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.

LILLIAN MAE HAY,
APPELLANT.

-vs-

LYMAN SALISBURY and
RUTH F. SALISBURY,
APPELLEES.

BRIEF OF COUNSEL FOR APPELLANT.

STATEMENT OF THE CASE.

Some time just prior to January, 1924, Lillian Mae Hay, through her brother James D. Hay, entered into negotiations with Lyman Salisbury, one of the defendants herein, for the purchase of

Lot Three (3) of W. S. Smith's Re-Plat
of Block Five (5) of Lakeside Subdivision,
St. Petersburg, Florida.

Terms and conditions of purchase were agreed upon and thereafter Lyman Salisbury and wife tandered a contract to Lillian Mae Hay, setting out in specific terms, as had already been agreed upon, except that there were some reservations or easements provided for in the written contract that had not been mentioned in the verbal contract.

At the time of the verbal agreement Lillian Mae Hay was placed in possession of the property, a small building having been previously erected thereon, and after some negotiations between the parties, and failing to agree because of the difference between the written contract and the verbal agreement, Lillian Mae Hay, through her agent, James D. Hay, caused to be prepared and spread upon the records of Pinellas County a notice or caveat, which will be found in the record, setting up in general terms that Lillian Mae Hay had purchased this property and was ready to comply with the terms of the purchase, etc. On the 24th day of January, 1924, Lyman Salisbury, one of the appellees herein, filed a bill in the Circuit Court of Pinellas County, Florida, to cancel this caveat, said suit having been brought against James D. Hay and Lillian Mae Hay.)Pages 13 to 15 inclusive, Transcript of Record.) The defendants appeared in this case, but through neglect or oversight on the part of their then counsel, a decree pro confesso was obtained against them and final decree later entered. (See pages 23 and 24, Transcript of Record.) A motion was made to vacate the decree pro confesso and final decree by the present counsel for Lillian Mae Hay. Motion being denied, this case was appealed to the Supreme Court from the decision of the lower court, refusing to set aside the decree, was affirmed.

In the meantime, on the 30th day of June, 1924, Lillian Mae Hay, Appellee herein, brought the present suit against Lyman Salisbury and Ruth Salisbury, for Specific performance of Contract. (Pages 1 to 5 inclusive, Transcript of Record.) On the 6th day of April, 1925, the defendants, or Appellees, filed a Plea of Res Judicata. (See pages 7 to 27 inclusive, Transcript of Record.) To this Plea the complainant filed on the 15th day of April, 1925, Replication. (See pages 28 and 29, Transcript of Record.) On the 8th

day of May, 1925, this case having been set down for argument upon Bill of Complaint, Plea and Replication, stipulation was entered into by counsel. (See pages 30 and 31, Transcript of Record.) On the same 8th day of May, 1925, the court rendered a decree or order upon the Bill, Plea, Replication and Stipulation, sustaining the Plea and dismissing the Bill of Complaint. (Page 32, Transcript of Record.) (I wish to call the attention of the Court to the fact that the Order bears date April 8, 1925. Opposing counsel will agree this order bears an erroneous date, and should have been May 8th as shown by the heading on the filing date, and also by the date of Stipulation, and in the appeal was ordered set out as having been made on the 8th day of May, which is correct.) From this order the Appellant appeals. (Page 33, Transcript of Record.)

A R G U M E N T.

There are three Assignments of Error, but each of them go to the same point and raise but one point, and that is, that the court erred in rendering a final decree dismissing the Bill of Complaint instead of finding that the matters and things set forth in the complainant's Bill of Complaint had not been adjudicated, and finding the equities with the complainant, and giving a decree in favor of the complainant. So we shall argue this case on this basis of one Assignment of Error.

The Court will observe by reference to the original Bill of Complaint filed by Lyman Salisbury in this case, (Page 13 et se qua.) that the Bill of Complaint in the original suit brought by Lyman Salisbury against Lillian Mae Hay and James D. Hay was brought simply and solely for the purpose of removing

from the record a caveat that had been prepared by James D. Hay and caused to be filed and recorded in the records of Pinellas County, Florida. (See Transcript of Record pages 13 and 14.) It is a well settled principle that a Court of Equity will not and cannot attempt to cancel a verbal agreement, and certainly all that could be done in that case would be to cancel the caveat which had been caused to be spread upon the records of Pinellas County, giving notice to the public that these parties had entered into a verbal contract to purchase this property.

The Court will note that the present suit, (Transcript of Record pages 1 to 5 inclusive,) is predicated upon a verbal contract setting out a case where a part of the purchase money was paid and the purchaser placed in possession of the property; a purchaser ready, willing and able to buy the property upon the terms agreed upon, and tendering and offering to pay the purchase price under the terms and conditions of the contract. So the original bill brought by Salisbury to cancel a caveat, and the present bill being brought by the purchaser under a contract on a verbal agreement to purchase this property, cannot be said to be one and the same cause of action .

"The test of the identity of the cause of action for the purpose of determining the question of res judicata is the identity of the facts essential to the maintenance of the action. "

Citing Prall v. Prall,
50 So. 866,
6th and 7th headnotes.

Also citing Harrison v. Pennington Paper Co.,
5 U. S. 314.

Again, the case of
DeCosta v. Dibble,
24 So. 911

this principle was laid down.

A plea in equity setting up a former decree at

bar must show that the former suit was substantially between the same parties, and for the same subject matter, etc.

We wish further to call the attention of the Court to the fact that the Appellant in this case was not the actor in the original case, but in the original case the suit was brought by Lyman Salisbury against the Appellant in this case, and that suit was asking a court of equity to decree only that the caveat was null and void and of no effect, and the court properly did so. If that case, or the Bill of Complaint in that case had gone on and set up the facts as we have set them up in this case, which facts are admitted by the Plea in the present case, to be true, and the court had rendered a decree under such facts, then we admit that we would be estopped from further attempt to litigate these facts, but in the original suit Lyman Salisbury carefully omitted to mention the facts leading up to the caveat, and the case as now presented by Lillian Mae Hay has never been adjudicated by the lower court, or by this court. It was a well settled principle of equity that he who goes into equity must do so with clean hands, and this court has held in every case that has ever been before it where a contract for sale of land was attempted to be set aside, foreclosed, or declared null and void, even for the non-payment of instalments on the purchase price, that the complaining party must offer to do equity, and in this case it is stated that at least One Hundred Dollars was paid, accepted and retained by Salisbury as part of the purchase price, and this fact is admitted by the Plea, for it is a well established principle that a plea in bar in equity should not deny the equity of the bill, but brings forward a fact which if true, displaces it, and in equity, as in law, its office is to confess the rights and avoid it upon matters dehors.

Citing 16 Enc. of Pleading & Practice, 598.

So we see that the facts in the present case are not the facts in the original case, and as above stated, a court of equity could not cancel a verbal contract.

Now this principle being established, what should have been the decree or order of the court upon the argument of this case on the 8th day of May, 1925 when the court entered its decree or order dismissing complainant's Bill of Complaint?

The Court will note that there was a Replication filed to this Plea. (Transcript of Record, page 28.) That the said cause, instead of taking testimony, was tried upon stipulation, which took the place of the testimony. (Pages 30 and 31, Transcript of Record.) Then this case not having been formerly adjudicated, or the facts in this case not having been formerly adjudicated, as attempted to be shown by the Plea, and the Plea having admitted the truthfulness of the allegations of the Bill of Complaint, the court should have entered a decree in favor of the complainant upon the allegations set forth in the Bill of Complaint.

We admit the entire sufficiency of the Plea and stake the results on its falsity in fact.

16 Cyc. 296.

18 Enc. Pleading & Practice, 685.

"As a replication confesses 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. If the defendant fails to prove his plea he will not be permitted to answer, and plaintiff may take his decree according to his case as stated in his bill."

16 Cyc. 296 and 297.

Now in this case a stipulation having acted as testimony, and the case having been submitted for final hearing upon Bill, Plea, Replication and Stipulation, if this Honorable Court determine that the facts in this case had not been adjudicated, then our contention is that we are entitled to an order of this Honorable Court directing the lower court to enter a decree in favor of the complainant in the present case upon the facts set forth in the Bill of Complaint, which under the law, are admitted by the Plea of res judicata.

Again citing

16 Enc. Pleading & Practice, 598.

Also same volume, p.587.

We call the attention of this court to the four (4) identities under which a judgment or decree in one proceeding can be successfully pleaded in bar to a second proceeding; according to a learned authority, there must be a concurrence of four(4) conditions, to-wit:-

I.

Identity in the thing sued for or subject matter of the suit.

II.

Identity of the cause of action.

III.

Identity of persons and of parties to the action.

IV.

Identity of the quality in the person for or against whom the claim is made.

A distinction is made by the authority of a difference between the case of a judgment offered as evidence of some particular question which was adjudicated in a former controversy and the case of a decree as in the instant case, which is set up as a bar to the maintenance of the cause of action. See,

Black on Judgments, 2nd. edition, Vol. 2, Section 610.

15 R.C.L., Section 429,
City of New Orleans v.
Citizens Bank, (U.S.), 42 L. Ed. P.202

But it may be contended by the learned counsel for appellee that the estoppel of a decree binds the litigant by not only what point was involved in the litigation, but as to any other admissible matter which might have been offered as a defense. Applying the reasoning of Mr. Black and of the courts in discharging the construction of the four (4) identities, it is apparent that the appellant could not have introduced in evidence the subject matter of the present bill of complaint for the obvious reason that in the former suit, the purpose of the bill was merely to cancel a caveat, which instrument was not entitled of record. The decision of said suit in no way involves the law with reference to specific performance.

The Final Decree in the former suit (pages 23 and 24 Transcript of Record) covers considerably more than the Bill of Complaint asked for in said cause, (pages 13 and 14, Transcript of Record) but even the Final Decree itself is not broad enough, even if permissible, to enjoin anyone from asserting their rights under a verbal contract, or permissible for a court of equity to cancel a verbal contract. This Final Decree referred to does not enjoin the present complainant or appellant, from asserting her rights under the contract for purchase of this property uder the conditions of the case stated, as is stated in the present Bill of Complaint. (pages 1 to 5, Transcript of Record.)

In our conclusion we wish to reiterate that the former suit was only for the purpose of canceling a caveat which had been spread upon the record, and in no way could it affect the rights under the present Bill, which is predicated upon a contract, not of record, for specific performance where the

allegations of the Bill of Complaint show that a part of the purchase money was paid and accepted, and the wouldbe purchaser, the appellant herein, placed in possession of the property, and under the allegations of the Bill of Complaint and admissions made by the Plea in the present suit, the appellant was ready, willing and able to perform her part of the contract, and was anxious to perform her part of the contract, and is still ready, willing and able to perform, and this court having held previously that specific performance can be predicated upon a verbal contract where the terms of the contract are clear, we believe we are entitled to a reversal of this case, we having shown plainly that the matters and things sought to be adjudicated in the present suit were not, and could not have been adjudicated in the former suit, and upon reversal under the authorities above set forth, we are entitled to an order of this Honorable Court directing the lower court to enter a decree for the complainant or appellant upon the matters set forth in her Bill of Complaint and admitted by the Plea to be true. The Appellees have had their day in court and had their choice to have answered, but when they filed their plea in the present suit they staked their all upon the plea, and when they failed, as we believe they have done, then they are not entitled to answer under the authorities above cited, but we are entitled to a decree, and we believe this Honorable Court will so instruct the lower court.

Respectfully submitted,

Hampton, Bull & Sandford

S. S. Sandford

SOLICITORS FOR APPELLANT.