I N T H E S U P R E M E C O U R T

O F T H E S T A T E O F F L O R I D A.

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LILLIAN MAE HAY,

Appellant,

Vs.

LYMAN SALISBURY and RUTH F. SALISBURY,

Appellees.

REPLY BRIEF OF COUNSEL FOR APPELLEES.

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STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This suit was commenced in the Circuit Court of Pinellas County, by the appellant, Lillian Mae Hay, to compel specific performance by the appellees, Lyman A. Salisbury and wife, Ruth F. Salisbury, of an alleged verbal contract of sale to her of certain lands in said County; and is now before this Court on appeal from an order of the Court below, sustaining the appellees' plea of res judicata to, and dismissing the appellant's bill of complaint.

Preliminary to a discussion of the questions raised on the record, we shall recite briefly the proceedings had in this and in the former suit between the parties.

The former suit was commenced in the Circuit Court of Pinellas County by the appellee, Lyman A. Salisbury, by a bill in chancery, filed on the 24th day of January, 1924, against the appellant and her brother, James D. Hay, seeking a decree of the Court, quieting his title to the property involved in the present suit, and to have declared null and void and stricken of record a certain document appearing on the public records of Pinellas County, and purporting to give notice that the appellant had purchased said property from the said Salisbury, and that she was ready, able and willing to comply with the terms of the said sale, and would expect full compliance by him. (Transcript of Record, pages 13, 14, 15 and 16).

Thereafter, after the appellant and her said brother had been duly served with a subpoena to answer, and after their proper general appearance had been regularly entered in the cause, an answer on their behalf was filed to the bill; and thereafter, said answer was, by appropriate proceedings by the Court, ordered stricken of record, and thereupon a decree pro confesso was duly taken and entered against the appellant and her said brother. (Transcript of Record, pages 19, 20, 21 and 22).

On the 29th day of April, 1924, a final decree was rendered in said cause by the lower Court, sustaining the appellee's bill, ordering the cancellation of said caveat, or notice of purchase, and its removal from the public records

of Pinellas County, and quieting the appellee's title to said lands against said caveat, and against the appellant and her said brother and against all persons claiming by, through, or under them. The decree also granted to the appellee a perpetual injunction against the appellant from thereafter asserting any right, claim, interest or demand in, to, or upon said property. (Transcript of Record, pages 23 and 24).

On appeal by the appellant herein, this Court, by a judgment rendered in said cause on the 20th day of December, 1924, affirmed the decree of the lower Court. (Transcript of Record, pages 26 and 27).

Pending her appeal in the former suit, the appellant herein, on the 30th day of June, 1924, instituted the present suit by filing a bill in the Circuit Court of Pinellas County against the appellees, seeking the specific performance of an alleged verbal agreement, whereby the appellant claimed to be the purchaser from the appellee, Lyman A. Salisbury, of the property hereinbefore mentioned. (Transcript of Record, pages 1, 2, 3, 4, and 5).

Thereafter, and after this Court had affirmed the decree of the Court below in the former suit, the appellees herein, on the 6th day of April, 1925, filed to the bill of complaint in the present suit a plea of res judicata, setting up as a bar to the prosecution of the present suit the proceedings had in the former suit. (Transcript of Record, pages 7, 8, 9, 10 and 11).

On the 15th day of April, 1925, the appellant filed what amounted to a general replication to the appellees'

plea of res judicata; and thereafter, on the 8th day of May, 1925, the present cause was set down for hearing, and was heard before the Chancellor on the bill of complaint, the appellees' plea of res judicata, the appellant's replication and a stipulation of counsel, which was considered in lieu of testimony on the issues raised by the plea and replication; and, upon consideration of all of which, the Chancellor granted an order sustaining the appellees' plea and, after refusal of her counsel to plead further, dismissed the appellant's bill. (Transcript of Record, pages 28, 29, 30, 31 and 32).

A R G U M E N T

While we are of the opinion, and shall most strongly insist that, this cause having been heard in the Court below upon the appellant's replication to the appellees' plea of res judicata, there is but one question before this Court, namely, are the averments of said plea sustained by the facts upon this record? Nevertheless, we shall confine the first part of our brief to a discussion of the matters raised by the appellant's brief.

We agree with opposing counsel that the three assignments of error on behalf of the appellant, go to the same point and raise but one question, that is, stating the matter in different language; Did the Court below commit error in rendering a decree in favor of the appellees, sustaining the appellees' plea of res judicata and dismissing the appellant's bill?

As we understand the argument presented, counsel

for the appellant are relying upon the following propositions as grounds for a reversal of the decree of the Court below:

1. That the bill of complaint in the former suit brought by Lyman A. Salisbury against Lillian Mae Hay was brought simply and solely for the purpose of removing from the record a caveat that had been prepared and filed of record in the records of Pinellas County, Florida; and that, therefore, the Court by its decree in the former suit cancelled the caveat of record, but left, as valid and subsisting matter, the contract of which the caveat served only as a notice.

2. That, the agreement of purchase between the parties, being a verbal contract, and a Court of Equity being without jurisdiction generally to cancel verbal contracts, the Court below had only the power to cancel and remove the caveat or notice from the public records;

And that, therefore, such verbal contract remained after the cancellation and removal of the caveat or notice thereof, as a valid subsisting contract, which the appellant is entitled to have specifically performed.

3. That the former suit, having been brought by the appellee, Salisbury, to cancel the caveat or notice of a claim of purchase by the appellant of certain property, and the present suit, having been brought by the appellant to compel specific performance by Salisbury of the verbal contract or agreement for the sale and purchase of the same lands, of which contract the caveat involved in the former suit was a notice, cannot be said to be one and the same cause of action; and that, therefore, the decree in the former suit

cannot be plead in bar to the present suit.

4. That the appellee, Lyman A. Salisbury, having failed in the former suit to set out in his bill the facts leading up to the caveat, or to set them out as the appellant has set them out in this case, the case as now presented by the appellant, has never been adjudicated, and the facts alleged in her bill stand admitted on the appellees' plea.

5. That the appellee, Lyman A. Salisbury, having accepted and retained One Hundred Dollars ($100.00), paid by the appellant as part of the purchase price for said property, as admitted by the plea of res judicata, relief should have been denied the appellee in the Court below on the theory that he who seeks equity, must do equity.

We respectfully submit that there is no merit in either of said propositions. Taking them up for discussion in the order mentioned, we first invite the attention of the Court to the prayer of the bill in the former suit, which sets forth the purposes of that suit. The same appears in full as follows:

"That this honorable Court will entertain this his bill of complaint and that upon final hearing thereof quiet the title of such premises in and to your Orator, against the said Lillian Mae Hay and James D. Hay, and all persons claiming by, through, or under them; that the purported notice of purchase may be decreed to be a cloud upon the title of your Orator and removed therefrom, and your Orator's title quieted thereagainst; that such purported notice may be decreed to be null and void and of non-effect,

and stricken and cancelled of record; that the said defendants Lillian Mae Hay and James D. Hay, may be perpetually enjoined from thereafter asserting any title in or to such lot, by reason thereof, and for such other relief general or special, as to the Court seems meet and to Equity agreeable."

It will be seen from a consideration of the prayer, taken in connection with the allegations of the bill, that the appellee, Lyman A. Salisbury, in the former suit sought not only to have declared null and void the said caveat of record, and to have the same removed as a cloud upon his title to said property, but that he sought also to quiet his title to said property against all the right, title, interest and demand which the appellant might be claiming under and by virtue of the contract of which the caveat was a notice. The allegations in the bill in that respect are as follows:

"That the said Lillian Mae Hay and James D. Hay claimed some right, title or interest in and to said Lot Three (3) of the above-described property, as against your Orator, but have heretofore repeatedly and now refuse to litigate the same.....That said defendants, Lillian Mae Hay and James D. Hay, while refusing to litigate their claims against your Orator or to take any steps towards the prosecution of the same, have, for the purpose of injuring your Orator and clouding your Orator's title and preventing the sale of said premises, caused to be filed the purported notice above-mentioned as 'Exhibit A', as aforesaid."

Not only does the language in the bill show that the appellee Salisbury sought to quiet his title to said property against the alleged contract of purchase by the appellant, but that he sought also to quiet his title against

any and all claims and whatever right, title and interest which the appellant was making in and to said property. The language of the bill conveyed to the appellant express notice that the appellee Salisbury then had prospective purchasers of such property, who, by reason and on account of said caveat and the claims of the appellant, were declining and refusing to accept his title. And furthermore, the prayer of the bill, seeking an injunction against the appellant, served to put her upon notice that she was required to appear and defend whatever right, title and interest she may have had or was claiming in and to the property in question. We therefore, respectfully submit that the appellant's first proposition, that is, that said former suit was brought simply and solely for the purpose of having said caveat cancelled of record, is not sustained, but is absolutely refuted by the record.

The second proposition relied upon by the appellant is, we believe, wholely unsound. No authority is cited by counsel supporting the proposition that a Court of Equity will not or cannot cancel a verbal contract, or to be accurate, to declare void and ineffective a verbal contract, and we dare say no authority can be found in support of such proposition. Certainly a Court of Equity, where the matter is properly presented by the pleadings, can and will declare to be void and ineffective verbal agreements which are tainted with fraud, which provide for the doing of an unlawful thing, which are in contravention of public policy, which are without consideration, which have come to an end, which are in violation of the statute of frauds, etc., etc., kinds without

number, and whether such contracts are directly or only collaterally in issue.

To hold that a Court of Chancery may cancel a written contract, and yet at the same time hold that it is powerless to cancel a verbal contract, that is to say, declare such contract null and void, would be to place verbal contracts on a higher plane and in a more secure position than those contracts executed and entered into with greater care and formality.

The related proposition that the Court below had only the power to cancel and remove the caveat or notice of record, is likewise untenable. The contract itself was the very meat and blood and bone of the transaction; the caveat was merely the shadow. To say that the Court could strike down the shadow, but could not strike at the very heart of the thing which gave substance to the shadow, it seems to us, would be stating a principle contrary to the doctrine upon which Courts of Chancery are founded.

In this connection attention is again called to the fact that the appellee Salisbury in the former suit sought not only to have the caveat cancelled, but also to have finally declared and adjudicated whatever right and interest the appellant had or claimed to have in said property, by virtue of her alleged agreement to purchase. It would have been an idle and useless thing for Salisbury to have brought suit against the appellant, merely for the purpose of removing the caveat and left unchallenged and outstanding an apparent claim of the appellant in and to said property. Certainly the Chancellor below in granting a decree in favor of Salisbury,

quieting his title against said caveat and perpetually enjoining and restraining the appellant thereafter from asserting any right, title, or interest in or to said property, had in mind and considered that something more was being sought than the mere removal of record of the caveat. Certainly the Court below did not intend, by the language of its decree, to grant unto Salisbury a profitless remedy, a hollow victory. To have said to Salisbury that the Court could remove the caveat as a cloud that overshadowed his title, but that it was powerless to adjudicate and settle the rights of the parties that touched and affected the title to the property, would have but been inviting further litigation. Having assumed jurisdiction, to remove the caveat, the Court below, as it was fully justified by the pleadings in so doing, finally declared and adjudicated the rights of the parties in and to the subject matter of the suit. For the reasons stated, we confidently believe that this Court will agree that there is no merit in the second proposition relied upon by the appellant.

A discussion of the third proposition relied upon by the appellant, invites a consideration first of the law touching the plea of res judicata.

Whether invoked in bar of the action itself, or as an estoppel upon a question of fact, res judicata is something more than a mere matter of practice and procedure; it is a rule of fundamental and substantial justice, recognized in the judicial system of all civilized countries, dictated by public policy and demanded by the very object for which Courts have been established, namely, to secure the peace and

repose of Society by the settlements of matters capable of judicial determination.

23 Standard Encyclopaedia of Procedure,
Pages 8, 9, and 10.

In addition to being a principle of public policy, res judicata is also a matter of private right.

Putnam Vs. Clark, 30 N.J. Eq., 535.

The distinction is sought to be made, by some of the authorities, between the effect of a prior judgment as a bar against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties on a different claim or cause of action. But such distinction is without any real difference, for in the second action between the same parties, upon a different claim or demand, a prior judgment operates as a bar to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered, as completely and conclusively as in an action between the same parties upon the same claim or demand.

Cromwell Vs. County of Sac, 94, U.S. 352.

Where an issue, right, question or fact is submitted to a competent jurisdiction, the judgment of that Court is conclusive upon the parties and their privies, in every subsequent action involving the same issue, right, question, or fact.

Harris Vs. Mason, 120 Tenn. 668, 25 L.R.A.
(N.S.) 1011; So. Pac. Railroad Co., Vs.
U. S. 168 U.S. 1; 42L Ed. 355.

A judgment is conclusive between the parties not only as to such issues as were <u>in fact</u> determined in the

prior proceedings, but as to every other matter which the parties might have litigated as an incident to, or essentially connected with, the subject matter of litigation, where the same as a matter of fact was or was not considered.

Werlein Vs. New Orleans, 177 U.S. 395;
Parks Vs. Clift, 9 Lea (Tenn.) 524;
Mattier Vs. Card, 19 Fla. 455.

The doctrine of res judicata is not confined to adjudication had after trial and verdict or judgment, for it is the finality of the decision and not its nature which controls. If the judgment in question is a final one, it will estop the parties and their privies as to every matter of fact directly determined by it, and also as to all matters which are necessarily inferable from the judgment, regardless of whether the judgment was rendered on demurrer, or whether it was rendered by default, on dismissal or non-suit, by confession or consent, or by agreement of the parties.

23rd Standard Encyclopaedia of Procedure,
Pages 24, 25, 26.

All points raised by the pleadings or which might be predicated upon them, are concluded by the default.

Stelges Vs. Simmons, 170 N.C. 42;
86 S.E. 801.

The foregoing principles and the authorities in support thereof, we believe, state the law as it is established, not only in this State, but in the majority of the States of the Union on the question raised by the

appellant's third proposition. The application of the above principles in-so-far as this case is concerned, brings us now to a consideration of the stipulation of counsel, which was filed in the Court below and deemed and treated as testimony upon the issues raised by the appellant's replication to the appellee's plea of res judicata. Said stipulation establishes the following facts:

That the complainant in the former suit and the defendant in the present suit are identical persons; that the complainant in the present suit and the defendant in the former suit are identical persons; that the tract of land involved in the former suit and the tract of land involved in the present suit are identical; that the proceedings had in the former suit were regular and the Court assumed and had full and complete jurisdiction of the parties and of the subject matter of that suit; that the decree of the Court in the former suit has not been vacated, modified or reversed, but on the other hand, was affirmed by this Court prior to the rendition of the decree below in the present suit. If these had been the only facts contained in the stipulation of counsel and submitted as proof in the cause they would be sufficient under the foregoing authorities to sustain the appellee's plea of res judicata; but in addition to such facts the attention of the Court is specially called to the following, (quoting from said stipulation):

"That the alleged contract of sale and purchase of said land which the complainant, Lillian Mae Hay, is seek-

ing in this cause to have specifically enforced, is the same and identical contract referred to in the notice or caveat which the said James D. Hay had caused to be recorded in the public records of Pinellas County, Florida, a copy of which said notice was filed as exhibit, and made a part of the bill of complaint in the former suit; that the alleged contract in this cause sought to be specifically enforced, was subsisting and all the rights, claims and interest of the complainant, Lillian Mae Hay, touching the said land, had fully accrued in point of time when the bill of complaint in the former suit was filed on the 24th day of January, A. D. 1924." (Transcript of Record, pages 30 and 31).

It is true that the relief sought in the former suit is different from the relief sought in the present suit, but both suits are and were between the same parties and related to the same subject matter. And as stated by the rule laid down in the case of Cromwell Vs. County of Sac, supra, the mere matter of the difference in the relief sought makes no difference in the effectiveness of the plea of the judgment or decree in the former case as a bar to the prosecution of the present suit. Whether the plea be termed a bar, or considered as an estoppel, makes no difference as to the result.

We respectfully submit that even if the former suit had been brought simply and solely for the purpose of having said caveat cancelled and stricken of record as a cloud upon Salisbury's title to the property in question, still a decree of the Court below, ordering such caveat to

be so cancelled and stricken would be res judicata as to the appellant's suit for specific performance of the contract upon which the caveat was based. The caveat itself, whatever may have been its legal effect, was properly acknowledged and otherwise duly authenticated according to law so as to be entitled to recordation upon the public records of Pinellas County, Florida. Nothing appears upon its face which would have warranted the Court in ordering it cancelled of record, and the record in this cause is silent as to the reasons why the Court below so ordered the same cancelled and removed as a cloud upon Salisbury's title, unless it be that the Court found as a fact that the contract between the parties was a verbal contract, as insisted upon by the appellant in the present suit, and that the appellant was not in possession of the property at the time of the commencement of the former suit. And in this connection, we call the attention of the Court specifically to the fact that the Court below did find as a fact "that the defendants entered into possession of the lot described in the bill of complaint, after the filing of this suit." The Court below further found as a fact that the equities were with the complainant below. (See Final Decree, page 23, Transcript of Record).

The attention of the Court is called to the further fact that the decree in the former suit was based not along upon the decree pro confesso, taken and entered therein against the appellant, but that said cause was "heard upon the report of H. R. Williams, Special Master in Chancery heretofore filed in this Court." What the report of the Special Master contained, is not disclosed by this record. That such report contained matters of fact cannot be disputed.

We have a right, therefore, to assume, indeed the presumption of law conclusively is, that said report did contain the proof of every fact necessary to support the decree of the Court below. This being true, and as before stated, nothing appearing upon the face of the caveat, which would have warranted the Court in ordering its cancellation, we are driven irresistably to the conclusion that the facts upon which the decree of the Court below was based, were sufficient to show the invalidity or unenforcibility of the contract supporting the caveat.

What was the issue presented to the Court below in the trial of the former suit? Was it not the validity or enforcibility of the contract upon which the caveat was founded? Was not the right, title and interest of the appellant in and to said property by virtue of said contract in controversy? Indeed was whether or not the appellant had any valid or enforcible contract a question of fact to be determined by the Court in the trial of the former suit?

We respectfully submit that there was submitted to the Court below, in the trial of the former suit, under proper pleadings, such issues, such rights, and such questions of fact, affecting the parties to this suit and the subject matter of this suit, as renders the decree of the Court below a final adjudication and determination in favor of the appellee Salisbury and against the appellant herein every issue, right and question of fact submitted in the present suit.

Harris Vs. Mason; So. P. R. Company Vs. U. S., supra.

We assume that if the appellant had seasonably and properly made defense in the former action, she would have plead prcisely the facts which she has set forth in her bill in the present suit. Especially are we warranted in this presumption, in view of the fact that her own counsel stipulated "that the alleged contract, in this cause sought to be specifically enforced, was subsisting and all the rights, claims, and interest of the complainant, Lillian Mae Hay, touching the said land had fully accrued in point of time when the bill of complaint in the former suit was filed on the 24th day of January, A. D. 1924." (Transcript of Record, pages 30 and 31). Such being the case under the doctrine of the cases of Werlein Vs. New Orleans; Parks Vs. Clift; Harris Vs. Mason; and Mattier Vs. Card, supra, the final decree in the former suit must be taken as conclusive between the parties as to all of those matters set up and relied upon by the appellant in the present suit, upon the principle that such decree is conclusive between the parties not only as to such issues as were in fact determined upon the prior proceedings, but as to every other matter which the parties might have litigated as an incident to or essentially connected with the subject matter of the litigation. Treating the former suit as brought merely for the purpose of cancelling and removing said caveat from the public records of Pinellas County, as a cloud upon Salisbury's title to said land, an opportunity was offered to the appellant in that suit, in fact she was required to appear as a party defendant to litigate and she might have, had she cared to do so, litigated as an incident to and as essentially connected with the subject matter of the litigation, the right which she seeks to set up and enforce in the present

suit.

To sum up our argument on this phase of the case, we respectfully submit that, considering the former suit as having been brought for the sole and only purpose of cancelling said caveat of record and removing the same as a cloud upon Salisbury's title, since the contract itself was necessarily brought into the litigation, and since the rights and the interest of the appellant thereunder to the property in question were a necessary incident to and essentially connected with the subject matter of the suit, the decree in the former suit precludes the appellant from asserting in the present suit any right, title or interest in the property by virtue of said alleged contract or otherwise.

What of the appellant's fourth contention, that the facts set forth in her bill in the present case have never been litigated, but that, on the other hand, stand admitted by the appellees' plea?

The material allegations of her bill are:

(a) That she entered into a verbal agreement with one of the appellees, whereby she became the purchaser of the land in question;

(b) That she paid a part of the purchase price and was let into possession of the property at the time of the making of said agreement (the 5th day of January, 1923);

(c) And that she was ready, able and willing to comply with the terms of said agreement.

Were not all of these facts necessarily drawn into issue in the former suit? Let us look to the bill of complaint in the former suit. Salisbury alleged in his bill the existence of record of the notice that the appellant claimed to

be the purchaser of said land, and that she was ready, able and willing to comply with the terms of her contract of purchase. Could the appellant have desired a more accurate statement of her claim? Salisbury set up in his bill the very thing which she conceived to be a sufficient notice of her claim.

The bill in the former suit further alleged; "that the said Lillian Mae Hay.....claimed some right, title, or interest in and to the said property." (Transcript of Record, page 13). Was this not a generous, as well as a true statement of fact?

The appellant's claim, as alleged in her bill, that she had been let into possession of said property at the time of the making of said oral agreement, was put directly in issue by the allegations of the bill in the former suit, for it was therein specifically alleged "that the said Lot Three (3) is unimproved and is not in the actual possession of any person, but is in the constructive possession of your Orator as a result of the record of his title deeds." (Transcript of Record, page 13). Furthermore, the bill in the former suit alleged that while refusing to litigate her claims against the appellee, or to take steps towards the prosecution of the same, the appellant had, for the purpose of injuring the appellee and preventing the sale of his said property, caused said purported notice to be filed of record.

Thus, there was put directly in issue the ultimate facts upon which the appellant is relying for relief in her present suit. How can it more clearly be shown by argument, or how better demonstrated, that the facts set forth

in the appellant's bill were adjudicated in the former suit than by the foregoing simple recital of the matters to be found in this record. Were there any doubt remaining, it would be removed by the finding of fact in the decree of the Chancellor in the former suit: "that the defendants entered into possession of the lot described in the bill of complaint, after the filing of this suit." (Transcript of record, page 13).

How, upon reason, can it be said that the appellees' plea admits as true the allegations in the appellant's bill that she was let into possession of the property in controversy before the filing of the bill in the former suit, when the Court by a solemn decree found as a fact that such allegation was untrue? How can any fact which she alleges in her bill be taken as admitted which even tends to vitiate her bill? What purpose could possibly be served by the plea of res judicata in any case where applicable, if the facts alleged in a subsequent suit were, upon the filing of such plea taken as admitted? No decree would be final, if such were the law.

Now as to the appellant's fifth proposition, that the said Salisbury, having accepted and retained One Hundred Dollars ($100.00) paid to him by the appellant as part of the purchase price of said land, should be denied equity because he has not sought to do equity by returning to the appellant the money so paid to him. As we understand it, this salient principle of equity jurisprudence only applies to those who invoke the aid of the Court, and not to the defendant who is perforce brought into Court against his will.

Thus far we have endeavored and in the main we think we have succeeded in confining our argument to the propositions raised by the appellant upon the hypothesis that the former suit was brought by the appellee Salisbury solely and alone for the purpose of having the appellee's caveat declared null and void and stricken of record. We desire now to discuss the former suit as a suit to quiet title, a phase of that case entirely ignored by the opposing counsel in their brief.

The jurisdiction of Courts of Chancery to quiet title and remove clouds has been enlarged and extended by statute in this State.

Sections 3212 and 3213 of the Revised General Statutes of Florida, 1920;

Clements Vs. Baker, 73 Fla. 6.

The settled rule is, that in bills to remove clouds from the title to real estate, it must be shown that the complainant was in possession of the land when the bill was filed, or that the land was wild and unoccupied.

Watson Vs. Holiday, 37 Fla. 488.

One who claims title to land, legal in its character, cannot maintain a bill to remove a cloud upon his title against a person in possession of the land.

Gamble Vs. Hamilton,
31 Fla. 401.

In suits to quiet title, the complainant must show the validity of his own title and the invalidity of the title to his opponents.

Levy Vs. Ladd,
355 Fla. 391;

Houston Vs. McKinney,
54 Fla. 600.

Under this state of the law the appellee Salisbury filed the former suit alleging, among other things, that he was the owner in fee of the property in question; that said property was wild and unimproved land, and not in the actual possession of any person, but that he was in constructive possession thereof; that the appellant had caused to be prepared and put of record in the public records of Pinellas County a caveat or notice of purchase by her of said lands, which had the effect of clouding the title to his property; that the appellant was claiming some right, title or interest in the property which she had repeatedly refused to litigate; and that by reason of said caveat and the claims of the appellant, prospective purchasers from the appellee were declining and refusing to accept his title to said property; and upon such allegations the appellee prayed a general decree against the appellant quieting his title to said property against all the right, title, interest and claim which she had or was making in and to said property, and prayed specifically that said caveat be declared null and void and cancelled of record as a cloud upon his title; and he further prayed that the appellant be perpetually enjoined from thereafter asserting any right, title or interest in and to said property.

The appellant was made a party defendant to the bill in that cause by the service upon her of a subpoena to answer duly issued, and she entered her general appearance to the bill. Due to no fault of the appellant, and for reasons not appearing in the record, she neglected or failed to make proper defense to the suit, which proceeded in due course to a final decree by a Court of competent jurisdiction, which assumed and had full and complete jurisdiction of the parties and of the subject matter of the suit. The decree thus render-

ed based upon the bill of complaint, the decree pro confesso regularly taken and entered against the appellant, and the report of the Special Master, in solemn words declared: "It is, therefore, ordered, adjudged and decreed that as against the defendants, Lillian Mae Hay and James D. Hay, the complainant, Lyman A. Salisbury, is the owner in fee simple of Lot Three (3) of W. F. Smith's replat of Block Five (5), Lakeside Subdivision in the City of St. Petersburg, Pinellas County, Florida, free and clear of all claims of the defendants, James D. Hay and Lillian Mae Hay, or any person claiming by, through or under them or either of them. That the purported notice of purchase heretofore filed in the office of the Clerk of the Circuit Court of Pinellas County, Florida, as recorded in Deed Book 346, page 170, be, and the same is hereby declared and decreed to be cancelled, null and void and of non-effect and the title of said complainant be, and the same is hereby quieted thereagainst and against the defendants, James D. Hay and Lillian Mae Hay, and each of them, and against all persons claiming by, through or under them.

"That the defendants, James D. Hay and Lillian Mae Hay, be, and they are hereby perpetually enjoined from hereafter asserting any right, title, claim, interest, or demand in, upon or to the said Lot Three (3) of W. F. Smith's replat of Block Five (5) of Lakeside Subdivision, as aforesaid."

How can it be said in this suit between the same parties, that the decree in the former suit did not finally adjudicate and determine every right, interest and claim which the appellant is now seeking to set up and enforce in the present suit? How can it be said, after this Court has affirmed such decree, that the appellant is entitled to the

equitable relief of the specific performance of a contract to purchase said land, a contract which was in existence long before the former suit was commenced and under which the appellant was claiming rights which had fully accrued in point of time and which she had repeatedly refused to litigate. The case is too plain for argument. However, we desire to call the attention of the Court to three cases treating of the effect of decrees rendered in suits quieting the title to property, as against claims sought to be set up in subsequent suits by defendants in former suits.

In the case of Morarity Vs. Calloway, 134 Ind. 503, 34 N.E. Rep. 226, it appeared from the evidence that the land described in the complaint was conveyed by the appellees, King and King, to the appellant on the third day of June, 1879. King and King at the time of the conveyance, were husband and wife, and held the land by entireties. At that date, Phoebe King, the wife, was a minor, under the age of twenty-one years. She became twenty-one years of age on the fourth day of April, 1881, and at once repudiated the conveyance made by her and her husband and served upon the appellant a written notice of her intention to avoid the deed, on account of her minority at the date of its execution. She subsequently brought suit in the Clinton Circuit Court to set aside the deed, and quiet her title to the land, in which action she was successful. After quieting her title, she and her husband conveyed the land to the appellee Calloway. During the time the appellant held the land under the deed from King and King, he purchased the same at a sale for delinquent taxes. He also performed labor in the construction of a public ditch during that period, for which the land had been assessed. These were the matters

for which he sought recovery in that action. It was contended by the appellees that the appellant was estopped by the decree quieting title from asserting any lien on the land existing prior to the date of such decree; while the appellant contended, that the primary object of the former suit being to avoid the deed executed by Phoebe King while a minor, no such estoppel existed. The Court held that the decree quieting title as against any claim to the land described by the complainant held by the appellant at the time such decree was rendered, estopped him from later asserting any such claim. Said the Court:

"If they were valid liens, they should have been set up by way of cross complaint in the action to quiet title and saved from the operation of the decree. To permit the appellant to assert these supposed liens now would be to hold that the title of the appellees to the land described in the complaint was not quieted, notwithstanding a general decree of the Court of competent jurisdiction to the effect that such title is quieted, as against all claims of the appellant."

In Green Vs. Glynn, 71 Ind. 336, the Court said in passing upon the effect of a decree quieting title: "If one brought into Court, being not only allowed full opportunity to assert such claim as he may have, but directly challenged to do so, neglects to use this opportunity expressly afforded him, he has no right to again vex the Court or the claimant adversely to him by instituting a new and distinct action against the party who summoned him into Court."

In Hawkins Vs. Taylor, 128 Ind. 431, 27 N.E. Rep. 1117; the Court, under a statute providing that a widow who remarries while holding lands by virtue of a previous marriage,

shall not alien such land with or without her husband's assent , and, if she die during such marriage, the land shall go to her children by the previous marriage, held that where, before the second marriage a widow and her children conveyed their inherited land and the grantee, in a suit wherein both the widow and the children were made defendants, quieted title, the decree estopped the children from disputing after the widow's death her right of alienation, since though their rights did not accrue until after her death, they had had an opportunity to litigate the validity of her alienation.

The foregoing are by no means all of the cases relating to the effect of decrees quieting title under circumstances similar to the case at bar, but they very well illustrate the rule which obtains, so far as we have been able to ascertain, in all of the States of the Union. Indeed, we have been unable to find any case where, after the rendition of a decree quieting the title to real estate, the defendant has been permitted in a subsequent suit to set up any right, title, claim or interest which had accrued or was in existence at the time of the commencement of the former suit. We confidently believe that this Court will approve the principles announced in the above quoted cases and will hold that the appellant's present suit is barred, or that she is estopped from setting up in the present suit any claim whatsoever in and to the property in question.

But before leaving this phase of the case, we desire to call to the attention of the Court again the finding of fact in favor of the appellee by the Court below in the former suit: "that the defendants entered into possession of the lot described in the bill of complaint after the filing of this

suit; and that the equities are with the complainant.....
.....That the defendants, James D. Hay and Lillian Mae Hay, and each of them, be, and they are hereby required to relinquish possession of said lot.....and to vacate the same within a period of thirty (30) days from and after the entry of this decree." We respectfully submit that this finding of fact by the Court below in the former suit settled once and for all the right of the appellant to have a decree for the specific performance of her alleged verbal contract of purchase. The settled law of this State is, that a verbal contract is not the subject of a decree for specific performance, unless at the time of the commencement of the suit, the complainant is rightfully in possession of the property.

Price Vs. Price, 17 Fla. 605;
Neal Vs. Gregory, 19 Fla. 356.

So, it seems to us, that even if the decree of the Court below should be reversed and this cause remanded for an answer by the appellees and for further proceedings, that no matter what the outcome of the case might eventually be, the complainant would never be in a position entitling her to a specific performance of the alleged contract. To hold otherwise, would be in effect saying that the Court below could in one case hold that a certain condition existed as a fact, and in a subsequent suit between the same parties involving the same matter, hold that such a condition did not in fact exist at all.

Even if the Court below had not found as a fact that the appellant had not entered into possession of the property in controversy before the commencement of the former

suit, and had not held that she was wrongfully maintaining possession at the date of the decree, the fact of her non-possession of said property would nevertheless be inferable from the decree in favor of the appellee quieting his title to said land.

Watson Vs. Holidan and

Gamble Vs. Hamilton, above.

One other proposition which, we think, is controlling in this case, and that is the effect of setting the case at bar for hearing in the Court below upon the appellees' plea of res judicata and the appellant's replication thereto.

Counsel for the appellant have correctly stated the law upon this phase of the case, and in so stating it, have stated themselves out of Court. On Page Six of their brief, they have this to say:

"We admit the entire sufficiency of the plea and stake the result on its falsity in facts.

"18 Cyc. 896.

"18 Ency. Pleading and Practice, 885.

"As a replication conveys the sufficiency of the plea, the whole case turns on the determination of the issues so made. If the defendant proves his plea, the bill should be dismissed either as a whole, or to the extent covered by the plea."

Upon the filing of the plea res judicata to the bill, two courses are open to the complainant; he may either set the plea for hearing or he may file a general replication thereto. If he sets the plea for hearing, he thereby admits the truth of the facts set up in the plea, and merely tests

the sufficiency of the plea in form and substance as a defense to the entire bill. If he files a replication to the plea, he thereby admits the sufficiency in form and substance of the plea as a defense to the entire bill.

Spaulding Vs. Ellsworth,
39 Fla. 76.

The complainant did not choose to test the sufficiency of the plea in the case at bar, but, on the other hand, filed a pleading thereto which amounted to and was deemed and treated by the Court below as a general replication. Such being the case, we, therefore, respectfully submit that the entire argument made by the appellant in the brief of her counsel, goes to but one point and that is, the sufficiency of said plea in substance; the argument being that the former suit and the present suit between the same parties are not identical in subject matter. We respectfully submit that this was a question of law, and should have been raised in the lower Court by setting the plea for argument.

18 Ency. Pleading and Practice,
page 689.

Wherein it is said: "If the complainant replies to a plea, denying the facts alleted therein, he thereby admits that it is sufficient in form and substance as a defense to the entire bill, and if the allegations of the bill are established, the bill must be dismissed without reference to the equities arising from the facts therein averred, which are not met by the plea; and this result will follow even though the averment of facts would not have authorized a judgment, had the plea been set down for argument."

So that, the only question before this Court is a

question of fact and that is; Does the stipulation entered into by and between counsel sustain the averments of the appellees' plea of res judicata? We shall not take up the further time of the Court by quoting again from that stipulation. The Court will see by reference to the record that the appellees set up in their plea of res judicata a full history of the proceedings in the former suit and made as exhibits thereto all of the material parts of the record in the former suit. The stipulation of counsel establishes as a fact the proceedings had in the former suit; identifies the subject matter of both suits, the identity of the causes of action, the identity of the persons and parties to the action, and the identity of the quality in the person for and against whom the claim is made. So that every averment of fact contained in the plea is amply supported by the stipulation of fact entered into by counsel and which was treated by the Court as testimony in the cause.

The Court below, having found that the evidence submitted upon the issues raised by the plea and the replication thereto fully sustained said plea; the decree of the Court should not be reversed unless it manifestly appear that the Court was in error in such finding. In conclusion, therefore, we most earnestly insist that the appellant was afforded an opportunity in the former suit to litigate the claim which she now seeks to enforce, in fact she was directly challenged to do so, and having neglected or failed to litigate such claim, it is now too late after a pronouncement of a general decree quieting the appellees' title for her to undertake by subsequent

proceedings, to set up the claim which she could and should have litigated in the former proceedings.

Respectfully submitted,

Harris & Denning

Solicitors for Appellees.