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Quieting Title to Real Property

James W. Middleton

LEGISLATIVE NOTES

QUIETING TITLE TO REAL PROPERTY

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The legal or equitable owner of land in Florida has four primary equitable procedures by which he may quiet his title:

1. Re-establishment of land titles when the records have been destroyed by fire.[1]
2. The 1889 quiet-title act.[2]
3. The 1925 quiet-title act.[3]
4. The 1947 quiet-title act.[4]

I. Equitable Jurisdiction

The purpose of a bill to quiet title is to relieve the owner of the threat of litigation based upon invalid claims which make his title doubtful or affect its marketability. Originally, equity proceeded quia timet, acting in personam. Through an action and decree in personam persons brought to the bar could be coerced to render up the invalid instrument for cancelation or to make a conveyance of the interest claimed. Enforcement was by contempt proceedings. To secure jurisdiction to act in personam and to render an in personam decree, it was necessary to serve the defendant personally within the jurisdiction of the court.[5] Personal compliance with the order was necessary to accomplish the purpose of the decree.[6]

Two important factors in the United States have resulted in a change in the nature of the equitable jurisdiction. States are quasi-sovereign, and process in civil suits runs only to their borders. The citizens of the United States move freely from one state to another, acquiring and

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[1]Fla. Stat. 1941, §71.14 *et seq.*
[2]Fla. Stat. 1941, §66.10.
[3]Fla. Stat. 1941, §66.16 *et seq.*
[4]Fla. Stat. 1941, §66.28 *et seq.* (Supp. 1947).
[5]Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101 (1884).
[6]Davidson v. Sharpe, 28 N. C. 15 (1845); J. R. v. M. P., Y. B. 37 Hen. VI, f. 13, pl. 3 (1459).

retaining property interests under the protection of the Constitution.[7] The result is that personal service is ineffective as a means of securing jurisdiction over any persons having claims to lands within a state if they are beyond the boundaries of the state.[8]

A few states solved the jurisdictional problem by providing for constructive service upon non-residents, declaring that a court of equity has the inherent power to act in rem.[9] Florida followed this policy with the original act for quieting title.[10] The other states, not deciding whether a court of equity has this inherent power, provided both a constructive service statute and a statute permitting the decree, in a suit to quiet title, to operate as a conveyance.[11] Florida followed this policy with the 1925 act.

II. Limitations upon Procedure Prior to 1947

Procedure under the 1925 act is not available to test the validity of the source of the plaintiff's title. Construction of the act denied jurisdiction of a suit by an owner deraigning from a tax title to quiet the record title, without some other basis for the suit than the mere existence of the record title.[12] Jurisdiction is also denied in a suit for a declaratory judgment designed to accomplish the same purpose.[13] Realizing that a tax title is replete with possible future claims, the expectancy of which directly and adversely affects the marketability of land, the legislature removed this limitation in 1943 and permitted a direct remedy by the tax title holder in a quiet-title suit.[14]

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[7]Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299 (1935); *cf.* Fla. Const., Decl. of Rights §18.

[8]Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670 (1890); Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

[9]Alabama, New Mexico, New Hampshire, Nevada, and South Carolina; see Walsh, Equity 50 (1930).

[10]*See* Myakka Co. v. Edwards, 68 Fla. 372, 386, 67 So. 217 (1914).

[11]Berton v. All Persons, 176 Cal. 610, 170 Pac. 151 (1917); Garfein v. McInnis, 248 N. Y. 261, 162 N. E. 73 (1928).

[12]Taff v. Hodge, 132 Fla. 642, 182 So. 230 (1938); Woodman v. Jones, 101 Fla. 177, 133 So. 620 (1931); Florida Central & Ga. Ry. v. Boswell, 98 Fla. 117, 123 So. 567 (1929).

[13]Woodman v. Jones, 101 Fla. 177, 133 So. 620 (1931); Stuart v. Stephanus, 94 Fla. 1087, 114 So. 767 (1927).

[14]Fla. Stat. 1941, §§66.26, 66.27 (Supp. 1947), Beebe v. Richardson, 156 Fla. 559, 23 So.2d 718 (1945).

A bill against unknown defendants with unknown claims is not a justiciable matter under the 1925 statute.[15] Such a bill neither advises the defendant of the nature of the case nor advises the court what decree it shall make.[16] Under the rules of res judicata, there must be set out in the decree either a known claim or a known claimant, for the suit is binding only on the parties thereto and the issues therein.[17] The constructive service act permits constructive service upon unknown persons without stating the nature of their claims; but it does not eliminate the necessity of allegations in the bill showing the basis or character of the claims of interest or title by such persons.[18]

Under the act providing for re-establishment of land titles when the records have been destroyed by fire, the parties plaintiff or their grantors must have been in actual possession of the land at the time of the destruction of the records, and such parties must also be in possession at the time of bringing suit.[19] "Actual possession" is not here defined, but the insertion of the adjective indicates that constructive possession at the time of the destruction would not be sufficient. The act does not provide for re-establishment when the means of loss is other than fire. It does provide for the establishment of title rather than for the re-establishment of the record, which is merely evidence of the title, and does establish it against all persons known or unknown.[20]

III. THE 1947 ACT

The Nature of the Proceeding. A person who claims or has conveyed by warranty deed a freehold estate in real property within the state may bring a proceeding in rem against all the world in the county in which the property is situated, in order to establish title and to determine all adverse claims.[21]

The legislature has thus prescribed an action in rem, but the determina-

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[15]Greene v. Uniacke, 46 F.2d 916 (C. C. A. 5th), *cert. denied*, 283 U. S. 847, 51 Sup. Ct. 493, 75 L. Ed. 1455 (1931).

[16]McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926); *accord*, Welborn v. Pierce, 75 Fla. 667, 78 So. 929 (1918).

[17]Greene v. Uniacke, 46 F.2d 916 (C. C. A. 5th), *cert. denied*, 283 U. S. 847, 51 Sup. Ct. 493, 75 L. Ed. 1455 (1931).

[18]Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926); Cobb v. Hawsey, 56 Fla. 159, 47 So. 484 (1908).

[19]FLA. STAT. 1941, §71.15.

[20]FLA. STAT. 1941, §71.14.

[21]FLA. STAT. 1941, §66.28 (Supp. 1947).

tion of the legislature, although persuasive, is not final as to the nature of the action. The courts must interpret the act as a whole to determine whether such result was intended, construing its provisions in the light of conditions existing at the time of its passage.[22]

A proceeding in rem is one taken against the property, and has for its object the disposition of the property without reference to the title of individual claimants.[23] A judgment in rem determines the status of the property, and by force thereof it ipso facto becomes what the judgment says it is.[24] Thus a probate decision declares a will to be valid or invalid;[25] the fact that incidentally the right of legatees may be determined is immaterial. Of a similar nature is the proceeding against land for taxes;[26] the interests of private persons in the land are not material to the determination that the land be assessed at a particular rate, nor to the determination that the title thereto be forfeited. The process in such cases runs against the res; constructive notice of the fact of such proceedings is sufficient to make all the world parties.[27]

For the purpose of Florida practice it is necessary to determine the question of the nature of the action, because of the clear-cut decision in *Reina v. Hope*[28] that provisions for service other than by publication are directory in an in rem action. This decision has been criticized on the basis that the ratio decidendi was a reluctance to alter a prior decision because of general reliance thereon;[29] and a recent case indicates that the court may have reconsidered its position.[30] Yet the proceeding is in rem, and the process runs against the res, not against the interested persons. This is the true basis; it is fundamental and may not be altered.

Validity of the act under the due process clause of the Fourteenth Amendment does not depend upon a determination that the action is in rem or quasi in rem. Due process requires only that the court which

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[22]American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906).

[23]Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

[24]Stiller v. Atchison, T. & S. F. Ry., 34 Okla. 45, 124 Pac. 595 (1912); *see* Bartero v. Real Estate Savings Bank, 10 Mo. App. 76, 78 (1881).

[25]Torrey v. Bruner, 60 Fla. 365, 53 So. 337 (1910).

[26]Reina v. Hope, 30 So.2d 172 (Fla. 1947).

[27]Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461 (1907).

[28]30 So.2d 172 (Fla. 1947).

[29]22 FLA. L. J. 21 (1948).

[30]*See* Golden v. Grady, 34 So.2d 877 (Fla. 1948).

assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and an opportunity to be heard.[31] It is not essential that the court have jurisdiction of the person; if the res, the subject matter of the controversy, is within the jurisdiction, the court can adjudicate the defendant's interest therein.[32] In spite of this, it is well to note that a true in rem action that did not exist in substantially the same area of operation prior to passage of the Fourteenth Amendment is extremely rare,[33] the courts avoiding decision of the question by assuming that the action is quasi in rem.[34]

A decree in rem is binding upon all persons if it is binding upon any person, since it ipso facto determines the status of the res. An examination of Florida decisions under the 1925 act shows that a decree under that act is in rem only as to the interests of persons actually made parties thereto, and as to claims or clouds that are alleged in the declaration. The compendious discussion in *McDaniel v. McElvy*[35] shows that a known claimant or a known claim is necessary for a binding decree. In *Greene v. Uniacke*[36] it was held that a person who was not made a defendant in an action and whose claim was not set out in the bill was not bound by a decree therein, on the basis that the statute failed to make unknown claims by unknown persons justiciable. Nor does the constructive service act permit joinder of unknown defendants claiming unknown interests, for the restriction is one of equitable procedure rather than service of process.[37] Unknown persons having known claims are made parties by specific allegation of the cloud on title if one is claimed to exist, or by allegation of the facts constituting the basis of a mere claim of interest and facts showing the invalidity thereof.[38] Thus, the decree determines only those issues before the court. An issue so determined by a court having jurisdiction over the cause is final unless reversed upon appeal. In this it

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[31]American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911).

[32]Jacob v. Roberts, 223 U. S. 261, 32 Sup. Ct. 303, 56 L. Ed. 429 (1912). *But see* Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877) (property must be seized).

[33]*Cf.* Hobbs v. Lenon, 191 Ark. 509, 87 S. W.2d 6 (1935).

[34]*See* American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906).

[35]91 Fla. 770, 108 So. 820 (1926).

[36]46 F.2d 916 (C. C. A. 5th), *cert. denied,* 283 U. S. 847, 51 Sup. Ct. 493, 75 L. Ed. 1455 (1931).

[37]Brecht v. Bur-Ne Co., 91 Fla. 345, 108 So. 173 (1926).

[38]Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926).

binds all persons; the validity of the claim or interest is ascertained, and by force of the decree the interest is transferred or secured to the true owner. On the other hand, should a person in possession under a void deed quiet his title without either naming the true owner, or his interest, in the bill, that issue would not have been determined, and as to that interest no person would be affected by the decree.

Because of this fundamental difference in the subject-matter of the decrees, the judgment against the interest or claim is spoken of as quasi in rem[39] or as "a proceeding in rem in a larger and more general sense."[40] The concept is defined as a term applied to prcoeedings which are not strictly or purely in rem but are brought against the defendant personally, though the real object is to deal with particular property or to subject property to the discharge of claims asserted.[41]

If the supreme importance that is accorded to land in Anglo-Saxon law is recognized, it will be seen that a private action concerning interests in land requires a different and more effective type of process upon owners of known adverse interests than is given in an action in rem in order for the court to acquire jurisdiction over the cause. This same importance requires effective settlement of the action, secured by a decree final as to the cause before the court, which is given by a decree in rem.

An Action Quasi in Rem. The major difficulties under the 1925 act may be met by considering procedure under the 1947 act to be quasi in rem. Proceedings may be had against unknown interests held by unknown claimants. Adequate provision is made for personal service when possible and for constructive service when necessary. Provision is made for testing plaintiff's title by a proceeding against known privy or adverse claimants or against unknown claimants with unknown claims.

A number of restrictions and precautions for the procedure of quieting title are closely inter-related to other fields of property law and depend upon a determination that this action is quasi in rem. For example, a person who is in possession of property must be personally served with process,[42] since there is an irrebuttable presumption of knowledge of

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[39]McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

[40]Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

[41]Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372 (1886); Hill v. Henry, 66 N. J. Eq. 150, 57 Atl. 554 (1904).

[42]Harrison v. Dolan, 172 Mass. 395, 52 N. E. 513 1899); Harris v. Barnes,

his possession and of his claim from the fact of his possession;[43] if personal service can be effected by the exercise of reasonable diligence, substituted service is unauthorized;[44] a record title owner whose name is apparent in the record is considered known,[45] and personal service upon him is necessary if he is a resident and it can be had; the state or any subdivision thereof must be actually served with process or its rights may not be determined.[46]

This action does not proceed as an action in rem. Although the action is by the owner against all the world,[47] if there are known claimants or if claimants appear, there is a case which proceeds *inter partes*.[48] There is no taking of custody of the property involved which differs from the custody taken under the 1925 act.[49] Where only the plaintiff appears and a decree is taken pro confesso, the decree is rendered in accordance with the sworn bill of the plaintiff as a party;[50] it would be a manifest absurdity to say that the object of the proceeding is to determine the status of the property without reference to his title; rather, the entire object of the proceeding is to determine the validity and extent of his title, not as such but as against any claims which could or should be asserted.

Jurisdiction of the property. In this proceeding, jurisdiction and control by the court is taken by a lis pendens filed with the bill[51] and by

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137 Neb. 905, 291 N. W. 721 (1940); Killian v. Hubbard, 69 S. D. 286, 9 N. W.2d 700 (1943); *cf.* Smetal Corp. v. West Lake Investment Co., 126 Fla. 595, 172 So. 581 (1936).

[43]Carolina Portland Cement Co. v. Roper, 68 Fla. 299, 67 So. 115, *prior appeal dismissed*, 67 Fla. 518, 68 So. 1023 (1914); Tate v. Pensacola Gulf Land & Development Co., 37 Fla. 439, 20 So. 542 (1896).

[44]Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939 (1907); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906); Davis v. Brewer, 135 Fla. 752, 186 So. 207 (1939) Smetal Corp. v. West Lake Investment Co., 126 Fla. 595, 172 So. 58 (1936); Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926).

[45]Federal Land Bank v. Dekle, 108 Fla. 555, 148 So. 756 (1933).

[46]Berton v. All Persons, 176 Cal. 610, 170 Pac. 151 (1917).

[47]FLA. STAT. 1941, §66.29 (Supp. 1947).

[48]FLA. STAT. 1941, §66.35 (Supp. 1947).

[49]*Compare* FLA. STAT. 1941, §§66.32, 66.36 (Supp. 1947) *with* FLA. STAT. 1941, §§66.18, 47.49.

[50]FLA. STAT. 1941, §66.37 (Supp. 1947).

[51]FLA. STAT. 1941, §66.36 (Supp. 1947).

a summons posted on the property.[52] A lis pendens is defined as the jurisdiction, power, or control that courts have, during the pendency of an action, over the property involved therein,[53] the filing thereof giving priority to the decree rendered over prior unrecorded and subsequent conveyances.[54] A copy of the summons, with a memorandum of known claimants, must be posted in a conspicuous place on the property within fifteen days after the first publication of the summons.[55] This is a seizure of the property which does not consist of actual possession; it is sufficient if the person who has possession is officially notified that the court has control of the property for the satisfaction or determination of claims thereto.[56] The law presumes an owner to be in possession himself or by his agent; the attaching of the property is notice to come forward and assert his claim.[57]

Jurisdiction of the person. Service of process upon persons named in the bill is in the manner of a summons ad respondendum if the persons are found in the state; but, if such person is a resident who cannot be found after due diligence or whose address was not given in the bill, the summons shall be mailed to him at the county seat of the county in which the property lies.[58] For defendants, resident or non-resident, whose addresses are known but who are not found within the state, substituted service by mail is required. For all other persons—known non-residents whose addresses are unknown, or unknown claimants—constructive service is authorized.[59]

Validity of process. The state may regulate the manner and conditions upon which the property within its borders may be acquired, enjoyed, or transferred, and the title thereto quieted and determined.[60]

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[52]FLA. STAT. 1941, §66.32 (Supp. 1947).

[53]DePass v. Chitty, 90 Fla. 77, 105 So. 148 (1925).

[54]FLA. STAT. 1941, §695.01, O'Bryan v. Phillips, 123 Fla. 302, 166 So. 820 (1936).

[55]FLA. STAT. 1941, §66.32 (Supp. 1947).

[56]Security Savings Bank v. California, 263 U. S. 282, 44 Sup. Ct. 108, 68 L. Ed. 301 (1923); Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

[57]Huling v. Kaw Valley Ry. & Imp. Co., 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045 (1889).

[58]FLA. STAT. 1941, §66.33 (Supp. 1947).

[59]FLA. STAT. 1941, §66.32 (Supp. 1947).

[60]Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691 (1896); Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

The duty of providing certain and convenient methods of quieting title is upon the state.[61] It is, therefore, competent for the state to prescribe the conditions and circumstances under which constructive process will issue. It is competent for the legislature to authorize the issuance of constructive process upon allegations which follow the wording of the statute, unsupported by other allegations which show that personal service is impossible or impracticable.[62] Under this statute an allegation that personal service is impossible would be unnecessary, since the summons which issues is addressed to all persons, both known or unknown, and the order of publication comes as a matter of course upon filing a proper complaint.[63]

The sole restriction upon the authority of the legislature to prescribe the manner of issuing substituted process and the form thereof, in suits of this nature, is the due process clause of the state and federal constitutions.[64] The criterion is not the probability of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.[65]

The period of notice is adequate.[66] It is the same as in other proceedings under the constructive service act.[67] In proceedings of this nature, periods of time from ten days to thirty days have been held valid.[68] A Florida statute providing for four weeks' publication was cited in a United States Supreme Court decision holding five days' notice to non-residents insufficient.[69]

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[61]Heck v. Nicholas, 6 F.2d 10 (C. C. A. 8th 1925); McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

[62]Security Savings Bank v. California, 263 U. S. 282, 44 Sup. Ct. 108, 68 L. Ed. 301 (1923); American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911).

[63]FLA. STAT. 1941, §66.31 (Supp. 1947); Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939 (1907); *cf.* McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

[64]McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

[65]American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911).

[66]FLA. STAT. 1941, §66.38 (Supp. 1947).

[67]FLA. STAT. 1941, §48.10.

[68]North Laramie Land Co. v. Hoffman, 268 U. S. 276, 45 Sup. Ct. 491, 69 L. Ed. 953 (1925) (three weeks); Security Savings Bank v. California, 263 U. S. 282, 44 Sup. Ct. 108, 68 L. Ed. 301 (1923) (four weeks); Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914 (1909) (ten days) *cf.* Castillo v. McConnico, 168 U. S. 674, 18 Sup. Ct. 229, 42 L. Ed. 622 (1898) (thirty days); Huling v. Kaw Valley Ry. & Imp. Co., 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045 (1889) (thirty days).

[69]FLA. REV. STAT. §1413 (1892), *cited in* Roller v. Holly, 176 U. S. 398, 20 Sup.

The scope of the publication is adequate. A copy of the summons must be conspicuously posted on each parcel.[70] An owner of property is presumed to be in possession in person or through his agent. Publication is made in a newspaper published in the county in which the suit is pending or, if there is no such paper, by posting in three public places.[71] It is the duty of a non-resident owner to take some measures to be represented when his property is called into requisition; and if he fails to do this and fails to get notice by the ordinary publications which have usually been required in such cases, he must suffer the consequences.[72]

The contents of the notice are adequate. Such notice should fairly communicate to the claimant the fact of the commencement of the suit and its general nature, so that he may ascertain whether or not his interests are affected.[73] Here the subject matter of the suit is set out with a particular description of the property.[74]

The decree. The decree rendered determines all adverse and privy claims of private persons.[75] Claims of the sovereign cannot be determined without personal service, since, without a clear intent to be bound by one of its own laws, the state cannot be so bound.[76] To this extent, the decree establishes title; if regular and valid on its face it is title and not merely evidence of the validity of title against named persons or claims. This is a direct result of making all the world a party.

Although statutes of this type are considered remedial and highly beneficial and will be liberally construed and applied,[77] still, the plaintiff must comply strictly with the procedure outlined in the act to permit the

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Ct. 410, 44 L. Ed. 520 (1900).

[70]FLA. STAT. 1941, §66.32 (Supp. 1947).

[71]*Ibid.*

[72]North Laramie Land Co. v. Hoffman, 268 U. S. 276, 45 Sup. Ct. 491, 69 L. Ed. 953 (1925); Huling v. Kaw Valley Ry. & Imp. Co., 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045 (1889).

[73]American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911); Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877); Hinely v. Wilson, 91 Fla. 815, 109 So. 468 (1926).

[74]American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911); Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939 (1907).

[75]FLA. STAT. 1941, §66.44 (Supp. 1947); Berton v. All Persons, 176 Cal. 610, 170 Pac. 151 (1917).

[76]Berton v. All Persons, 176 Cal. 610, 170 Pac. 151 (1917).

[77]McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

court to acquire jurisdiction and to render a valid decree.[78] The procedure is simplified. A complaint in the form set forth in the statute is sufficient.[79] Publication and procedure therefor is carefully set out. For this reason there should be little opportunity for direct or collateral attack on the validity of the decree, except for fraud.

IV. Similar Statutes

The McEnerney Act. The Florida act is similar to a California law,[80] with four major differences. The only persons who may bring the action under the California act are those in possession in a case in which the public records have been lost or destroyed.[81] In the Florida act, such action may be brought by persons in or out of possession, claiming title of record by adverse possession, by tax deed, by foreclosure, or in instances in which the record title has been lost, stolen or destroyed.[82] The jurisdiction and power to proceed on constructive process depends upon both the seizure of the property and the adequacy of the constructive process provided;[83] the nature and source of the title of the person bringing the action should not be material. When the defendant is in possession he may not be denied a trial by jury in ejectment,[84] but he must assert such right or his interest will be determined by the court.[85]

The California act provides that no judgment may be given by default

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[78]Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926); Reynolds v. Harrison, 90 Fla. 834, 106 So. 909 (1925); Myakka Co. v. Edwards, 68 Fla. 372, 67 So. 217 (1914); Shrader v. Shrader, 36 Fla. 502, 18 So. 672 (1895).

[79]Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939 (1907); McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

[80]Cal. Gen. Laws, Act 1026 (Deering, 1941) (Cal. Stat., c. 59, June 16, 1906), American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911) (statute noted in margin), Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906) (statute noted in opinion).

[81]Cal. Gen. Laws, Act 1026, §1 (Deering, 1941).

[82]Fla. Stat. 1941, §66.28 (Supp. 1947).

[83]Jacob v. Roberts, 223 U. S. 261, 32 Sup. Ct. 303, 56 L. Ed. 429 (1912); McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

[84]Hughes v. Hannah, 39 Fla. 365, 22 So. 613 (1897); Internal Improvement Fund v. Gleason, 39 Fla. 771, 23 So. 539 (1897). *But see* Peters v. Duluth, 119 Minn. 96, 137 N. W. 390 (1912).

[85]American Mills Co. v. American Surety Co., 260 U. S. 360, 43 Sup. Ct. 149, 67 L. Ed. 306 (1922); Griffin v. Bolen, 149 Fla. 377, 5 So.2d 690 (1942); Rosenthal v. Largo Land Co., 146 Fla. 81, 200 So. 233 (1941).

and that the plaintiff's claims must be proved;[86] the Florida act authorizes a decree pro confesso,[87] in accord with Florida law that the discretionary nature of a decree pro confesso makes it as valid a process of law as a reiteration of the sworn bill of complaint.[88]

The California statute was construed to include a code provision for the reopening of the decree by any person not actually served with process, within a period of one year.[89] This interpretation was mentioned but not relied upon by the United States Supreme Court in holding that there was due process.[90] A similar provision in the General Chancery Procedure Statutes of Florida was repealed in 1943,[91] and a similar provision in the 1925 quiet-title statute was not carried forward into this act.[92] The procedure for reopening the decree is the same as in other chancery pleadings, as is the procedure for reopening the decree in the first quiet-title act.[93] Thus the procedure should be valid process.

There are minor variations from the California statute in the instant act in accord with Florida laws concerning the wording of the summons, the designation of newspapers, and publication. None of these variations changes the nature of the proceeding; and the California act, which has been proven constitutional, is persuasive as to the validity of the Florida law.

The Torrens Acts. The decree rendered establishes title, both privy and adverse. In this it is directly parallel to the initial proceedings for title registration. The numerous decisions determining the validity of process[94] and the effect of the decree rendered under these acts[95] should

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[86]CAL. GEN. LAWS, Act. 1026, §10 (Deering, 1941).

[87]FLA. STAT. 1941, §66.37 (Supp. 1947).

[88]McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926); *cf.* Ruff v. Georgia S. & F. Ry., 67 Fla. 224, 64 So. 782 (1914).

[89]Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906).

[90]American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911).

[91]FLA. STAT. 1941, §62.12, *repealed* by Fla. Laws 1943, c. 22000, §6.

[92]FLA. STAT. 1941, §66.22.

[93]*Compare* FLA. STAT. 1941, §66.32 (Supp. 1947) *with* FLA. STAT. 1941, §66.10.

[94]Crowell v. Akin, 152 Ga. 126, 108 S. E. 791 (1921); Tyler v. Court of Registration, 175 Mass. 71, 55 N. E. 812, *writ of error dismissed*, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252 (1900); Peters v. Duluth, 119 Minn. 96, 137 N. W. 390 (1912); State *ex rel.* Douglas v. Westfall, 85 Minn. 437, 89 N. W. 175 (1902).

[95]Follette v. Pacific Light & Power Corp., 189 Cal. 193, 208 Pac. 295 (1922); Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129 (1907); Henry v. White, 123 Minn.

be of value in understanding the instant act, although title registration has no particular interest to Florida.

V. The *Key* Case[96]

Early in 1948 Key brought a bill under the 1947 statute alleging adverse possession for more than seven years. He did not name any defendant in his bill. Service of process was quashed by the circuit court on the ground that it failed to meet the requisites of due process. On appeal the Supreme Court denied certiorari on the entirely different theory that the bill did not present a justiciable issue. Nevertheless it proceeded, in addition, to discuss the merits anyhow by approving the reasoning of the chancellor.

The primary object of the proceeding was to test the constitutionality of the statute in its most extreme interpretation. A guardian ad litem was appointed to enable the chancellor to reach a decision, in spite of the express statutory prohibition of this maneuver.[97]

The question of jurisdiction was presented to the Court in two phases: jurisdiction of the cause, and jurisdiction of the persons that might conceivably be involved in the suit. In holding that there was no jurisdiction of the cause, four cases were cited in substantiation. *Tibbetts v. Olson*[98] and *McDaniel v. McElvy*[99] interpreted the 1925 act only. In those cases the Court was careful to reserve the question as to whether the Legislature could by a more carefully drafted enactment make a bill against unknown defendants with unknown claims a justiciable matter. The citation from *McDaniel v. McElvy*[100] shows this:

> ". . . but a bill seeking only to quiet a cloud, the nature and existence of which is wholly unknown, as against defendants, who are also wholly unknown, does not present a justiciable matter *under this statute in its present form.*"

182, 143 N. W. 324 (1913).

[96]Key v. All Persons, 36 So.2d 366 (Fla. 1948).

[97]Fla. Stat. 1941, §66.42 (Supp. 1947). "If the bill be taken as confessed, a guardian ad litem shall not be appointed unless it shall affirmatively appear that the interests of minors, persons of unsound mind or convicts are involved."

[98]91 Fla. 824, 108 So. 679 (1926).

[99]91 Fla. 770, 108 So. 820 (1926).

[100]Key v. All Persons, 36 So.2d 366, 369 (Fla. 1948). Italics supplied.

Green v. Uniacke,[101] citing *McDaniel v. McElvy*, simply paraphrased the above statement. *Brecht v. Bur-Ne Co.*[102] was decided in 1926, but the 1925 act was not yet in question. The statement quoted from that case dealt with the 1889 act and is broad enough to foreclose many actions now considered regular under the 1925 act. For example, a cloud on title is required for equitable jurisdiction. At the time of the *Brecht* decision a cloud was required to constitute such a claim as would create a prima facie case in ejectment.[103] The 1925 act[104] specifically changed the necessity for such a cloud as a basis of action to quiet title.

These four cases, then, cannot be considered as authority for a statement that such a bill fails to submit for determination a justiciable matter; they did not deny, but rather affirmed, the power of the Legislature to create a new type of action such as this.

Similar statutes have been passed elsewhere, both for meeting emergencies[105] and for routine application.[106] Such power of the Legislature was not considered, argued, or discussed in this case. Under the Florida Constitution the circuit court may be given jurisdiction of causes not strictly equitable.[107] Such cause need not be either case or controversy as contemplated by the Fourteenth Amendment to the United States Constitution.[108] Since the Florida Legislature has power to create such a cause and to confer jurisdiction on the circuit court, the action of the lower court in taking jurisdiction and issuing process was proper.

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[101]46 F.2d 916 (C. C. A. 5th), *cert. denied*, 283 U. S. 847, 51 Sup. Ct. 493, 75 L. Ed. 1455 (1931).

[102]91 Fla. 345, 108 So. 173 (1926).

[103]Reyes v. Middleton, 36 Fla. 99, 17 So. 937 (1895); Benner v. Kendall, 21 Fla. 584 (1885).

[104]FLA. STAT. 1941, §66.16.

[105]Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906); Bertrand v. Taylor, 87 Ill. 235 (1878).

[106]CAL. GEN. LAWS, Act 8589 (Deering, 1941); COLO. STAT. ANN., c. 40, §169 (1935); GA. ANN. CODE, tit. 2, c. 8 (Parks, 1922); ILL. REV. STAT., c. 30, §45 (1947); MASS. GEN. LAWS, c. 185 (1932); MINN. GEN. STAT. §§6868-6950 (1913); NEB. COMP. STAT. §§5695-5799; N. Y. REAL PROP. LAW §12 (1909); 1 N. C. COMP. STAT., c. 47 (1919); N. D. LAWS, c. 235 (1917); OHIO GEN. CODE §§8572-1 to 118; ORE. LAWS 438 (1901); S. D. REV. CODE §§3060-3143 (1919); TENN. ANN. CODE §§3793a-3793a96 (1917); UTAH COMP. LAWS §§4920-5008 (1917); VA. LAWS, c. 62 (1916); WASH. COMP. STAT. §§10622-10726 (1922).

[107]FLA. CONST. Art. V, §11.

[108]Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930).

The second question of jurisdiction was whether the process in this case was sufficient to obtain jurisdiction of all persons that might have adverse claims. The particular argument advanced by the respondent was that, although this statute was patterned closely on the McEnerney act, the California interpretation of that act should not be applied, inasmuch as that act was passed as an emergency measure only.[109] A careful reading of the United States Supreme Court decision interpreting that act,[110] however, will show that the constitutional basis for permitting such an action did not depend upon an emergency but rather upon the inherent power of a state over the lands within its borders. The more important interpretation placed upon that statute was that the plaintiff must use due diligence to ascertain whether any adverse claim to the land exists.[111] The fact that the California Legislature did not see fit to require an allegation by the plaintiff that he had used due diligence was not conclusive, since the courts of California and other states have repeatedly held that means of knowledge is knowledge itself, particularly when dealing with public records.[112] At the time the California act was passed, shortly after the great San Francisco fire, there were no records; but the application of this principle is just as valid in instances in which there are public records in existence.

Due diligence by attorneys is expected in title suits as a matter of course, and a specific requirement of this would be mere surplusage. With this interpretation of the statute, the only serious objection raised by the respondent is eliminated. It is not the province of the courts to question the wisdom of the legislature,[113] or to hold a statute unconstitutional when there is a valid interpretation that will sustain it.[114] In the

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[109]CAL. STAT., c. 59 (June 16, 1906) is still in existence as CAL. GEN. LAWS, Act 1026 (Deering, 1941).

[110]American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (1911).

[111]McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926), citing Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906); Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939 (1907).

[112]Wheaton v. Nolan, 3 Cal. App.2d 401, 39 P.2d 457 (1934); *accord,* Malone Motor Co. v. Green, 213 Ala. 635, 105 So. 897 (1925); State v. Bagby's Est., 126 S. W.2d 687 (Tex. Civ. App. 1939); Irwin v. Holbrook, 32 Wash. 349, 73 Pac. 360 (1903); Bennett v. Greer Gas Coal Co., 127 W. Va. 184, 32 S. E.2d 51 (1944). See also numerous cases cited 46 C. J. 545.

[113]Minersville School Dist. v. Gobitis, 310 U. S. 586, 60 Sup. Ct. 1010, 84 L. Ed. 1375 (1939).

[114]United States v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836 (1909); *accord,* Harriman v. Interstate Commerce Comm'n, 211 U. S.

instant case such an interpretation existed but was overlooked.

The effect of this decision should be limited by the facts before the Florida Supreme Court. It denied jurisdiction of the cause on the basis of the facts alleged;[115] and for this reason any discussion of the constitutionality of the statute itself was superfluous.[116]

The ultimate result as to the cause of action in this case was correct on other grounds. The plaintiff alleged title by adverse possession and lack of knowledge of any adverse claim. He did not allege record title in himself. Such allegations were obviously repugnant. The records of title were in existence, and any normal exercise of reasonable diligence would have dispelled the alleged ignorance of the plaintiff. Instead of quashing service of process both courts should have dismissed the bill. The 1947 statute provides that decrees will be entered in accordance with the bill of complaint under the rules of chancery procedure;[117] accordingly this bill, although valid to support jurisdiction over this general type of case, did not confer jurisdiction to render a decree for the plaintiff on the pleadings presented.[118]

VI. Conclusion

The effect of this decision will depend upon the willingness of the Florida Supreme Court in any future action, brought under this statute in cases properly raising the real issues, to consider carefully the power of the Legislature to create such a procedure in the light of similar enactments such as the Torrens Act now in force in numerous states. The Court can logically give effect to the intention of the Florida Legislature in this statute by construing it as embracing the general law

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407, 29 Sup. Ct. 115, 53 L. Ed. 253 (1908); Knights Templar v. Jarman, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139 (1902).

[115]Key v. All Persons, 36 So.2d 366, 368 (Fla. 1948): "The proceeding is adversary in nature, yet the bill fails to present such adversary matter as would justify the invoking of the court's jurisdiction."

[116]A refusal to take jurisdiction does not fall within the principle of stare decisis in the federal courts, and a later case raising the same issue on the merits can properly be considered. Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. Ed. 1058 (1851). See Mr. Justice Brandeis dissenting in Washington v. Dawson, 264 U. S. 219, 44 Sup. Ct. 302, 68 L. Ed. 646 (1924).

[117]Fla. Stat. 1941, §66.38 (Supp. 1947).

[118]McDaniel v. McElvy, 91 Fla. 770, 108 So. 679 (1926); *see* Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927); Torrey v. Bruner, 60 Fla. 365, 53 So. 337 (1910).