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Whither Nonsuit?

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depend upon consideration of many circumstances for their determination. Until a pattern of circumstances sufficient to constitute “accusation” emerges from future United States Supreme Court decisions, it will be difficult to predict with any certainty when investigation has shaded into accusation in any particular case.

MICHAEL J. CAPPUCIO

WHITHER NONSUIT?

The plaintiff moved for nonsuit immediately after the jury had been impaneled and sworn. The defendant then moved for a judgment with prejudice against the plaintiff on the ground that the Florida Rules of Civil Procedure provide only for voluntary dismissal of actions, with no provision for nonsuits. The trial court denied the defendant's motion and allowed the plaintiff to take a nonsuit, assessing costs against the plaintiff. The First District Court of Appeal reversed, holding that Florida Rule 1.35(a), as revised in 1962, supersedes Florida's nonsuit statute, insofar as the statute permits the taking of a voluntary nonsuit in any manner inconsistent with the Rule. The Supreme Court granted certiorari and affirmed the decision of the District Court of Appeal. Crews v. Dobson, 177 So.2d 202 (Fla. 1965).

In the instant case the Florida Supreme Court attempted to deal the death blow to the common law concept of nonsuit in this state. This was done on the federal level in 1938, with the promulgation of the Federal Rules of Civil Procedure. In Florida, however, despite the similarity of Florida Rule 1.35 to Federal Rule 41, the right of the plaintiff to take a nonsuit until “the Jury retire from the bar,” has been zealously protected. The decision of the supreme court to treat with finality the long-standing problem of “Florida's unique dismissal” calls for a review of the history and significance of the problem.

Under the common law, as modified by the statute of 2 Hen. IV. c. 7, a plaintiff had an absolute right to terminate his litigation at any stage of the proceedings before the verdict was read. In 1913, the United States

1. Fla. Stat. § 54.09 (1963): “No plaintiff shall take a non-suit on trial unless he do so before the Jury retire from the bar.”
2. Fed. R. Civ. P. 41 provides for the voluntary dismissal of actions under specified circumstances and conditions. On the federal level there is no absolute right of dismissal after service by an adverse party of an answer or of a motion for summary judgment.
Supreme Court discussed the common law nonsuit\(^7\) and said it was a dismissal of a plaintiff’s action without prejudice, upon the payment of costs.

It was felt by some that the absolute right of nonsuit was unjustly advantageous to the plaintiff at the expense of the defendant, who might be put to excessive expenditure of time and money to defend a suit only to have it dropped at the last moment on a whim of the plaintiff, who might later decide to put the defendant through the same costly process again.\(^8\) Because of this possible injustice, the majority of American jurisdictions have limited the right of nonsuit, at least to specified stages of the proceedings.\(^9\) There has been, however, a general reluctance to abandon entirely the concept, possibly because of a deep seated belief in the principle of the common law never to compel parties to maintain civil actions.

The Florida statute, section 54.09, by providing that no plaintiff shall take a nonsuit unless he does so before the jury retires from the bar, implies and has been interpreted to mean that the common law nonsuit does exist in Florida,\(^10\) limited by the requirement that it be taken before the jury retires. To limit further the use of nonsuit, the Florida courts have developed the involuntary nonsuit,\(^11\) unknown under the common law. A nonsuit taken by a plaintiff in the face of an impending adverse ruling of the court which would preclude him from recovery under any circumstances on that cause of action is characterized as an involuntary nonsuit. Unlike the voluntary nonsuit, it is a judgment on the merits and accordingly precludes further litigation of the same lawsuit.\(^12\)

In the light of developed statutory and case law limiting the once absolute right of nonsuit, the Federal Rules of Civil Procedure, as

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A nonsuit at common law was a dismissal of the plaintiff's action without an adjudication, other than the imposition of costs, and constituted no bar to another action for the same cause. Originally granted where the plaintiff made default when his presence was required, or otherwise failed to proceed in due course, it came to be applied on the trial when, although actually present, he chose, in view of the state of his evidence, not to risk an adverse verdict. But unless he assented to being nonsuited on the evidence it was essential that a verdict be taken, even although it was certain to be against him. In other words, such a nonsuit was always voluntary, and never compulsory.

8. "The courts have recognized the tremendous advantages allowed the plaintiff by his right to non-suit and have constantly been in the process of qualifying and restricting the use of this concept . . . ." 13 U. Fla. L. Rev. at 122.

9. Typical statutory provisions permit voluntary discontinuance before trial, Denver & R.G.R.R. Co. v. Paonia Ditch Co., 49 Colo. 281, 112 Pac. 692 (1910); before the defendant begins the presentation of his defense, Consumers' Power Co. v. McNichol, 287 Fed. 529 (6th Cir. 1923); before argument on the facts has begun, Gildea v. Lund, 131 Md. 385, 102 Atl. 467 (1917); and before submission of the cases to the jury, St. Louis, I.M. & S.R.R. Co. v. Ingram, 118 Ark. 377, 176 S.W. 692 (1915).


11. Id. at 42.

12. Id. at 43.
adopted, severely limited the common law nonsuit. The federal rule, 41, has been held to have completely abolished nonsuit at the federal level. The plaintiff’s absolute right of dismissal, except by stipulation of all the parties, is sharply limited to the period before service by the adverse party of an answer or of a motion for summary judgment. Nor may a plaintiff dismiss the same action more than once without prejudice. After such a motion or answer the plaintiff can only dismiss his action upon stipulation of all the parties, or by “order of the court and upon such terms and conditions as the court deems proper.”

There is some disagreement in the federal courts as to whether the plaintiff has an absolute right to take a voluntary dismissal without prejudice upon terms and conditions set by the court, or whether the court may refuse to allow such dismissal by refusing to set such terms and conditions, as held by a large majority of jurisdictions. Therefore, in the majority of the federal courts, after the service by the adverse party of an answer or of a motion to dismiss and in the absence of a stipulation by all the parties, the plaintiff’s power to voluntarily dismiss his action is totally discretionary with the trial judge.

When the 1954 Florida Rules of Civil Procedure were adopted, those sections of Rule 1.35 applying to voluntary dismissal by the plaintiff were virtually identical to the comparable sections of Federal Rule 41, indicating that Florida apparently intended to supersede its own statutory nonsuit. But the Florida rulemakers added a clause not included in the Federal Rule. Appended to Rule 1.35(2)(b) was the statement, “however . . . nothing stated herein shall preclude a nonsuit from being taken pursuant to any applicable statute.” These words, whose original purpose no one seems able to fathom, have caused much confusion. The only applicable statute is section 54.09. It was generally considered that the questioned clause, although added to the section of the rule dealing with involuntary dismissals, did in fact preserve intact Florida’s statutory nonsuit. This, of course, was inconsistent with the clear intent of Rule

16. Ibid.
20. Sections 59.05 and 59.07(3) apply only to appellate review of nonsuits.
21. Author’s Comment, Fla. R. Civ. P. 1.35, 30 FLA. STAT. ANN (1956), “Nonsuits are not superseded”; Arnow and Brown, Florida’s 1954 Rules of Civil Procedure, 7 U. FLA. L. REV. 125, 137 (1954), “The statutory provision found in Section 54.09, Florida Statutes 1953, concerning nonsuits heretofore applicable at law still remains, of course, and will presumably have application in law cases.”
1.35 (a) to limit the use of voluntary dismissal, but a prevalent reluctance to relinquish the established practice of nonsuit carried the day.

In 1962, however, the Florida rules were amended, and the clause concerning nonsuits was omitted. No explanation for the omission was provided, and the courts were presented with the problem of whether the omission of the reference to nonsuit was intended to put an end to the statutory nonsuit. Because the rules supersede all conflicting statutes, there can be no nonsuit if section 54.09 conflicts with Rule 1.35. Plaintiffs, however, have continued to take nonsuits, and the district courts have not agreed in their treatment of the problem.

Now that the Florida Supreme Court has taken a stand and declared that the Florida Rules, as amended, eliminate the statutory nonsuit, our courts are left in the same position as the federal courts. But, there is still a decision to be made. Will Florida courts hold that a plaintiff has an absolute right to a voluntary dismissal upon terms and conditions set by the court subsequent to answer or motion for summary judgment, or will they, like the minority of federal courts, hold that the plaintiff’s power to take a voluntary dismissal rests within the sound discretion of the court, which can, if it thinks justice will best be served, refuse to allow the dismissal by refusing to set terms and conditions? If the latter view prevails, then Florida plaintiffs will have no absolute right to dismissal without prejudice after answer or motion for summary judgment, save by stipulation of all the parties.

When Crews v. Dobson was handed down, it could be questioned

22. In re Fla. Rules of Civil Procedure, 1962 Revision, 142 So.2d 725 (Fla. 1962), “This compilation and revision shall supersede all conflicting rules and statutes.”

23. The First District has firmly taken the stand that under the current rule plaintiffs have no right to nonsuit. Dobson v. Crews, 164 So.2d 252 (Fla. 1st Dist. 1964), aff’d, 177 So.2d 202 (Fla. 1965).

The Second District, in Cook v. Lichtblau, 176 So.2d 523, 533 (Fla. 2d Dist. 1965), said, “We...hold that under Florida R.C.P. 1.35, [sic] as amended, a plaintiff may not terminate an action as a matter of right by taking a nonsuit whether voluntary or involuntary under prior Florida practice.” However, it will be noted that prior to May 28, 1965, the Second District Court of Appeal did not take a definite position, but rather chose, when the problem was before it, to decide the case on an unrelated issue. State ex rel. Paluska v. White, 162 So.2d 697 (Fla. 2d Dist. 1964); Thoman v. Ashley, 164 So.2d 252 (Fla. 2d Dist. 1964). In the Thoman case, the dissent argued that the court should hear the case on the merits and consider whether nonsuits had been abolished. The dissent did consider the problem and argued that voluntary nonsuits were not abolished by the rules, as amended.

The Third District Court of Appeal gave at least tacit recognition to nonsuits in Ramsey v. Aronson, 99 So.2d 643 (Fla. 3d Dist. 1958). That case, however, was decided before the 1962 revision of the rules.

24. When the 1965 revisions to the Florida Rules of Civil Procedure, In re Fla. Rules of Civil Procedure, 1965 Revision, 178 So.2d 15 (Fla. 1965), become effective, the question will be whether a plaintiff has an absolute right to a voluntary dismissal on terms and conditions set by the court after a hearing on a motion for summary judgment, or in the event he has already dismissed an action on the same cause once before.

25. Under the 1965 revisions, supra note 24, there would be no absolute right to dismissal without prejudice after a hearing on a motion for summary judgment, save by stipulation of all the parties.
whether this was a satisfactory resolution of the nonsuit controversy. Certainly it was a radical change from the common law position. Innovation was originally sought in the concept because of a feeling that the absolute right of nonsuit provided the plaintiff with an undue advantage in all cases at law. With Crews the pendulum may have swung too far to the other side. A situation may arise in which the court may be ready to direct a verdict for the defendant, because the plaintiff has failed to prove some element of his case. If the plaintiff is reasonably certain he can supply the missing element, he will wish to dismiss his action and bring it again when his evidence is complete. One can easily imagine other situations in which a plaintiff could justifiably wish to temporarily terminate his action. Under the prevailing federal view, if the court believes the move would be unduly prejudicial to the defendant, the plaintiff must stand by helplessly and see his case lost. His only recourse is to convince a court of review that there was an abuse of discretion in the lower court. There has been some indication that at least one Florida district believes that the court does have discretion in deciding whether to set terms and conditions after the plaintiff has lost his absolute right of dismissal under the rule.

Although this may at times seem to tip the balance too far toward the defendant, there is a compensating consideration. In some cases a plaintiff will wish to dismiss his action after the litigation has proceeded to a point where the defendant has expended such efforts in the defense of the case that he cannot be adequately protected by any terms and conditions which the trial court may impose upon the plaintiff as a prerequisite to granting the voluntary dismissal of the action without prejudice. Allowing the court discretion to refuse to set terms and conditions provides a remedy for this eventuality. Clearly there is a dilemma, which explains the disagreement at the federal level, and pinpoints at least one of the problems which Crews v. Dobson has dropped into the laps of our district courts.

A second major problem arising from this decision is the Supreme Court's evident lack of consideration for the plight of all the plaintiffs who have taken nonsuits since the 1962 amendments to the rules. These plaintiffs in good faith dismissed their actions in the reasonable belief that


27. In Cook v. Lichtblau, 176 So.2d 523 (Fla. 2d Dist. 1965), the court spoke favorably of the disfavor with which the federal courts treat motions for voluntary dismissal without prejudice after the plaintiff has rested or the defendant has moved for a directed verdict. Although recognizing that the judge does have discretion to dismiss after such time, the court said that a strong showing is necessary to warrant the entry of a dismissal without prejudice at that late stage. As authorities for its statement of the federal position, the court cited 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 912 at notes 44.1, 45; and 5 MOORE, FEDERAL PRACTICE, § 41.05[1] at notes 27, 28.
they had an absolute right to bring the action again at a later date. All of these plaintiffs may now be foreclosed and barred.

All three districts have heard cases concerning the problem, and once again, there is a split. The Second District, in *Cook v. Lichtblau*, where the plaintiff had taken a nonsuit after the court had indicated an intention to grant the defendants' motion for a directed verdict, said:

In view of all the circumstances of this case we conclude that a mistrial should be declared. The basis for a mistrial is found in the action of the trial court dismissing the jury. By dismissing the jury before he exercised his discretion upon what, in legal effect, constituted a motion for dismissal without prejudice, the trial judge effectively foreclosed any possibility of exercising his discretion against granting that motion. By the same action he precluded the possibility of denying the defendant's motion for a directed verdict, upon which he did not expressly reserve a ruling. Under the circumstances we think the trial court should preserve the pending action by declaring a mistrial.  

However, both the First and Third Districts have sent such actions back to the trial courts for a dismissal of the action with prejudice. In *Dade County v. Peachey*, the Third District Court reasoned:

We find that we are not at liberty to adopt the course suggested by the appellee and indicated by *Cook v. Lichtblau*, . . . because in the instant case the jury had retired from the bar and no possible ground for a dismissal without prejudice was given by the plaintiff at the time he moved for a nonsuit. . . . The plaintiff-appellee's insistence upon his right to a nonsuit, which must now be considered a motion for dismissal without prejudice, must be considered as a failure to prosecute and dismissal with prejudice must follow.

And the First District, in a per curiam opinion, *St. Johns River Terminal Co. v. Pickett*, cited *Crews v. Dobson*, and held that the judgment entered on plaintiff's nonsuit should be vacated, and a judgment entered on the motion of the defendant dismissing the action with prejudice and at the cost of the plaintiff. The First District, of course, had already taken a stand on this question. That court, in *Dobson v. Crews*, held that when the plaintiff had sought to dismiss his action without using the procedure provided by 1.35(a), the trial court erred in overruling the defendant's motion for a judgment on the merits, under the provisions of 1.35(b), for failure of the plaintiff to prosecute the action.  

30. 178 So.2d 215 (Fla. 1st Dist. 1965).
31. 164 So.2d 252 (Fla. 1st Dist. 1964), aff'd, 177 So.2d 202 (Fla. 1965).
32. Under Rule 1.35(b) it is not required that an involuntary dismissal for failure to prosecute be a dismissal with prejudice. For a discussion of this aspect of the rule, see Massey and Westen, *Civil Procedure*, 18 U. MIAMI L. REV. 745, 776 (1964).
Dobson court held that when a defendant had allowed the plaintiff to take a nonsuit without objecting, or moving the court for an order dismissing the action with prejudice, or appealing the judgment of voluntary nonsuit, the defendant had waived his rights and was estopped to assert the error of the trial court in granting the nonsuit, or to insist that the order of nonsuit be construed as a dismissal of the action on the merits, which would preclude the maintenance of a later action under the doctrine of res judicata. It seems reasonable to assume then, that at least in those cases where the defendants did object to the nonsuit and did move to dismiss the plaintiff’s action with prejudice under 1.35(b), the plaintiffs are now in danger of having a court hold that by taking a nonsuit they have submitted their action to what will now be construed as a judgment on the merits and a bar to further litigation. It is submitted that this is unjust. Much confusion was manifested among the bench and bar as to the status of nonsuit in this state. Plaintiffs should not be penalized because they, in effect, aligned themselves with the losing side in the controversy. The Dobson v. Crews court could have returned the case to the trial court with instructions to treat the plaintiff’s request for nonsuit as a motion for voluntary dismissal without prejudice under 1.35(a) and to set terms and conditions of dismissal accordingly. If the courts hold that nonsuits taken after the 1962 amendment, at least in those cases in which the defendant objected to the nonsuit, are judgments on the merits, then the Supreme Court in Crews v. Dobson has for all practical purposes handed down a retroactive ruling of serious and injurious consequences to a large number of plaintiffs. It is submitted that the court should have ruled that from the date of its decision there will be no nonsuits in this state, and returned the case before it to the lower court for treatment of plaintiff’s nonsuit as a motion for voluntary dismissal without prejudice.

The third, and most perplexing problem raised by Crews v. Dobson, is the effect of the 1965 revisions of the Florida Rules on the nonsuit chimera. In the Crews decision, the Court said:

Our first thought was that since this court is considering now the question whether or not a further rule should be adopted to clarify the procedure in this respect, we should not in this case anticipate the court’s action as a rule-making body; our second

33. Florida East Coast Ry. Co. v. Lewis, 167 So.2d 104 (Fla. 1st Dist. 1964). The court reasoned that by failing to take such action the defendant had deprived the plaintiff of the privilege of deciding whether to proceed with the trial rather than submit to an involuntary nonsuit.

34. Since 1962, plaintiffs’ counsel could have protected their clients’ interests by asking the court to issue an order of nonsuit and an order of voluntary dismissal. But counsel could not be expected to foresee that such action would be necessary.

35. The court in Cook v. Lichtblau, 176 So.2d 523 (Fla. 2d Dist. 1965) considered this solution, but rejected it because of the possibility of the plaintiff in that action being barred by the statute of limitations.

36. Supra note 24. The opinion states that the new amendments will take effect January 1, 1966.
and abiding thought is that we would do a service to the Bench and Bar by settling the matter in the present litigation.\textsuperscript{37}

Twenty-one days later, the Court handed down an opinion revising some of the Florida Rules of Civil Procedure, including Rule 1.35,\textsuperscript{38} effective January 1, 1966. Substantial changes were made, and while a full discussion of the text of the new rule is beyond the scope of this paper, it will be well to briefly consider certain aspects of the rule which were seemingly changed to mitigate the effect of the \textit{Crews} decision.

The current Rule 1.35(a) states:

\begin{quote}
[A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment or decree, which ever first occurs, or (ii) by filing stipulation of dismissal signed by all parties who have appeared in the action. . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state an action based on or including the same claim.
\end{quote}

The new Rule 1.35(a) states:

\begin{quote}
[A]n action may be dismissed by plaintiff without order of court (i) by serving a notice of dismissal \textit{at any time before a hearing on motion for summary judgment, or if none is served, or if such motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision}, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim. (Emphasis added.)
\end{quote}

It would seem that the reluctance of Florida attorneys to relinquish the concept of nonsuit has manifested itself rather forcefully.

It is suggested that this revision of Rule 1.35 restores the nonsuit to Florida practice, \textit{Crews v. Dobson} notwithstanding. However, nonsuits have not emerged unscathed; they are now to be called voluntary dismissals, and in some respects they are more severely limited than before. Once again, a Florida plaintiff can dismiss his action without prejudice after an answer has been filed, but not after a hearing on a motion for

\textsuperscript{37} Crews v. Dobson, 177 So.2d 202, 204 (Fla. 1965).
\textsuperscript{38} Supra note 24 at 25.
summary judgment, unless such motion is denied, in which case he can
dismiss up until the time the jury retires from the bar or the case is sub-
mitted to the judge for decision. A further limitation is the stipulation
that a plaintiff may avail himself of this voluntary dismissal without
prejudice only one time with any one lawsuit. Neither may he dismiss
his action over the defendant's objections after a counterclaim has been
filed upon him, unless the counterclaim can remain pending for inde-
pendent adjudication by the court. These are significant limitations
upon the once absolute right of nonsuit, but the revised rule does mitigate
the holding of Crews v. Dobson.

That decision, however, is still of significance to those plaintiffs who
have and will have dismissed their actions while the present Rule 1.35 is
in effect, and who may come under its retroactive effect. It is also rea-
sonable to assume that in the absence of a motion for summary judgment
or upon the denial of such motion, or if a plaintiff has once before dis-
missed his action or a defendant has objected because his counterclaim
cannot remain pending, in such cases the courts will hold, following Crews,
that voluntary dismissals may be had only upon order of the court and
upon such terms and conditions as the court deems proper. This of course
raises the problem of whether the right to have such terms and condi-
tions set is absolute. Crews v. Dobson has effectively abolished statutory
nonsuit in Florida, and the new Florida Rule, 1.35, will create a voluntary
dismissal similar to the old nonsuit, but more limited in scope with respect
to actions at law tried by a jury.

There is a further consideration, however. The Florida Supreme
Court, by the 1965 revision of Rule 1.35, has actually accomplished a
broad extension of the concept of nonsuit, contrary to what has hereto-
fore been a steady trend toward limiting the concept. The new rule
specifies that the absolute right to voluntary dismissal, in the absence of
a summary judgment, prior voluntary dismissal, or counterclaim, exists,
"before retirement of the jury in a case tried before a jury or before sub-
mission of a nonjury case to the court for decision . . . ." (Emphasis
added.) This not only restores the absolute right of dismissal to jury trials,
as was the old nonsuit practice, but it appears to extend the practice so
that it is available in actions at law without a jury, and further still to
suits in equity, where it has never existed before.

39. 1965 revision of 1.35(a)(2).
40. "The courts have recognized the tremendous advantages allowed the plaintiff by
his right to non-suit and have constantly been in the process of qualifying and restricting the
use of this concept . . . ." 13 U.FLA. L. REV. at 122.
41. 13 U.FLA. L. REV. at 108-11 provides a consideration of Florida cases which
substantiate the view that Fla. Stat. § 54.09, by its reference to a jury, limits nonsuit, by
implication, to law actions with a jury, and precludes its use in suits in equity.
42. KOOMAN, FLORIDA CHANCERY PLEADING AND PRACTICE § 163 (1939), discusses the
discretion of the court in considering the motion of a plaintiff in equity to dismiss his
action without prejudice.
It is difficult to understand why the Florida Supreme Court handed down a decision abolishing nonsuit in this state and then only twenty-one days later so drastically revised the rules of civil procedure that Florida now seems to be pioneering in the extension of the practice of nonsuit.

CHARLENE HERMANN

SEQUESTRATION OF WITNESSES—SHOULD IT BE GRANTED AS A MATTER OF RIGHT?

The defendant was convicted of robbery and assault with intent to commit murder. At the trial a detective, who was a spectator, heard the defendant testify that he had not made an oral confession. After hearing this, the detective advised the prosecutor that the defendant had in fact made an oral confession to him. Over defense counsel's objection, the detective was allowed to testify as to the confession. The defendant collateralistically attacked the judgment and moved for a new trial. Upon the trial court's denial of his motion, the defendant appealed. On appeal, held, reversed and remanded for a new trial: allowing a witness to testify after hearing the defendant's testimony was in violation of the rule requiring sequestration of witnesses and was an abuse of judicial discretion. Jackson v. State, 177 So.2d 353 (Fla. 3d Dist. 1965).

Since the Biblical story of Susanna's exoneration, the separation of witnesses has been regarded as a valuable adjunct to direct and cross examination of witnesses. The early English doctrine indicated that sequestration is entirely discretionary with the court, and with the

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1. FLA. R. CRIM. P. 1, provides that a prisoner under sentence of a court may collateralistically attack the court's judgment on the basis that his Constitutional rights were violated.
2. See Jackson v. State, 166 So.2d 194 (Fla. 3d Dist. 1964).
3. Two elders coveted Susanna, a very fair woman and pure, the wife of Joacid; they tempted her, but she resisted; then they plotted, and charged her with adultery; and she was brought before the assembly; and the elders said: As we walked in the garden alone ... a young man ... came unto her, and lay with her. ... [T]hese things do we testify. Then the assembly believed them, as those that were the elders and judges of the people ... But Daniel, standing in the midst of them said: "Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel?" [T]hen Daniel said unto them, "Put these two aside, one far from another, and I will examine them." So when they were put asunder one from another, he called one of them and said unto him, ... "now then, if thou hast seen her, tell me under what tree sawest thou them company together?" who answered, "under a mastick tree." So, he put him aside and commanded to bring the other, and said unto him ... "Now therefore tell me, under what tree didst thou take them company together?" who answered, "under an holm tree ..." And they arose against the two elders, for Daniel had convicted them of false witness by their own mouth. ... As quoted in 6 Wigmore, EVIDENCE § 1837 (3d ed. 1940).
4. Braddon, Observations on the Earl of Essex's Murder, 9 How. St. Tr. 1224 (1725); Cook's Trial, 13 How. St. Tr. 311 (1696); Rosewell's Trial, 10 How. St. Tr. 147 (1684); Sir Walter Raleigh's Trial, 1 Jardine Crim. Tr. (1603).
5. "Sequestration" is defined as, "the separating or setting aside of a thing in controversy, from the possession of both parties that contend for it." BLACK, LAW DICTIONARY 1531 (4th ed. 1951).
6. Cook's Trial, supra note 4 at 348. ("It is not necessary to be granted for the ask-