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Civil Procedure

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CIVIL PROCEDURE

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1. Process and Notice

New Process Unnecessary on Petition by Mother to Modify Support Provisions of Divorce Decree. The petition of a mother to have the court modify support provisions of a divorce decree was held by the supreme court not to be a new action, but a proceeding in the original action. Notice by mail to the non-resident father was sufficient.[1]

Notice: Adversary Proceedings Require Notice. An order stripping the mother of custody of her infant children, which had been awarded by a previous decree nearly two years old, was held unauthorized without notice or a statement of facts excusing notice.[2]

Attorney Without Authority to Waive Statutory Right of Parent to Notice of Proceedings Involving Infant. When the statute provides for notice to the parent of a pending action in the juvenile court to deprive the parent of right to custody and to commit the child for adoption, a waiver of notice by an attorney is beyond the scope of his authority.[3]

II Pleadings and Motions

Venue When Local Defendants Joined With Non-resident Defendant. Even though a foreign non-resident defendant does not have the right to claim venue privileges under section 46.01 Florida Statutes (1957), other defendants who were residents of the state were entitled to be sued in the county "where the defendant resides or where the cause of action accrued" as provided by the statute.[4]

Complaint: All Complaints Pray for General Relief. The supreme court, construing Rule 1.8 of the Florida Rules of Civil Procedure, held that every complaint is to be interpreted as containing a prayer for general relief. The facts alleged and proved are to govern the relief to be granted and not the forms of the prayer for relief as expressed in the complaint.[5]

Complaint: Sufficiency Of. A complaint of a broker against the purchaser of real estate stating that the defendant privately negotiated the purchase with the vendor and "wrongfully, intentionally, fraudulently and maliciously" informed the vendor that the broker was not involved

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1. Watson v. Watson, 88 So.2d 133 (Fla. 1956).
2. Abney v. Abney, 84 So.2d 905 (Fla. 1955).
3. Noeling v. State, 87 So.2d 593 (Fla. 1956).
4. Kauffman v. King, 89 So.2d 34 (Fla. 1956).
5. Chasin v. Richey, 91 So.2d 811 (Fla. 1957).

was held not to state a claim for relief in law or in equity. The supreme court ruled that it was error to transfer the case from the equity to the without prejudice.[6] A complaint is required to state "a claim showing the pleader is entitled to relief" which is the definition of the noun-clause "cause of action."

Commencement of Action for Limitation Purposes: Rule v. Statute. Notwithstanding that Rule 1.2, Florida Rules of Civil Procedure, provides that "every suit of a civil nature shall be deemed as commenced when the complaint is filed," an action was barred by the statute of limitations when the complaint was filed within the statutory period but the summons was not delivered "to the proper officer to be served" until after the statutory period had run.[7] The supreme court stated that the manner of commencing an action for procedural purposes is governed by the court rule; however, the court may not under its rule making power abrogate a right resting on substantive law. Therefore, section 95.01 of the Florida Statutes which provides that for the purposes of limitations an action is deemed commenced when the "summons or other original process shall be delivered to the proper office to be served" governed this case.

Florida Rule 1.2 is similar to Federal Rule of Civil Procedure 3, "a civil action is commenced by filing a complaint with the court." The United States Supreme Court[8] held that a state statute providing that an action is commenced for the purposes of limitation when the defendant is served with process governed the diversity case pending in the District Court of the United States rather than the Federal Rule.

Amendment of Complaint—Statute of Limitations. The complaint and process were against the "Clearwater Construction Company, a corporation organized and existing under the laws of the State of Florida" and the return of process by the sheriff was that the process was served on "Robert M. Snyder, sole owner of Clearwater Construction Company, not incorporated, the within named defendant." At a hearing on Snyder's special appearance and motion to quash process and service of process and to dismiss complaint, the plaintiff moved to be allowed to amend the complaint to make "Robert M. Snyder, doing business as Clearwater Construction Company" the named defendant. The motion to amend was denied and the motion to dismiss was granted. The statute of limitations had not run when process was served but had run when the motion to amend the complaint was made. The supreme court reversed allowing the amendment as not tantamount to a new cause of action.[9]

Defense: Collateral Estoppel. In a widow's suit for wrongful death of her husband, the issue of the negligence of the defendant was actually

6. Borinsky v. Cohen, 86 So.2d 814 (Fla. 1956).
7. Lundstrom v. Lyon, 86 So.2d 771 (Fla. 1956).
8. 337 U.S. 530 (1949).
9. Cabot v. Clearwater Construction Co., 89 So.2d 662 (Fla. 1956).

raised, tried and decided against the defendant. The court decided that adjudication on that issue may be pleaded as estoppel by the plaintiff against the defendant in an action by the widow against the same defendant for injuries to herself and her automobile growing out of the same accident.[10] This case gives an excellent presentation of a "certified question" as submitted by the trial judge. The estoppel involved was "estoppel by judgment," not res judicata, because the claims were different. The foregoing decision seems consistent with the landmark case on collateral estoppel.[11]

Where two causes of action are different and there are material issues common to both, when these issues have been tried and adjudicated in the first action the successful party may plead it in estoppel in the second action when the parties to both actions are the same.[12] In this case the wife filed a counter-claim for separate maintenance and the court, after holding that the principal action by the husband must be dismissed, held that the wife's counterclaim for separate maintenance could not "survive the dismissal of the main action and continue as an independent suit" and that both must be dismissed.[13]

Objections to Complaint: Unnecessary Jurisdictional Allegations May Be Tested by Motion to Dismiss. Although under Rule 1.9(e) of the Florida Rules of Civil Procedure it is sufficient "to aver the judgment or decision without setting forth matter showing jurisdiction to render it," when the pleader undertakes to allege in his complaint jurisdictional facts the sufficiency of jurisdictional allegations may be tested by a motion to dismiss.[14]

Defense of Estoppel. Estoppel was held an affirmative defense which must be specially pleaded and is waived if not pleaded.[15]

Defense: Necessity of Pleading Defense of the Statute of Limitations; Law Action. Although section 92.031 of the Florida Statute provides that the courts of Florida shall take judicial notice of the statutes of the other states, the defense of the statute of limitations of New Jersey in a suit on a judgment rendered in New Jersey is waived if not pleaded by the defendant.[16]

Striking Sham Pleadings. To justify the striking of a pleading as sham it must be shown to be so undoubtedly false as not to give rise to a genuine issue of fact. This is also the rule in a case heard on a motion for a summary judgment.[17]

10. Shearn v. Orlando Funeral Home, Inc., 88 So.2d 591 (Fla. 1956).
11. Cromwell v. County of Sac, 94 U.S. 351 (1876). See also Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).
12. Field v. Field, 91 So.2d 640 (Fla. 1957).
13. *But see* Krumrine v. Krumrine, 90 Fla. 368, 106 So. 131 (1925).
14. Pacific Mills v. Hillman Garment, Inc., 87 So.2d 599 (Fla. 1956).
15. Dicks v. Colonial Finance Corp., 85 So.2d 874 (Fla. 1955).
16. Aboandandolo v. Vonella, 88 So.2d 282 (Fla. 1956).
17. Meadows v. Edwards, 82 So.2d 733 (Fla. 1955).

III. Parties

Misjoinder of Parties—Not Ground for Dismissal. Rule 1.18 Florida Rules of Cvil Procedure provides "misjoinder of parties shall not be ground for dismissal of an action" and it is error to dismiss a complaint sufficient in law, even in event of a misjoinder of defendants. Misjoinder relates to too many parties, not too few.[18]

Intervention after Final Decree—for Appellate Purposes. The supreme court in *Wags Transportation System, Inc. v. Miami Beach*,[19] held that home owners affected by a final decree enjoining the enforcement of a zoning ordiance could properly be allowed to intervene after final decree for purposes of taking an appeal.

Parties Plaintiff; Real Party in Interest—Father, as next Friend of minor, not Real Party in Interest. The minor and not the father is the real party in interest in a suit brought by the father, as next friend of the minor, and an adverse judgment in that action is not res judicata of a subsequent action brought by the father in his own right.[20]

IV. Discovery

Discovery in Suit for Accounting: In an action for accounting the plaintiff sought answers from the defendant by interrogatories to establish the accounts between the parties. The interrogatories were based on Florida Rule of Civil Procedure 1.27. The defendant's objections to the interrogatories were overruled and upon interlocutory certiorari the supreme court quashed the order, holding that the trial court should first have determined that the plaintiff was entitled to an accounting before requiring discovery as to the status of the account between the parties.[21]

Production of Documents for Inspection; "Work Product" Rule. The supreme court held that it was not error to deny a motion of a defendant to require the plaintiff city to produce for inspection a report of a private detective employed by the city in regard to recovery of city funds. The report was held to be within the "work product" rule.[22]

Production of Documents. "Privileges" of Accountant do not Extend to his Employer. When a party filed a claim based on matter ordinarily privileged, the proof of which required the matter to be offered in evidence, the party waived the privilege.[23] Florida Statute section 473.15 specifies that no accountant "shall be permitted to testify." In the instant case the testimony of the accountant was not involved; the question was whether the

18. Lawrence v. Eastern Air Lines, 81 So.2d 632 (Fla. 1955).
19. 88 So.2d 751 (Fla. 1956).
20. Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956).
21. Charles Sales Corp. v. Rovenger, 88 So.2d 551 (Fla. 1956).
22. Lake Worth v. First National Bank in Palm Beach, 93 So.2d 49 (Fla. 1957).
23. Savino v. Luciano, 92 So.2d 817 (Fla. 1957).

party to the suit should be required to produce the accountant's report for inspection. It was held he should, since he had waived his right to insist that the matter was privileged.

V. TRIAL

Jury Trial Ordered after Waiver by Both Parties. Even though both parties have waived trial by jury by not demanding it, the trial court may order jury trial in the absence of a motion therefor by either party where the parties were advised of a jury trial when the case was set for trial. Florida Rules of Civil Procedure. 2.1.[24]

Jurors Interrogated about Insurance. It was held erroneous not to exclude prospective jurors from the court room on hearing a motion for mistrial because jurors were asked if they were interested in a particular insurance company and some of the jurors later served in the case.[25]

Use of Witness not Disclosed at Pretrial Conference. Even though plaintiff, four days before the trial, notified defendant that he would use a specified witness not previously named, the trial court was held not to have abused discretion in refusing to allow the witness to testify.[26]

Motion for Directed Verdict. It is well settled that a motion to direct a verdict should not be granted unless it is clear that there was no evidence presented to support a verdict for the adversary.[27]

A party moving for a directed verdict admits not only the facts stated in the evidence presented which were favorable to the adverse party, but also every conclusion favorable to the adverse party that a jury might reasonably infer from the evidence.[28]

When the evidence is in conflict or where reasonable minds might differ as to inferences of fact to be drawn from undisputed evidence, a question of fact exists and should be resolved by the jury.[29]

Instruction to Jury. When the defendant had requested instructions to the jury which were refused, and the evidence was conflicting, it was held to be an error of the trial court not to give a charge which set out standards for the jury to follow under possible views of the evidence.[30]

Probate: Claims not objected to must be paid. When executrices fail to object to a claim against an estate, the probate court is without power to reject the claim or to determine a dispute as to whether the claim is barred by the statute of limitations.[31]

24. Shores v. Murphy, 88 So.2d 294 (Fla. 1956).
25. Blanton v. Butler, 81 So.2d 745 (Fla. 1955).
26. Rose v. Yille, 88 So.2d 318 (Fla. 1956).
27. Gudath v. Culp Lumber Co., 81 So.2d 842 (Fla. 1955).
28. Nelson v. Ziegler, 89 So.2d 780 (Fla. 1956).
29. Townsend Sash Door & Lumber Co. v. Silas, 82 So.2d 158 (Fla. 1955).
30. Holley v. Kelley, 91 So.2d 862 (Fla. 1957).
31. Goggin v. Shanley, 81 So.2d 728 (Fla. 1955).

Habeas Corpus. When at a hearing on a return to a writ of habeas corpus the return is unimpeached by evidence, the return will be taken as true.[32]

VI. NEW TRIAL

New Trial Granted Even When Evidence Sufficient. Notwithstanding that there is sufficient evidence to support a verdict for the plaintiff, it is not error for the trial court to grant a new trial when the court is of the opinion that the verdict is not in accord with the manifest weight and probative force of the evidence.[33]

Newly Discovered Evidence. Newly discovered evidence that the plaintiff had testified falsely as to his earnings, when such showing would naturally tend to produce a different verdict, was held to be a good ground for granting a new trial.[34]

New trial on motion for judgment n.o.v. absent motion for new trial; F.R.C.P. Rule 50(b); Fla. R.C.P. Rule 2.7(b) and (c). In the case of *Shaw v. Hines Lumber Co.*,[34a] the court by an excellent opinion rendered by Judge Lindley reviewed the leading cases relating to judgments n.o.v. when the trial court reserved ruling on a motion for directed verdict at the close of all the evidence. The *Shaw* case adopted the reasoning of the dissenting opinion in *Jackson v. Wilson Mfg. Co.*,[35] quoting from the dissent in the Jackson case as follows:

> Rule 50(b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the trial court 'may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.' This 'either-or' language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. See Berry v United States, 312 U.S. [450] 452, 453, 61 S.Ct. 637, 85 L.Ed. 945. And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who

32. Hitson v. Mayo, 82 So.2d 591 (Fla. 1955).
33. Turner v. Frey, 81 So.2d 721 (Fla. 1955).
34. Ogburn v. Murray, 86 So.2d 796 (Fla. 1956).
34a. 249 F.2d 434 (7th Cir. 1957).
35. 243 F.2d 212 (C.A.D.C. 1957).

> saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.

The Shaw case in construing rule 50(b) further states:

> As pointed out in Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253, 61 S.Ct. 189, 105, 195, in reference to the construction of Rule 50(b): 'the courts should so administer the rule as to accomplish all that is permissible under its terms.'
> . . . As said in the dissenting opinion in Jackson v. Wilson Trucking Corp., 100 U.S. App.D.C. 105, 243 F.2d 212, 222: 'The Rule simply points the way like a highway marker; in saying it may be done thus it does not preclude all other ways. It should be read as a *direction* to the parties, not a *limitation* on the court.'

VII. JUDGMENTS

Judgment on the Pleadings: When Moved for by Defendant. A defendant who in his answer has set up the defense of res judicata, with a copy of the prior judgment attached to his answer, is not entitled to a judgment in his favor on a hearing of a motion for a judgment on the pleadings when the complaint states a cause of action.[35a]

Summary Judgment: On the Pleadings Only. When the complaint states a cause of action it is error for the court to grant the defendant's motion for a summary judgment when the motion heard has been only on the pleadings.[36] The allegations of the defendant's answer are of no avail to him at a hearing on a motion, by the defendant, for a decree on the pleadings.[37]

Summary Judgment: Purpose. A motion for summary judgment raises an issue of law and the motion should not be granted when there is a genuine issue of fact.[38] A motion for summary judgment should be denied when conflicting affidavits give rise to an issue of fact which require the trial judge to evaluate the credibility of the affidavits.[39] The summary judgment rule was not devised as a substitute for trial.[40]

Summary Judgments: Burden of Moving Party. A party moving for a summary judgment has the burden of making an affirmative showing that there is no genuine issue of a material fact and all doubt as to the existence of such issues must be resolved against the moving party.[41] A summary judgment should not be entered if there is a genuine issue on a material

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35a. Falick v. Sun N Sea, Inc., 81 So.2d 749 (Fla. 1955).
36. Flaherty v. Metal Products Corp., 83 So.2d 9 (Fla. 1955).
37. Reinhard v. Bliss, 85 So.2d 131 (Fla. 1956).
38. Cockerham v. R. E. Vaughan, Inc., 82 So.2d 890 (Fla. 1955).
39. Navison v. Winn & Lovett Tampa, Inc., 92 So.2d 531 (Fla. 1957).
40. Bruce Construction Corp. v. U.S. for Use of Westinghouse Electric Supply Co., 242 F.2d 873 (5th Cir. 1957).
41. Shaffran v. Holness, 93 So.2d 94 (Fla. 1957).

fact and the court should draw all reasonable inference in favor of the party adverse to the movant.[42]

The trial court, on a motion for summary judgment under Florida Rules of Civil Procedure 1.36 (same as Federal Rule of Civil Procedure, Rule 56) is not authorized to try or weigh the facts, but should determine whether there is a material factual issue. All doubts should be resolved against the movant, who has the burden of establishing in the hearing that no issues exist on a material fact.[43]

A plaintiff is not entitled to a summary judgment in his favor on motion when affidavits filed by plaintiff fail to meet and overcome the issues of fact raised by the defendant's answer. Under such circumstances the sufficiency of defendant's counter affidavits is not material.[44]

Summary Judgment: Movee; Duty of Adverse Party to Make an Affimative Showing. When the movant for a summary judgment has made a showing that there is no genuine issue that ought to be tried by a jury the adverse party must show affirmatively that a real, not formal, issue actually exists; he does not do this by relying on his denials in pleadings or by holding back evidence.[45]

Summary Judgment: Affirmed Without Prejudice. The defendant's motion for a summary judgment was granted and affirmed on appeal but the supreme court held that the affirmance was without prejudice to the plaintiff to move the lower court to amend her complaint since the hearing on the motion for summary judgment was without sufficient notice.[46]

Habeas Corpus: Judgment of Remand Is Res Judicata in Subsequent Habeas Corpus Proceedings. After an adverse decision in a habeas corpus proceeding in the circuit court the petitioner, instead of appealing, petitioned for habeas corpus in the supreme court on the same grounds. The supreme court held that the prior judgment was res judicata on the question under Florida Statutes, section 79.10 (to the effect that the prior judgment is conclusive).[47]

Disbarment. When 60 days have elapsed since the filing of the recommendation for the disbarment of an attorney and no petition for review has been filed by the attorney, the court will enter an order of disbarment in accordance with the recommendation.[48]

Nunc Pro Tunc Orders. The purpose of a *nunc pro tunc* order is to supply an omission in the record of an action previously done when the

42. Delany v. Breeding's Homestead Drug Co., 93 So.2d 116 (Fla. 1957).
43. Jones v. Stoutenburgh, 91 So.2d (Fla. 1956).
44. Chereton v. Armstrong Rubber Co., 87 So.2d 579 (Fla. 1956).
45. See note 40 *supra.*
46. Roberts v. Braynon, 90 So.2d 623 (Fla. 1956).
47. State v. Kelly, 88 So.2d 118 (Fla. 1956).
48. State v. Hamilton, 89 So.2d 350 (Fla. 1956).

omission was made through inadvertance or mistake. An order purporting to grant, *nunc pro tunc*, leave to appeal a judgment of remand in a habeas corpus case is ineffectual when leave was not actually granted before the appeal was taken.[49]

Nunc Pro Orders and Decrees. Pending an appeal from a final decree validating a bond issue of the city, the city passed an amended resolution incorporating some basic changes; thereupon, a supplemental petition for validation was filed in the case and a supplemental final decree was rendered and appealed from. The supplemental final decree was not a *nunc pro tunc* decree since new matter was involved and not something omitted from the former decree through oversight.[50]

An appropriate conclusion of a *nunc pro tunc* decree would be "Done this 31st day of May, 1957 as of and for the 1st day of March, 1957."

Rehearings: Time. When a petition for rehearing was filed within 10 days after the court overruled objections to a judicial sale it was held by the supreme court that the trial court had jurisdiction to entertain the petition for rehearing for consideration of the merits.[51]

Amendments of Judgment After Time for Appeal Has Run. An order dismissing a complaint with prejudice on a motion to dismiss is a final judgment. The trial court has no jurisdiction to vacate or modify it so as to make it "without prejudice" after the time for appeal therefrom has run, in absence of a showing of fraud, want of jurisdiction or other approved grounds.[52] It is thought that even in the event of fraud a new proceeding is essential when the time for appeal has run.[53]

Vacation of Divorce Decree, Ex parte, After Expiration of Time for Appeal. The plaintiff named in a divorce decree wrote the judge that she was not a resident of the state as required for maintaining a divorce petition. The decree had been rendered in 1953. Acting upon the letter and other information the chancellor vacated the divorce decree, ex parte, in July, 1956. The supreme court reversed the order vacating the decree as no formal proceedings had been brought to vacate the decree of divorce.[54]

Dismissal for Want of Prosecution Under Florida Statute, section 45.19 Is "Without Prejudice" Notwithstanding Common Law Rule 35(b)—Now Rule 1.25(b). In *Zukor v. Hill*,[55] the supreme court held that a dismissal for want of prosecution for a year, pursuant to Florida Statute, section 45.19 was without prejudice, notwithstanding the provision of Common Law Rule 35 (b) (presently 1.35 (b) Florida Rules of Civil Procedure)

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49. Freeman v. Blackburn, 92 So.2d 262 (Fla. 1957).
50. Test v. State, 87 So.2d 587 (Fla. 1956).
51. Maule Industries, Inc. v. Seminole Rock & Sand Co., 91 So.2d 307 (Fla. 1957).
52. Capers v. Lee, 91 So.2d 337 (Fla. 1957).
53. See Woodward v. Woodward, 95 Fla. 396, 116 So. 501 (1928).
54. Hoffman v. Hoffman, 92 So.2d 524 (Fla. 1957).
55. 84 So.2d 554 (Fla. 1956).

relating the effect of involuntary dismissals. The rule provides that a "dismissal under this subdivision *or any dismissal not provided for in this rule*" (with certain exceptions not applicable) "shall operate as an adjudication upon the merits" unless the court, in its order for dismissal, otherwise specifies. It is evident that the foregoing *italicized* words should be deleted from the rule. The judge should affirmatively determine whether the dismissal is to be with or without prejudice.

Involuntary Dismissals "With Prejudice" Under Florida Statute, section 45.19 When the Adjudication Is Not on the Merits of the Claim or Sufficiency of the Complaint. The decision of *Hinchee v. Fisher*[56] clearly adheres to Florida Rules of Civil Procedure -.35 (b). The pertinent provisions of the rule adopts the same language as Federal Rules of Civil Procedure, Rule 41(b). The controlling words are as follows:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision, and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, *shall operate as an adjudication upon the merits.*

The complaint filed by the Fishers alleged that they were friends of the Hinchees and had advised the Hinchees that they owned a lease of land containing an option to purchase, that they were in a precarious financial condition and were having difficulty in meeting payments on the lease. The Hinchees suggested to the Fishers that the lease be assigned to them under a plan to work out a refinancing of the entire property, after which the property would be reconveyed to the Fishers. The complaint admitted a debt to the Hinchees of $4,500.00, and alleged that plaintiffs were ready, willing and able to repay and "do tender and offer to repay." Doubtless the $4,500.00 was for advancements made after the transfer to them and in respect to the property.

The court entered an interlocutory order requiring the Fishers to pay the $4,500.00 into the registry of the court; they did not do so and for their failure the action was dismissed in February, 1956.

Thereafter in July, 1956, the Fishers filed another suit against the Hinchees seeking substantially the same relief; the present decision states that the dismissal of the first suit was res adjudicata of the claim made in the second suit. The decision is based on the rule and not on any words or action in the order of dismissal. The rule operated *sub silentio* in law and, doubtless, in fact.

It is to be noted that the complaint was not held insufficient and no decision was rendered to the effect that the equities were with the defendants.

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56. 93 So.2d 351 (Fla. 1957).

The rule has given rise to other similar consequences. It is reasonable and natural that a prior adjudication on the merits of a claim is res judicata and that a prior adjudication holding a complaint to be insufficient is res judicata. Perhaps it is not a natural conclusion that dismissal for failure to pay a sum into court is res judicata when the payment is required merely as a condition to the prosecution of the suit. This is especially true when the circumstances are such that it would not be likely that the chancellor would have expressly directed that the dismissal was "with prejudice."

It is thought that it would be better if the sentence of the rule were changed to read:

> Unless the court in its order of dismissal otherwise specified, a dismissal under this subdivision other than a dismissal for lack of jurisdiction or for improper venue *or for the lack of an indispensable party*, operates as an adjudication on the merits.

The words "or for the lack of an indispensable party" are not in the federal or state rule because of an oversight; and the words of the state rule and the federal rule "and any dismissal not provided for in this rule" are omitted.

Dismissal Under Florida Statute, section 45.19 for Want of Prosecution: Reinstated; Reversed. Pursuant to Florida Statute, section 45.10, an action was dismissed because no proceedings had been taken for more than a year. Thereafter the court reinstated the case and, upon certiorari, the supreme court reversed, stating that the lower court was without jurisdiction since the reinstatement was more than two months after the dismissal.[57] Prior to the amendment of Florida Statute, section 45.19 in 1955, dismissals under this statute were often entered without notice to the adversary, but the 1955 amendment provided for notice "to the opposing counsel."

57. Morrison v. Chambers, 82 So.2d 594 (Fla. 1955).