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## FLORIDA REAL PROPERTY LAWS OF 1947

J. M. FLOWERS\*

The important statutory changes in Florida real property law effected during the 1947 session of the Legislature are found in three fields: conveyances by husband and wife; actions to quiet title to land; and public highways. The requirement that a married woman must acknowledge separately a contract to convey real estate has been abandoned. A new action for quieting title to land, which if generally accepted may offer all the advantages of a registry system, has been introduced. The author views with alarm a statute ripening the public easement in state highways and county roads into a fee simple. These acts and others which the lawyer may encounter in his everyday practice, will be discussed in this article.

A married woman need no longer acknowledge a contract to convey her separate real estate or to relinquish dower in her husband's.<sup>1</sup> The legislature has amended an act,<sup>2</sup> which first appeared in 1892, providing that such a contract could not be enforced in equity unless it was not only acknowledged, but also acknowledged out of the presence of the husband. Apparently this provision was designed to enforce the policy declared in an earlier statute<sup>3</sup> which required a married woman's deed, effective to convey separate property or to relinquish dower in her husband's, to be separately acknowledged. It was doubtless feared that this statute could be circumvented by a suit for specific performance based on an informal written agreement. In 1943, the Legislature dispensed<sup>4</sup> with the requirement that deeds and contracts to sell be acknowledged separately, and it was thought by many that the

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<sup>1</sup> Ch. 23820, 1947, effective May 27, 1947; F.S.A. §693.03.

<sup>2</sup> §2076, R. S. 1892; F. S. 1911, §708.07.

<sup>3</sup> §1, Act of Feb. 4, 1935; ch. 3011, 1877; F. S. 1941, §693.03.

<sup>4</sup> Ch. 21746, 1943; F. S. A. §693.03.

prohibition on decrees for specific performance had also been removed by necessary implication; but the Supreme Court of Florida ruled otherwise.<sup>5</sup> The Legislature has now made its intent clear.

As interpreted by the Supreme Court, the effect of the amended statute was to oust equity of a jurisdiction otherwise assumed to exist; therefore, a contract executed after the effective date of the 1943 statute, but before May 27, 1947, the effective date of the amendment, may now be enforced. The present wording of the act may invite the contention that the amendment has repealed the requirement found in the 1943 statute that a husband join in a wife's conveyance of her separate property; but inasmuch as the wording of the statute remains unchanged in this respect, and in view of the history of the amendment, it is submitted that this contention should not prevail.

A husband or wife owning separate real property in fee simple may now create a tenancy by the entirety by conveying one to the other, reciting in the deed the purpose to create such an estate.<sup>6</sup> Heretofore husband and wife have been authorized<sup>7</sup> to convey to one another, but strictly interpreted, this statute does not include a conveyance by one to both. The act has, however, been liberally construed,<sup>8</sup> and now the Legislature has incorporated into the statute the rule of the cases. It is unfortunate that the Legislature did not provide for the destruction of estates by the entirety, or specify that the grantee need not join in the conveyance.<sup>9</sup>

What is perhaps the most significant development of the 1947 session is the introduction<sup>10</sup> of a new procedure for quieting title to land, designated as the "cumulative

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<sup>5</sup> *Berlin v. Jacobs*, ..... Fla., ..... 24 So. (2d) 717 (1946). This case and the statutes preceding it are the subject of a comment in 1 *Miami L. Q.* 37 (1947).

<sup>6</sup> Ch. 23964, 1947, effective June 16, 1947; F. S. A. §689.11.

<sup>7</sup> Ch. 5147, 1903; F. S. 1941, §689.11.

<sup>8</sup> *Johnson v. Landerfield*, 138 Fla. 511, 189 So. 666 (1939).

<sup>9</sup> The grantee did join in the conveyance in *Johnson v. Landerfield*, *supra* note 8.

<sup>10</sup> Ch. 24099, 1947, effective June 16, 1947; F. S. A. §§89.01-20.

method".<sup>11</sup> The new procedure differs from the previous ones, which continue to be available, in that a proceeding in rem is now authorized, the former methods being entirely in personam.<sup>12</sup> Under the cumulative method, the plaintiff may proceed against the property, serving actual or constructive notice upon all persons believed to have an adverse interest therein, or he may at his option proceed directly against the adverse claimants.

An action may be brought by any person claiming an estate of freehold or by any person who has conveyed property by warranty deed, whether in possession of the property or not. The plaintiff's claim may be based upon record title deraigned from an appropriate sovereignty, upon a tax deed or foreclosure, upon adverse possession, with or without color of title, or upon public records which have been lost, stolen or destroyed. When the proceeding is to be in rem, it is brought in the circuit court of the county in which all or part of the land lies, against "all persons claiming any estate, right, title or interest in, or lien upon" the specific property. A sworn statement must be filed with the bill of complaint setting out the nature of the plaintiff's claim. All persons having an adverse claim and their addresses must be included in the statement. Where this information is not available, the reason therefore must be stated fully and explicitly. Service of process is begun by publishing a summons in which the property is described. Copies of this summons, with a memorandum attached showing the names of any adverse claimants disclosed in the bill of complaint or sworn statement, are then posted in a conspicuous place on each

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<sup>11</sup> "Cumulative" because in addition to F. S. 1941, §§66.11-.15, based on ch. 4739, 1899, and F. S. 1941, §§66.16-.24, ch. 11385, 1925. The latter is designated as the "additional remedy".

<sup>12</sup> The "additional remedy" was characterized as "quasi-in-rem". "A suit under chapter 11383 will lie against known defendants to quiet against a cloud of a known or an unknown nature; and against unknown defendants to quiet against a cloud of a known nature; 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. *McDaniel v. McElvey*, 91 Fla. 770, 108 So. 820 (1926); *Greene v. Uniacke*, 46 F. (2d) 916 (1931).

parcel of land. Copies of the summons and memorandum must be served personally on each adverse claimant found within the state. If a known claimant cannot be served within the state, copies are addressed to him by first class mail, prepaid. Where personal service cannot be made upon a resident, or where the address is not known, copies of the summons and memorandum must be mailed to him at the county seat of each county in which the land lies. The court is given jurisdiction to appoint a guardian ad litem to represent minors, persons of unsound mind, or convicts; but this need not be done unless it affirmatively appears that such persons are interested. It is also possible to join all parcels of real property belonging to the plaintiff which are situated in the same county.

Such sweeping provisions will doubtless invite challenge on the part of some person having an adverse claim to the land, who is not named in the bill of complaint or statement, and was at all times a resident of the state, or who, although named, has not been served personally within the state, claiming that he has been deprived of property without due process of law. A cautious lawyer, not wishing to assume this risk, will prefer to follow the established methods when adverse claimants are known and a particular cloud is to be removed. It may be pointed out, however, that if this procedure can successfully withstand attack, the groundwork has been laid for a practical registry device, offering many of the advantages of the Torrens System. Every attorney engaged to pass on title for a purchaser can, by means of the cumulative method, insure a title which after seven years possession will be impregnable, and in the meantime may with caution be made virtually as secure.

It is the opinion of the writer that this act will withstand attack on the ground that it expropriates property without due process of law. Cases<sup>13</sup> arising under the state and federal constitutions have repeatedly affirmed the proposition that a state, having inherent authority over the titles of lands within its territory, cannot be deprived

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<sup>13</sup> *American Land Co. v. Zeiss*, 219 U. S. 47, 31 S. Ct. 200, 55 L. Ed. 491 (1910), cited and followed in *McDaniel v. McElvey*, 91 Fla. 770, 108 So. 820 (1926) and *Tibbets v. Olson*, 91 Fla. 824, 108 So. 679 (1926).

of jurisdiction to determine rights and interests claimed therein by the absence from its borders of adverse claimants. Due process requires, however, that some effort be made fairly calculated to apprise such absentees of the pending action.<sup>14</sup> The fact that a non-resident has had actual notice of suit does not bar him from asserting that the statutory method is invalid because it does not comply with the requirements of due process.<sup>15</sup> While service of notice by registered mail may be necessary where an action is only quasi in rem,<sup>16</sup> the requirements of due process are served in actions strictly in rem by actual personal service upon known resident claimants and service by publication in the case of unknown claimants and persons beyond the territorial limits of the state. This rule has been exemplified in land registry proceedings,<sup>17</sup> actions to quiet title to land,<sup>18</sup> and proceedings for the settlement of the estates of decedents.<sup>19</sup> Where land is involved, a nonresident owner is held<sup>20</sup> to owe a duty to be represented when his land is requisitioned by, or is otherwise subjected to the processes of, the state.

It may be noted that this statute goes beyond the requirements of due process in requiring the mailing of notices where persons cannot actually be served. Constructive service upon unknown claimants and persons whose addresses cannot be ascertained, if actually resident within the state, is authorized only if by diligent inquiry they cannot be found. Since the findings of fact by a court in support of its own jurisdiction are always

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<sup>14</sup> See *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

<sup>15</sup> *Wuchter v. Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446 (1928).

<sup>16</sup> The "additional remedy" was quasi-in-rem. See note 12, supra.

<sup>17</sup> *American Land Co. v. Zeiss*, 219 U. S. 47, 31 S. Ct. 200, 55 L. Ed. 491 (1910).

<sup>18</sup> *Arndt v. Griggs*, 134 U. S. 316, 10 S. Ct. 557, 33 L. Ed. 918 (1890); *Jacob v. Roberts*, 223 U. S. 261, 32 S. Ct. 303, 56 L. Ed. 429 (1912).

<sup>19</sup> *Hamilton v. Brown*, 161 U. S. 256, 16 S. Ct. 585, 40 L. Ed. 491 (1896); *Cunnius v. Reading School Dist.*, 198 U. S. 458, 25 S. Ct. 721, 49 L. Ed. 1125 (1905).

<sup>20</sup> *Huling v. Kaw Valley R. Co.*, 130 U. S. 559, 9 S. Ct. 603, 32 L. Ed. 1045 (1889), cited and followed in *McDaniel v. McElvey*, 91 Fla. 770, 108 So. 820 (1926).

subject to collateral attack,<sup>21</sup> the question whether due diligence was in fact exercised will not be foreclosed by the proceeding in question, at least not until seven years have elapsed. To ameliorate this disadvantage, the statute provides that no subsequent action shall be tried until all parties to the first have been served or accounted for. The danger of collateral attack can be minimized. However, if lawyers having recourse to the cumulative method will insist upon a careful examination of the title.

There is a possible defect in the statute in that it does not require trial by jury when an issue of ejectment is framed.<sup>22</sup> Other features of the act relating to procedure, including the power of the court to dispense with a guardian ad litem unless it affirmatively appears that disability exists, are similar to features of the older statutes, and have received judicial approval.<sup>23</sup>

The "additional remedy"<sup>24</sup> to quiet title to land has also been amended<sup>25</sup> to specify that in deraigning title, the plaintiff must show the original source of his title or trace it back for a period of at least seven years, unless the court directs otherwise. The "additional remedy", introduced in 1925, combined in one action the former bill quia timet in equity and the legal action of ejectment, providing for trial of the issue of ejectment before a jury.<sup>26</sup> The act required that the complainant deraign his title, but did not specify the manner of doing this. If this requirement were strictly construed, it would deny use of the additional remedy to a person claiming by right of adverse possession without color of title, who could not deraign title to its ultimate source in a sovereign state; but the statute was more liberally construed by the Supreme Court of Florida.<sup>27</sup>

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21 See *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897 (1874).

22 See *Hawkins v. Rellim Inv. Co.*, 92 Fla. 784, 110 So. 350 (1926); *Briles v. Bradford*, 54 Fla. 501, 44 So. 937 (1907).

23 *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820 (1926); *Tibbetts v. Olson*, 91 Fla. 824, 108 So. 679 (1926).

24 §§1-9, Ch. 11383, 1925; F. S. 1941, §§66.16-24.

25 Ch. 24293, 1947, effective June 16, 1947.

26 *Hawkins v. Rellim Inv. Co.* 92 Fla. 784, 110 So. 350 (1926); *Sawyer v. Gustason*, 96 Fla. 6, 118 So. 57 (1928).

27 *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820 (1926).

The amendment therefore seems to have been designed to incorporate in the statute a rule which formerly could be found only in the cases. Because the language of the amendment is less explicit than that of the court, it appears to raise new problems. From time immemorial, it was required in actions of ejectment that title be deraigned from sovereignty or from a party in possession. The reason for this latter alternative is, that the party shown to be in possession is presumed by law to have title, and a *prima facie* case is thus established. It was also the rule in ejectment actions that the plaintiff must rely on the strength of his own title, not the weakness of the defendant's. Inasmuch as the "additional remedy" allows the bringing of an action where defendant is in possession, the amendment might be construed as barring a plaintiff who cannot deraign title to a person in possession within seven years, even where the defendant's has been of shorter duration, or it might be construed as permitting the plaintiff to show only the weakness of the defendant's title, not the strength of his own. If the purpose of the amendment as stated above is kept in mind, the court will obviate these difficulties by permitting or requiring the plaintiff in such cases to deraign his title to someone in possession.

An amendment<sup>28</sup> to two sections<sup>29</sup> of the Florida Statutes which relate to the acquisition of title to public roads by adverse user, increases the title of the State Road Department and the several counties to one in fee simple. It has heretofore been the accepted view in this state that when private property is taken for a public road by eminent domain proceedings, the title acquired is a mere easement.<sup>30</sup> Presumably this would also be true of title acquired by adverse user. If the state or county acquires a fee simple title, the owner would have no right to recover the property when the road is abandoned or

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<sup>28</sup> Ch. 23935, effective June 6, 1944; F. S. A. §§341.59, 341.66.

<sup>29</sup> F. S. 1941, §§341.59, 341.66.

<sup>30</sup> *Seaboard Air Line Ry. Co. v. Southern Inv. Co.* 53 Fla. 832, 44 So. 351 (1907); *Atlantic Coast Line R. Co. v. Kickliter*, —Fla.—, 32 So. (2d) 166 adv. (1947); *Jacksonville T. K. W Ry. Co. v. Lockwood*, 33 Fla. 573, 15 So. 327 (1894). An abutting owner is presumed to own title to center of road or street.



relocated. This act therefore threatens potentially sweeping effects, and as such, presents some difficult constitutional problems.

The Constitution of Florida provides certain requirements for the protection of the individual where property is taken in exercise of the right of eminent domain. There must be a judicial review of the question whether or not the property is required for a public purpose,<sup>31</sup> and there must be a judicial determination of the question of value.<sup>32</sup> The purchase price must further be secured before the property can be occupied.<sup>33</sup> A statute which *ex proprio vigore* simply expropriates private property would violate all of these requirements. The former sections which have been amended herein, have accordingly been held<sup>34</sup> to be in the nature of a statute of limitations upon an action for wrongful taking, or an act to quiet title to land already acquired where there are defects in the proceedings or in the record of title.

Will the act be construed as ripening all present easements, whether acquired by eminent domain proceedings or by adverse possession, into a fee with the passage of four years? Possession under an actual or presumed grant cannot of itself ripen into a fee, because it would in no way be adverse to the interests of the owner. The language of the act, which is carried over from the earlier statute, specifically excludes from the operation of the act roads the title to which has already been acquired by adverse user; but it is silent as to land acquired by dedication, grant, or eminent domain.

If it is construed as applying only to roads which have not yet been maintained for four years, exclusive of those acquired by eminent domain, the act presents fewer constitutional problems, but more practical ones. Statutes providing for the acquisition of a fee instead of an easement when exercising the power of eminent domain, have

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<sup>31</sup> *Sibley v. Volusia County*, 147 Fla. 302, 2 So. 2d 578 (1941).

<sup>32</sup> *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926).

<sup>33</sup> *ibid.*

<sup>34</sup> *Bridgehead Land Co. v. Hale*, 145 Fla. 389, 199 So. 361 (1941); *Palm Beach County v. Florida Cons. Dist.*, 126 Fla. 170, 170 So. 630 (1936).

generally been held<sup>35</sup> constitutional. It must now be determined as a practical matter whether a road, the title to which is in question, was acquired before or after June 6, 1943, to determine whether the State Road Department or a county has a fee or a mere easement.

A statute<sup>36</sup> providing for the closing of public roads by counties, apparently new in its entirety, provides that if title is held in fee, the county shall on abandonment convey title to the abutting owners. If the Legislature did not wish to vest the incidents of a fee in the counties, why did it make this change?

New statutes of limitation have been provided for actions to enforce tax titles.<sup>37</sup> Heretofore the statutes<sup>38</sup> required four years' actual possession under a tax deed before a suit was barred, and also that where the property was in the possession of another, the holder of a tax deed must sue for possession within four years. In 1943, the Legislature amended<sup>39</sup> the law to protect Murphy titles, that is, titles which had passed to the state of Florida because of nonpayment of taxes, by requiring that suits to question Murphy titles must be brought within six months. The new act now provides that where a tax deed of any kind is issued for property, the former owner of the land shall have only one year after the deed is placed of record to sue for the possession of the land, if the holder of the tax deed is in possession, or to attack the tax deed in any manner. The new act also requires the holders of a tax deed to bring suit for possession within three years after the date of the tax deed. As the law now stands, where property is vacant when a tax deed is recorded, the former owner is barred unless he brings suit to set aside the deed within one year; but if the land is in possession of the former owner, the holder of the tax deed is barred unless he sues for possession within three years.

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<sup>35</sup> See *Fairchild v. City of St. Paul*, 46 Minn. 540, 49 N. W. 325 (1891); *Rottschaeffer*, *Constitutional Law* (1939), 709; 25 Am. Jur. §134.

<sup>36</sup> Ch. 23963, 1947; effective June 16, 1947; F. S. A. §343.42.

<sup>37</sup> Ch. 23827, 1947, effective May 27, 1947; F. S. A. §192.48.

<sup>38</sup> F. S. 1941, §196.06.

<sup>39</sup> Ch. 21685, 1943; F. S. A. §192.48.

The statute is prospective in operation, and is unquestionably constitutional.

Cancellation of tax certificates twenty years old is authorized and directed by Chapter 23828<sup>40</sup> of the 1947 Laws. Heretofore such tax certificates were invalid, but it was impossible to remove them from the record without suit. The new section obviates the necessity of suit; but does not apply to certificates held by public bodies.

Chapter 23832<sup>41</sup> authorizes and directs the clerk of the Circuit Court to cancel all tax certificates issued prior to 1940 on land the title to which has passed to the state under the Murphy Law. Certificates held by public bodies are not affected. Prior to the passage of this act, these certificates were invalid, but could not be cancelled without suit.

Chapter 24205<sup>42</sup> authorized the County Commissioners of any county to disclaim any interest for the public in any street or road, with the exception of federal and state highways and streets within municipal limits. The closing of streets and roads heretofore made is also validated.

Chapter 24303<sup>43</sup> authorizes county commissioners to vacate and annul plats on application of the sub-divider or of owners under subsequent plats. It was commonly approved in practice prior to 1947 for a subdivider to place of record a new plat and secure the approval of the county commissioners thereon. Lawyers have passed title upon the theory that the county, by approving the new plat, has barred the rights of the public in the easement created by the old. The problem of getting a deed out of the county has never arisen because the title to the street is vested in the adjoining owners, and the interest of the public has been treated as a mere easement. The easement is relinquished by approval of the new plat. The new act which purports to ripen easements into a fee, which is discussed above, may increase the difficulties which the section under consideration has sought to avoid.

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<sup>40</sup> May 27, 1947; F. S. A. §196.12-1 et seq.

<sup>41</sup> F. S. A. §192.50-1.

<sup>42</sup> Effective June 16, 1947; F. S. A. §§343.45-.49.

<sup>43</sup> Effective June 16, 1947; F. S. A. §177.14.

Construction of statutes in advance of court decisions is extremely hazardous, and the reader must take my opinions for what they are worth. I do think, however, that the 1947 session has given real property lawyers something to think about.