IN THE SUPREME COURT

OF THE STATE OF FLORIDA.

LILLIAN MAE HAY,
Appellant. ::

-vs- ::

LYMAN SALISBURY and RUTH F. SALISBURY,
Appellees. ::

REPLY BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

If it please the Court, counsel for appellees seem to have based his argument entirely upon matters which are not shown by the facts in the record in this case.

We have cited numerous authorities to show that the plea of res adjudicata admitted the truth of the bill of complaint, but seeks to defend on matters de hors the record.

Counsel for appellees take the position that because of the fact that he alleged in his original bill against Hay that no one was in possession of this propetty, that the allegations of the appellant in its bill of complaint, that she is in actual possession of the property, and was at the time the former suit was filed, cannot be considered, and the appellees try to avoid the effect of their plea in bar in this case in

admitting the possession of the appellant, by referring back to the allegations of the bill of complaint in the former suit.

If indeed, the appellees have now awakened to the fact that in the former suit it was alleged that the land was wild and unimproved by Salisbury, and in the present suit it was alleged that the land is and has been in the possession of Hay since the verbal contract referred to was entered into, and that the appellees could not consistently maintain a plea of res adjudicata because of the fact that the subject matter varies between the allegations of the former suit, and the allegations of the present suit, the appellant is not responsible for the condition or position in which the appellees now find themselves, because the record was before the appellees at the time they offered and filed this plea. And now in attempting to point out the difference between the allegations of the former suit, and the allegations in the present suit, they admit that the subject matter of the two suits is not identical, and in doing this, admit that the matters in the present suit have not been formerly adjudicated as alleged.

Quoting from appellees' brief, the fifth page from the last, appellees say: " "The settled law of this State is, that a verbal contract is not 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." Citing Price v. Price, 17, Fla. 605 , Neal v. Gregory, 19 Fla. 358.

Now as formerly stated, the present bill by appellant sets up the case where a verbal contract was entered into for the purchase of this property, and the appellant herein placed in possession by the appellees. If the plea of res adjudicata on the part of the appellees does anything, or has any legal effect, as heretofore stated, it admits these allegations of the bill to

be true, but says, in order to avoid this, that these matters have been formerly passed upon by the court, but when the appellees begin to quote from their bill of complaint that has been passed upon, they allege that the land was wild and unimproved, and not in possession of any one, save and except constructional possession of appellees. The appellees challenge us to produce any authorities that equity does not interfere to cancel a verbal contract.

It is held however, in the case of

Waters v. Lewis, 106 Ga. 758 and
32 S. E. 854,

and in the case of

Parker v. Shanon, 131 Ill.452;
13 N. E. 155;

and numerous other cases cited, that a mere verbal claim to, or assertion of ownership, in reality does not constitute a cloud on title. It is also held, 30 Cyc. 1314, that a cloud such as equity will undertake to remove, is the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded, and which it would be inequitable to enforce.

In conclusion, we wish to state; that the test of the identity of the cause of action for the purpose of determining the question of res adjudicata, is the identity of the facts essential to the maintenance of the action. Again citing

Prawl v. Prawl, 50 So. 866,

sixth and seventh headnote. Also

Harrison v. Pennington Paper Company,
5 U. S. 314.

Our contention is, in conclusion, that the appellees having admitted the difference between the allegations of the former bill and the present bill, with reference to possession, admitted that we do not have in this case the identity of the subject matter, and by so admitting, have admitted themselves

out of court by confessing the inconsistency of the plea.

We respectfully submit that this case should be reversed and remanded to the lower court with instructions to enter a decree in favor of the appellant upon the facts set out in the bill of complaint, and admitted to be true by the plea, without further evidence or reference.

Respectfully submitted,

Hampton, Bell & Reed

L. L. Sanford

SOLICITORS FOR APPELLANT.