GA. CODE ANN. § 24-2716 (Rev. 1959).

property is a resubdivision of land already subdivided, the caption must refer to the former plat. All plats must show an established monumented position as a point of reference which can be identified on the public records. They must show sufficient data to calculate a closure including all corners and angle points. The width and former width of all rights-of-way adjacent to or crossing the property must be shown, together with all use lines and apparent encroachments "if pertinent." Irregular curved lines must also show the distance of chords at intervals of 100 feet or less; regular curves must show pertinent data. All markers shall be shown and their material identified such as iron, concrete or stone. There must be a directional arrow with a notation as to magnetic, true north, or grid north; and showing whether bearings are from compass readings or angles turned. All distances must be by horizontal measurement.

The acts specifically provide that they do not apply to any plat or survey made prior to its passage. In Fulton County this would be March 17, 1960. In other counties it would be March 6, 1961.

§ 26-9. Title opinions and certificates

The examination of title culminates in the title opinion or certificate, in which the attorney sets forth the following items:

1. An adequate description of the property.
2. The name of the present owner or owners of record.
3. A statement of all liens, encumbrances, or objections, which must be cleared before the closing of the sale or loan.
4. A statement of all outstanding liens or encumbrances, easements or other exceptions which will remain upon the property.
5. A certificate or opinion that the title of the owner or owners shown is good and marketable except for the matters set forth.

§ 26-10. Clearances

The title certificate or opinion becomes the basis for the task of clearing the title. Many objections can be waived in reliance upon long adverse possession or the mere lapse of time.[46] Objections of a more recent origin may necessitate obtaining quitclaim deeds from parties whose interests remain outstanding of record, or from their heirs or devisees. It often develops that these persons cannot now be located, and in such cases the clearance may take the form of a judicial proceeding in which they are named as parties and served by publication.[47]

46. *See* § 26-11, *infra.*

47. This may be a land registration proceeding or an action to quiet title.

§ 26-11. Reliance upon adverse possession

Determining to what extent a possible outstanding interest may be waived in reliance upon adverse possession calls for much skill and experience. To estimate the risk of future litigation requires a knowledge both of the law of prescriptive title and of the foibles of human nature. Some of the factors which must be borne in mind are as follows:

Suspensions

The running of prescription is suspended during the minority or mental incompetency of the true owner.[48] Imprisonment[49] or service in the armed forces[50] may have a similar effect. Prescription is also suspended as against remaindermen so long as the life tenant lives.[51] In dealing with unknown persons the hazard of these matters is difficult to estimate.

Tenants in Common

Prescription does not run against a tenant in common in favor of his cotenant[52] until there has been an ouster, or notice has been brought home to the prescribee that his cotenant is claiming adversely to him.[53] The record of a deed purporting to convey the entire fee will serve this purpose, when followed by a sufficient period of adverse possession.[54]

Character of Possession

Possession without color of title counts very little in the scales of marketability. The mere payment of taxes,[55] cutting timber,[56] or use as a thoroughfare,[57] has little or no weight alone. Even cultivation is of no value unless continued from year to year. The erection, maintenance, and use of fences, walls, barns, sheds, and houses are the best evidence of adverse possession.[58]

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48. *See* PINDAR §§ 12-53, 12-54.
49. *Id.* at § 12-55.
50. *Id.* at § 12-56.
51. *Id.* at § 12-58.
52. *See* PINDAR § 7-91 *et seq.*
53. *Id.* at § 7-92.
54. *Id. See* Warner v. Hill, 153 Ga. 510, 112 S.E. 478 (1922).
55. *See* PINDAR § 12-36.
56. *Id.* at § 12-34.
57. *Id.* at §§12-35, 12-49.
58. *Id.* at §§ 12-30-33.

Constructive Possession

The attorney will often find that although the particular land has always been vacant, it is part of a larger tract as described in the prior chain of title, and advantage may be taken of improvements or cultivation on another part of the larger tract.[59]

Period of Possession

While technically seven years' possession under color of title may suffice to bar an outstanding interest,[60] the possibilities of suspension mentioned above usually make it unsafe to rely upon a period of less than twenty years or more.

Probability of Litigation

The remoteness in time of the outstanding record interest carries great weight in favor of waiving it, while on the other hand comparative recency counts adversely. Another important factor is whether the possible claimants have been alerted to the situation by request for a release which has been refused or not given.[61]

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59. *Id.* at § 12-25 *et seq.*; GA. CODE ANN. § 85-404 (Rev. 1970).

60. *Id.* at § 12-39.

61. A title attorney should never approach possible adverse claimants with requests for quitclaims without the knowledge and consent of the seller.