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Civil Procedure

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CIVIL PROCEDURE

M. MINNETTE MASSEY* AND MARION WESTEN**

The express purpose of the Florida Rules of Civil Procedure is to secure the just, speedy and inexpensive determination of every action. This goal will only be realized when those who practice in the courts are so familiar with their provisions that the rules become the tools of those who use them and not stumbling blocks to needless litigation.

One is dismayed at the number of cases in which the issue before the appellate court concerns a point of procedure. It is apparent that many of these cases need never have been decided if only the Bar, and even the Bench, had *read the rules*.

This article surveys¹ the more important and interesting cases, amendments to the rules and legislative acts that have occurred during the period. The format follows that of the Florida Rules of Civil Procedure.² The first major division is Actions at Law and Suits in Equity—law and equity. (Prior to the discussion of the rules and their judicial interpretation, there are contained in this division sections on Statutory Process, Notice Requirements and Venue.) The other major divisions are Actions at Law Only, and Suits in Equity Only.

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1. This article considers the cases reported in Volumes 132-155 So.2d, inclusive.

2. Unless otherwise stated, references to the Rules are to the 1962 Revision of the Florida Rules of Civil Procedure.

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I. LAW AND EQUITY

A. *Statutory Process and Notice Requirements*

1. QUASI-IN-REM JURISDICTION AND COLLATERAL ESTOPPEL

If a court has jurisdiction over the subject matter, its power to adjudicate the rights of parties before it is predicated upon the presence of the defendant's person or property within the state, thereby rendering the defendant amenable to personal or constructive service of process under a valid statute.³

When jurisdiction is based upon the presence of property within the state, satisfaction of the obligation is limited to the value of the property subject to levy and execution.⁴

In *Matz v. O'Connell*⁵ an action was brought on a promissory note that had been secured by a real property mortgage. The mortgage had been previously foreclosed by a suit in which the defendant mortgagors, who were Pennsylvania residents, had been constructively served with process.⁶ No objections were made to the sale which resulted in a deficiency.⁷ In a subsequent law action on the note in which there was personal service of process upon the defendants, the court refused to allow the introduction of evidence relating to the value of the property sold and claimed that its value had been conclusively established by the price at the foreclosure sale to which no objections were made within the statutory 10-day period. In reversing, the appellate court held that the defendants were not collaterally estopped from establishing the value of the property sold in the subsequent law action. Since the court in the foreclosure proceedings did not have personal jurisdiction over the defendants, the jurisdiction of the court was merely coextensive with the property. No personal rights could be determined in that action without depriving the defendants of due process.⁸ It necessarily followed that the provision establishing conclusive presumption of value under the foreclosure statute was inapplicable in the absence of personal service of process on the defendants.

3. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

4. *Jones v. Jones*, 140 So.2d 318 (Fla. 3d Dist. 1962). In *State v. Dekle*, 137 So.2d 581 (Fla. 3d Dist. 1962), satisfaction of a judgment by levy and execution against previously attached property, was denied where the State Department filed a suggestion of sovereign immunity after judgment had been entered but prior to execution.

5. 155 So.2d 705 (Fla. 2d Dist. 1963). See Bayitch, *Conflict of Laws in Florida 1957-1963*, 18 U. MIAMI L. REV. 269, 290 (1963).

6. FLA. STAT. § 48.01(1) (1963).

7. FLA. STAT. § 702.02(5) (1963).

8. U.S. CONST. amend. XIV.

2. IMMUNITY FROM SERVICE OF PROCESS

It appears to be established that witnesses and suitors in attendance in court outside of the territorial jurisdiction of their residence are immune from service of process while attending court and for a reasonable time before and after going to court and in returning to their residence.⁹

The privilege not to be served with process extends both to judicial and to quasi-judicial proceedings.¹⁰ There is an exception to the immunity rule which permits service of process in litigation incidental to or correlated with the subject matter of the proceedings for which the defendant had specially appeared. To find such correlation as would permit service of process, there must be substantial identity between the parties in both actions and between the issues in the two proceedings. When, for example, the defendant in one suit is a corporation and the defendant in the other is a natural person, there is not such substantial identity of the parties as to invoke the exception to the privilege of immunity.¹¹

3. ACTING WITHIN JURISDICTION

In determining whether jurisdiction over non-resident defendants and foreign corporations can be obtained by substituted service,¹² Florida bases the constitutionality of its long arm statutes on the minimum contact rule.¹³ The "doing business" requirement is difficult to apply, and also service of process on corporate officers, agents, and individuals frequently presents problems under these statutes. Such problems found in recent cases have been carefully analyzed in Part I of the current Survey of Florida Law.¹⁴

4. UNINCORPORATED VOLUNTARY ASSOCIATIONS

An unincorporated voluntary association is not a legal entity. Jurisdiction over the members of such an association can only be acquired by individual service of process upon each of the members.¹⁵

9. *Lienard v. DeWitt*, *infra* note 10, at 43.

10. *Lienard v. DeWitt*, 143 So.2d 42 (Fla. 2d Dist. 1962), *aff'd*, 153 So.2d 302 (Fla. 1963) (Workmen's Compensation proceedings).

11. *Ibid.* See also Bayitch, *Conflict of Laws in Florida 1957-1963*, 18 U. MIAMI L. REV. 269, 291-92 (1963).

12. FLA. STAT. §§ 47.16, .161, .162, .17, .171, .30 (1963).

13. The rule, first enunciated by Judge Learned Hand in *Hutchison v. Chase and Gilbert Inc.*, 45 Fed. 139 (2d Cir. 1930), and adopted by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

14. Bayitch, *Conflict of Laws in Florida 1957-1963*, 18 U. MIAMI L. REV. 269, 278-89 (1963).

15. *Walton-Okaloosa-Santa Rosa Medical Soc'y v. Spires*, 153 So.2d 325 (Fla. 1st Dist. 1963). See Bayitch, *Conflict of Laws in Florida 1957-1963*, 18 U. MIAMI L. REV. 269, 286 (1963) (re: partnerships).

5. COMPLIANCE WITH STATUTORY PROVISIONS

Strict compliance with the statutory provisions is a prerequisite to valid service of process. In *Florida Medical Ass'n, Inc. v. Spires*¹⁶ process was served upon an individual who was also president of the Florida Medical Association, a domestic corporation, but the return did not indicate that he had been served in that capacity. In reversing a trial court order denying the defendant's motion to dismiss the complaint, the district court held that the court had acquired no jurisdiction over the defendant corporation where its president was not expressly served in his representative capacity.¹⁷

A mortgage foreclosure suit was instituted in Dade County where the encumbered property was located and the mortgagor resided at the time of the execution of the mortgage. Before the suit was begun the mortgagee had moved to a different county within the state. After due and diligent search and inquiry, service of process was by publication.¹⁸ In affirming a lower court order denying the defendant's motion to quash the constructive service, the appellate court held that the defendant's presence within the state (and amenability to personal service)¹⁹ did not defeat the service by publication when the record indicated compliance with the requirements of the publication service statute.²⁰

6. AMENDMENT OF THE SHERIFF'S RETURN

In the much litigated case of *Brown v. Mitchell*²¹ the supreme court quashed²² the district court decision²³ which had sustained the service of process upon an incompetent because the record to the supreme court failed to establish strict compliance with the statutory requirements for service of process upon incompetents.²⁴ Such service must be made either by reading the summons to the incompetent and also to his guardian, or by delivering a copy thereof to the incompetent and his guardian and by further delivering another copy to the guardian ad litem appointed by the court.²⁵ On remand of the cause to the circuit court, the defendants deposed²⁶ the sheriff by whom service on the incompetent and his wife had been made nineteen years previously and petitioned the circuit court for leave to amend the sheriff's return to state the truth as allegedly revealed in that deposition. The motion was denied

16. 153 So.2d 756 (Fla. 1st Dist. 1963).

17. FLA. STAT. § 47.17(1) (1963).

18. FLA. STAT., § 48.01(1) (1963).

19. FLA. R. CIV. P. 1.3.

20. *Johnstone v. J. W. English Enterprises, Inc.*, 155 So.2d 835 (Fla. 3d Dist. 1963).

21. *Massey, Civil Procedure*, 16 U. MIAMI L. REV. 591, 593-94 (1962).

22. *Brown v. Mitchell*, 119 So.2d 385 (Fla. 1st Dist. 1960).

23. 114 So.2d 178 (Fla. 1st Dist. 1959).

24. FLA. STAT. § 47.25 (1963).

25. *Ibid.*

26. FLA. R. CIV. P. 1.21.

on the ground that the supreme court decision had finally determined the matter and the circuit court was without jurisdiction. From this order, the defendants took an interlocutory appeal and the plaintiff petitioned for a writ of prohibition in the supreme court which was denied. The district court reversed the order appealed (*i.e.*, the order denying the defendants' motion for leave to amend the sheriff's return) on the ground that neither it nor the supreme court had previously decided the question, and it remanded the cause with directions to the circuit court to consider the defendants' motion on the merits. After a hearing, at which the sheriff testified, the amended return was received into evidence, and the chancellor entered an order finding that it doubly complied with the statutory requirements for service of process upon incompetents.²⁷ He also ordered that in the foreclosure proceedings the circuit court had had jurisdiction over the incompetent and that the court's prior summary decree for the plaintiff be set aside. Thereupon, the plaintiff appealed. The district court affirmed²⁸ the order setting aside the interlocutory summary decree when the record, as amended, established proper service upon the incompetent in the foreclosure action, thus raising genuine issues of material fact that precluded entry of a summary decree.

B. *Venue*

Venue statutes have often been characterized as statutes of convenience. Their primary purpose is to require that litigation be instituted in the forum which will cause the least amount of inconvenience and expense to those parties required to answer and defend the action.²⁹

1. IN GENERAL

Florida's principal venue statute³⁰ provides that an action shall be begun only in the county (1) where the defendant resides, or (2) where the cause of action accrued, or (3) where the property in litigation is located.³¹ The statute's plain language has not precluded the necessity for judicial interpretation.

An action for breach of oral warranties, negligent preparation of a vessel for a voyage and rescission of a contract was brought in Escambia County where the plaintiffs retained possession of the vessel that

27. FLA. STAT. § 47.25 (1963). See text accompanying note 25 *supra*.

28. *Brown v. Mitchell*, 151 So.2d 305 (Fla. 1st Dist. 1963).

29. *Polar Ice Cream & Creamery Co. v. Andrews*, 146 So.2d 609, 612 (Fla. 1st Dist. 1962).

30. FLA. STAT. § 46.01 (1963).

31. *Colburn v. Highland Realty Co.*, 153 So.2d 731 (Fla. 2d Dist. 1962). Suit for the specific performance of a contract to sell Florida land was brought against the Michigan receiver of a non-resident vendor. The court had acquired jurisdiction over the defendant by his voluntary appearance to obtain a stay of execution and enforcement of an adverse summary decree. Venue in the county in which the real property in litigation was located was proper.

was the subject matter of the litigation. The alleged oral warranties had been made in Broward County where the boat was purchased and in which one of the corporate defendants maintained its principal place of business and the individual defendant resided. The principal place of business of the other corporate defendant was in Dade County. From an order denying their motion to dismiss the complaint from improper venue, the defendants took an interlocutory appeal.³² In quashing the order appealed and remanding the cause with directions to transfer³³ the action to the Broward County Circuit Court, the district court held that a transitory action may not properly be maintained in the county where the property in litigation is located and where neither the defendants reside nor the cause of action accrued.

Venue statutes are for the protection of the defendant where the action is personal or transitory, and unless waived, the statute grants to the defendant the privilege of being sued either in the county of his residence³⁴ or in the county where the cause of action accrued. The primary cause of action, (if any) . . . accrued in Broward County, and venue, on this ground lay in Broward County.³⁵

2. VENUE IN CAUSES OF ACTION ARISING FROM CONTRACTUAL RELATIONS

A recurring venue provision³⁶ permits an action to be brought in the county in which the cause of action accrued. In breach of contract actions, the breach ordinarily occurs in the county where the contract was to have been performed, absent circumstances indicating a contrary intention.³⁷

The state brought an action on behalf of a material-man against a general contractor, his surety, and the sub-contractor for breach of an agreement between the sub-contractor and the material-man. The agreement, to which the general contractor was not a party, had been made in Hillsborough County. The work was performed in Leon County. From an order denying their motion to dismiss the complaint for improper venue³⁸ the defendants took an interlocutory appeal. In affirming,³⁹ the district court held that where the contract provided for payments to be made in Hillsborough County, a cause of action arose there on default in the payments, and the action could be maintained.

32. FLA. APP. R. 4.2. Petition for certiorari to review an order dismissing a complaint for improper venue will not lie where plaintiff may obtain review by a direct interlocutory appeal. *Tel Serv. Co. v. Hendricks*, 139 So.2d 436 (Fla. 2d Dist. 1962).

33. FLA. STAT. § 53.17 (1963).

34. Where two or more defendants reside in different counties the action may be brought in any county where any defendant resides. FLA. STAT. § 46.02 (1963).

35. *Richard Bertram & Co. v. Barrett*, 155 So.2d 409, 412 (Fla. 1st Dist. 1963).

36. FLA. STAT. §§ 46.01, 46.03, 46.04 (1963).

37. *Williams v. Scholfield*, 144 So.2d 89 (Fla. 1st Dist. 1962).

38. FLA. R. CIV. P. 1.11(b)(3).

39. *Winchester v. State*, 134 So.2d 826 (Fla. 2d Dist. 1961).

3. LOCAL V. TRANSITORY ACTIONS

Much of the litigation relating to venue has arisen in connection with the classification of an action as local or transitory.

Actions were deemed transitory when the transaction on which they were founded might have taken place anywhere, and local, when the transaction was necessarily local, and could have happened only in a particular place. The unerring test by which it may be determined whether an action is local or transitory, inheres in the nature of the subject of the injury as differing from the means whereby or the place at which the injury was inflicted.⁴⁰

Applying this test, Florida courts have held⁴¹ an action to foreclose a chattel mortgage to be transitory. Payments on a promissory note were to be made in Broward County. The note was secured by a chattel mortgage on personal property located at the defendants' places of business in Dade County. On default in the note payments, the plaintiff instituted foreclosure proceedings in Broward County Circuit Court which transferred the suit to the Dade County Circuit Court. In reversing the transfer order, the appellate court noted that a cause of action arose in Broward on default in the payments. Under the applicable venue statute,⁴² an action may be maintained against a corporate defendant, either domestic or foreign, in the county in which the cause of action accrued.

4. VENUE IN UNFAIR TRADE PRACTICE SUITS

Where a cause of action arises is a factual question for the court to determine from the individual circumstances of each case. In a suit to enjoin the alleged infringement of a registered trademark, for damages, and for an accounting of profits, the court⁴³ held that "a cause of action accrues in any county where the act of unfair competition is committed."⁴⁴ Offering the allegedly infringing articles for sale in shops far distant from their place of manufacture is an act of unfair competition that entitles the plaintiff to maintain an action in the county where the goods were sold even though the corporate defendant maintains no place of business and the individual defendants have no residence in said county. It is seriously to be questioned whether such a broad definition of a cause of action is compatible with the purpose of the venue statute to protect the defendant from unnecessarily inconvenient litigation.⁴⁵

40. 25 *STD. ENCY. PROCEDURE* 858 (1911).

41. *Lucco v. Roller Corp.*, 151 So.2d 12 (Fla. 2d Dist. 1963).

42. *FLA. STAT.* § 46.04 (1963). *Accord*, *Edgewater Drugs, Inc. v. Jax Drugs, Inc.*, 138 So.2d 525 (Fla. 1st Dist. 1962).

43. *Luckie v. McCall Mfg. Co.*, 153 So.2d 311 (Fla. 1st Dist. 1963).

44. *Id.* at 313.

45. These considerations may have motivated the dissenting justice to find that the only cause of action arose in Dade County, where the individual defendants resided, the

5. FORUM NON CONVENIENS

Although Florida has no statute comparable to the federal act⁴⁶ providing for transfer of a cause from one district court to another in which the action might have been brought for the convenience of the parties and witnesses in the interest of justice, Florida courts do recognize the doctrine of *forum non conveniens*.⁴⁷ However, under the Florida view of the doctrine, its application is strictly limited to cases of complete diversity—*i.e.*, diversity between the parties and a cause of action not arising in the state.

An action to recover damages for personal injuries was brought against a foreign corporation in Dade County where its resident agent resided. The plaintiff resided in Hillsborough County, and the accident occurred in Alachua County. In reversing an order dismissing the complaint under the doctrine of *forum non conveniens*, the appellate court held that:

where the Legislature provides that an action may be brought in a certain court,⁴⁸ that court may not impose its will as to venue in order to force a plaintiff to accept another forum for the action, which the courts conceive to be better than one specified by the Legislature. . . . The reason . . . that the doctrine has been applied in Florida to non-resident plaintiffs is because, as to such plaintiffs, there is no statutory right to bring the action in any particular forum.⁴⁹

6. UNSECURED PROMISSORY NOTES

An action upon an unsecured promissory note can be maintained only in the county in which it was signed by one or more makers or in which one or more of the makers resides, regardless of where it was accepted or payments are made.⁵⁰

The district court applied the general principle of statutory construction that a special statute covering a particular subject is controlling over a general statutory provision covering the same and other subjects in general terms, and affirmed a lower court order granting the defendant's motion to dismiss the complaint for improper venue in an

defendant corporation maintained its principal place of business, where the alleged infringing labels were placed on the bottles, and from which the goods were shipped.

46. 28 U.S.C. § 1404(a) (1958).

47. See Note, 15 U. MIAMI L. REV. 420 (1961). Under the common law doctrine, unlike the statute, dismissal, rather than transfer, results when the court decides that the litigation has been brought in an inconvenient forum. See also Bayitch, *Conflict of Laws in Florida 1957-1963*, 18 U. MIAMI L. REV. 269, 292 (1963).

48. Under FLA. STAT. § 46.04 (1963), an action may be brought against a foreign corporation doing business in this state in any county where such company may have an agent.

49. *Touchton v. Atlantic Coastline R.R.*, 155 So.2d 738, 739 (Fla. 3d Dist. 1963).

50. FLA. STAT. § 46.05 (1963).

action upon an unsecured promissory note. The action had been instituted in the county where the default in payments had occurred.⁵¹

7. SUITS AGAINST STATE AGENCIES

The defendant in an action arising out of an automobile collision filed a compulsory counterclaim⁵² and joined the appealing cross-defendant as a necessary party.⁵³ The original action was brought in Duval County against a Florida non-resident and the cross-defendant was a state agency, maintaining its offices in Nassau County. From an order denying its motion to dismiss the compulsory counterclaim, the cross-defendant took an interlocutory appeal. The appellate court reversed.⁵⁴ An action against a government agency is essentially local and cannot be maintained in a county other than that in which the agency is situated, unless the agency has waived its venue privilege. The requirement is predicated on reasons of policy and intended to promote the efficient and economical operation of the agency.⁵⁵

In the case of administrative agencies, an exception to the general rule (which first developed in relation to municipal corporations) is expressly provided by the built-in venue provisions⁵⁶ of the Administrative Procedure Act. Under these provisions, an affected party may obtain a judicial declaration of the validity of any administrative rule by bringing a declaratory judgment action in the circuit court of the county in which such party resides or in the county in which the executive offices of the administrative agency are maintained.⁵⁷

When no provision has been made for direct review by the supreme court, appellate review of administrative orders entered in judicial or quasi-judicial proceedings is possible by a timely petition for certiorari to the district courts in the appellate district which includes the county wherein the administrative hearing was held, or if venue cannot thus be determined, in the appellate district wherein the agency's executive offices are located.⁵⁸

The Florida Milk Commission brought an action for a declaratory judgment in the circuit court of the county in which it was located to determine the validity of an order that it had entered requiring the defendant to resume payment of its former prices to its producers. The defendant took an interlocutory appeal from an order denying its motion to dismiss the complaint for improper venue. In denying the motion the

51. *Woodley Lane, Inc. v. Nolan*, 147 So.2d 569 (Fla. 2d Dist. 1962).

52. FLA. R. CIV. P. 1.13(1).

53. FLA. R. CIV. P. 1.13(8).

54. *Amelia Island Mosquito Control Dist. v. Tyson*, 150 So.2d 246 (Fla. 1st Dist. 1963).

55. 38 AM. JUR. *Municipal Corporations* § 716 (1941).

56. FLA. STAT. §§ 120.30-31 (1963).

57. FLA. STAT. § 120.30(1) (1963); *Stadnik v. Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962).

58. FLA. STAT. § 120.31(1) (1963).

trial court had relied on the special venue provisions in section 120.30(1) of Florida Statutes. The defendant contended that the general statute regulating venue in actions against domestic corporations was controlling,⁵⁹ and that, under that statute, the suit should have been brought in Escambia County where the defendant corporation maintained its business office and the contracts complained of were made. It argued that the plaintiff agency was not a proper party to bring an action for a declaratory judgment under the Administrative Procedure Act⁶⁰ and that the order for which an interpretation was sought was not a proper subject for a declaratory judgment. The district court agreed⁶¹ and remanded the cause with directions that it be transferred to the Escambia County Circuit Court.⁶² The declaratory judgment provision⁶³ permits an *affected party* to bring an action to determine the application, meaning or validity of an administrative agency's *rule*. Within the purview of this section, an affected party is one whose rights are affected by the rule, and does not include the agency which adopted it. A rule is a "rule or order of *general* application adopted by an agency which affects the rights of the public or other interested parties."⁶⁴

8. LEGISLATION

In re-enacting the principal venue statute,⁶⁵ the Legislature deleted the paragraph which required a plaintiff, who brought an action in a county where the defendant did not reside, to file a good faith affidavit alleging that the action was not brought with intent to annoy the defendant. The statute now reads:

Suits shall be begun only in the county (or if suit is in the justice of the peace court, in the justice's district) where the defendant resides, or where the cause of action accrued, or where the property in litigation is located.⁶⁶

The statutory alteration renders moot such decisions as *Cobb v. Santa Rosa County*⁶⁷ in which failure to file the required good faith affidavit was held to be grounds for dismissal unless it was filed within a short day as fixed by the trial court.

C. Circuit Court Local Rules

The Florida rules authorize the circuit courts, subject to the approval by the supreme court, to adopt local rules concerning practice

59. FLA. STAT. § 46.04 (1963).

60. FLA. STAT. ch. 120 (1963).

61. *Polar Ice Cream & Creamery Co. v. Andrews*, 146 So.2d 609 (Fla. 1st Dist. 1962).

62. FLA. STAT. § 53.17 (1963).

63. FLA. STAT. § 120.30(1) (1963).

64. *Polar Ice Cream & Creamery Co. v. Andrews*, *supra* note 61.

65. FLA. STAT. § 46.01 (1963); Fla. Laws ch. 63-572, § 12.

66. FLA. STAT. § 46.01 (1963).

67. 146 So.2d 600 (Fla. 1st Dist. 1962).

and procedure. In an independent suit for modification of a divorce decree the presiding judge reassigned the case to be heard by the judge who had granted the original decree. The plaintiff contended that she had the election to file her petition for modification in the original action, or that she could file a new and independent suit and, if she adopted the latter course, she was entitled to have her cause heard by the judge presiding over the division the cause had been assigned to under the blind filing system. The appellate court affirmed⁶⁸ the reassignment and opined that local rules are authorized⁶⁹ and that it was clear that the local rule⁷⁰ relied upon was valid and applied to the facts of the instant case.

D. Commencement of Action

1. STATUTE OF LIMITATIONS

A civil action, except an ancillary proceeding, is commenced when the complaint is filed.⁷¹ Further, the statute of limitations is tolled by the filing of the complaint.⁷² Federal decisions⁷³ require compliance with the rules providing for the filing of the complaint⁷⁴ and the forthwith issuance of summons, delivered for service,⁷⁵ in order to toll the statute of limitations. This federal position was argued to the first district in *Hawkins v. Bay County Publishers, Inc.*⁷⁶ The complaint was filed and summons was issued one day before the running of the statute of limitations. Process was delivered to the sheriff more than four months later and was at that time served upon the defendant. The trial court granted the defendant's motion to dismiss and held that the statute of limitations barred the action. The appellate court found no evidence in the record, nor was any finding made by the trial judge as to who had withheld the summons or why it was withheld from service. The appellate court did not resolve the issue of the necessity of delivering the summons for service as a prerequisite for tolling the statute of limitations. It held and reiterated that the statute of limitations is an affirmative defense which must be pleaded and cannot be asserted as ground for a motion to dismiss the complaint.

68. *Morrison v. Morrison*, 136 So.2d 30 (Fla. 3d Dist. 1962).

69. FLA. R. CIV. P. 1.1(d).

70. RULES OF PRACTICE IN CIRCUIT COURT OF DADE COUNTY, FLORIDA (1961) reads as follows:

7. (e) Cases previously Non-suited, petition for bills of review or to vacate or set aside prior proceedings, or cases where the merits have already been heard by a Judge of this court; may be reassigned by the Presiding Judge to the Judge before whom the first case was filed.

71. FLA. R. CIV. P. 1.2(a).

72. *Klosenski v. Flaherty*, 116 So.2d 767 (Fla. 1959).

73. 2 MOORE, FEDERAL PRACTICE ¶ 3.07 [4.-3-2] n.5 (2d ed. 1961).

74. FLA. R. CIV. P. 1.2(a).

75. FLA. R. CIV. P. 1.3(b).

76. 148 So.2d 561 (Fla. 1st Dist. 1963).

2. IMMUNITY FROM SERVICE OF PROCESS

The immunity rule provides "that witnesses and suitors in attendance in court outside of the territorial jurisdiction of their residence are immune from service of process while attending court and for reasonable time before and after going to court and returning to their homes."⁷⁷ The plaintiff, in an action to recover damages for personal injuries allegedly resulting from the defendant's assault in North Carolina, petitioned for certiorari to review a district court decision⁷⁸ affirming the lower court's order dismissing his complaint without prejudice for lack of jurisdiction over the non-resident defendant's person. The district court of appeals had held that when the non-resident defendant has responded to a request to appear before the deputy industrial commissioner in a Workmen's Compensation proceeding against the plaintiff's employer corporation to recover for injuries allegedly growing out of the same North Carolina altercation, he was immune from service of process, and that the facts were not such as to bring the defendant within the exception to the immunity rule. In affirming⁷⁹ the district court's decision, the supreme court found it necessary to overrule the earlier decision of *L. P. Evans Motors, Inc. v. Meyer*.⁸⁰ The supreme court agreed that when there was no identity of parties or issues in the two proceedings, the defendant was not subject to service of process on his appearance within the state. However, the court rejected the district court's third requirement—that there be a substantial identity of prospective results.

In *Lawson v. Benson*⁸¹ a non-resident filed a proceeding in Florida against an ex-wife for relief relating to child custody. It ended ineffectively and the plaintiff filed another custody proceeding in a different county. While prosecuting the second proceeding he was sued for fees by the lawyer who had represented him in the earlier proceeding. His motion to quash the service and dismiss the cause, on the ground that he was immune from service of process, was granted and affirmed on appeal. The appellate court held that a non-resident who was in Florida as a party and witness in his child custody proceeding against his former wife was immune from service of process, even though the attorneys' fees were connected with a prior, unsuccessful child custody proceeding.

3. SERVICE OF NEW AND ADDITIONAL CLAIMS ON DEFAULTING PARTIES

Rule 1.4(a) expressly requires pleadings which assert new or additional claims for relief against parties that default be served upon them

77. *Rorick v. Chancy*, 130 Fla. 442, 178 So. 112 (1937).

78. *Lienard v. DeWitt*, 143 So.2d 42 (Fla. 2d Dist. 1962).

79. *Lienard v. DeWitt*, 153 So.2d 302 (Fla. 1963).

80. 119 So.2d 301 (Fla. 3d Dist. 1960).

81. 136 So.2d 353 (Fla. 3d Dist. 1962).

in the manner provided by law for service of summons. This requirement is based upon notions of fairness, namely, that a party should receive notice of all claims for relief upon which judgment may be entered against him. Hence, if the defendant fails to appear and the plaintiff amends his complaint, by inserting new and/or additional claims for relief, a copy of the amended complaint must be served in the same manner as the summons.

In a suit against a vendor of Florida real estate to obtain specific performance of an agreement to sell property, the vendor defaulted after having been served with process. The plaintiff, by leave of court, then filed an amendment to the complaint showing that additional defendants had filed pendente lite claims against the lands in controversy. Further relief on that account was sought against the vendor. This subsequent pleading, the amended complaint, was not served in accordance with Rule 1.4(a). The appellate court held that the additional claims were not properly in issue and should not have been included in the decree.⁸²

The court opined that "when process is served upon a defendant, he is thus brought into court to answer only the case made by preceding pleadings." Adjudication of any other claim would be outside the issues and beyond the jurisdiction of the court. Hence, if the defendant upon whom process has been served decides to confess the complaint by failure to plead, he has the right to assume that only the claim thus confessed will be decided. If a different claim is decided, there is a lack of legal due process.⁸³

4. MODIFICATION OF THE STATUTORY PERIOD FOR THE COMMENCEMENT OF AN ACTION

To determine whether the court or the parties have the power to modify or waive the statutory time and notice requirements it is necessary in each case to read carefully the applicable law. In Florida, provisions in a contract limiting the time, within which the parties may bring an action on the contract or pertaining to matters arising from it, to a shorter period than the one provided by statute are void as against public policy.⁸⁴

*Sun Insurance Office, Ltd. v. Clay*⁸⁵ is a case in point. Suit was brought in a Florida court on an insurance policy with a one-year limitation provision. The plaintiff obtained the policy while he resided in Illinois and, thereafter, moved to Florida. Suit was brought under the

82. *Colburn v. Highland Realty Co.*, 153 So.2d 731 (Fla. 2d Dist. 1963).

83. *Id.* at 736.

84. FLA. STAT. § 95.03 (1963).

85. 133 So.2d 735 (Fla. 1961). See also *Clay v. Sun Ins. Office, Ltd.*, 376 U.S. 179 (1964); *Schluter v. National Union Fire Ins. Co.*, 144 So.2d 95 (Fla. 2d Dist. 1962); *Bayitch, Conflict of Laws in Florida 1957-1963*, 18 U. MIAMI L. REV. 269, 273.

policy more than a year after the cause of action had arisen. In response to a certified question from the United States Court of Appeals, Fifth Circuit, concerning the applicability of Section 95.03 of the Florida Statutes, the supreme court answered that the test is not whether the agreement was executed in Florida, but whether an action on the contract might have been maintained in a Florida state court. The statutory period for bringing an action on a written contract not under seal is five years.⁸⁶ Hence, the one-year limitation in the contract was void, and the complaint was timely filed within the statutory period.

Although the running of the statutory period is generally treated as an affirmative defense⁸⁷ that may be waived if not timely pleaded,⁸⁸ the wording of a particular statute may render the limitation jurisdictional. Thus, it has been held⁸⁹ that the language of the statute requiring an action challenging the validity of a tax assessment to be brought within sixty days of the time the assessment became final is mandatory. Failure to comply with its terms deprives the court of power to entertain the action and subjects the complaint to dismissal.⁹⁰ The state comptroller is an indispensable party to such proceedings.⁹¹ However, failure to join him within the 60-day period is not jurisdictional, since the statute only makes his presence a prerequisite to the *maintenance* of the action and not to its institution. A complaint, timely filed, may thereafter be amended to permit his joinder⁹² after the period within which the complaint could have been filed has expired.⁹³ Misjoinder of parties is not a ground for dismissal of the action.⁹⁴

E. *Private Agreements or Consents*

Florida courts do not recognize private agreements between the parties or their counsel unless they have been reduced to writing, subscribed by the party to be charged or his attorney, or unless they have been made before the court and promptly incorporated into the record or the stenographic notes of the proceedings.⁹⁵

Notwithstanding the plain provisions of the rule, and the caveat in the last survey, local attorneys still disregard its express provisions to their clients' prejudice.

Appellate courts have held private oral agreements regarding the

86. FLA. STAT. § 95.11(3) (1963).

87. FLA. R. CIV. P. 1.8(d).

88. FLA. R. CIV. P. 1.11(h).

89. *Henry v. County of Dade*, 149 So.2d 89 (Fla. 3d Dist. 1963).

90. FLA. R. CIV. P. 1.11(b)(1).

91. FLA. STAT. § 196.14 (1963).

92. FLA. R. CIV. P. 1.13(8).

93. FLA. R. CIV. P. 1.18. This rule analogous to FED. R. CIV. P. 21.

94. FLA. R. CIV. P. 1.18.

95. FLA. R. CIV. P. 1.5(d).

amount of alimony arrears,⁹⁶ postponement of the time in which to file an answer,⁹⁷ and the possibility of a reduction of attorney's fees⁹⁸ to be ineffective to bind the court because they did not comply with the rule.

F. *Extending Time*

The courts may not enlarge the time for making a motion for a directed verdict, for making a motion for a new trial, or for taking an appeal.⁹⁹ In all other matters, the courts have a broad discretionary power to grant time extensions.

The trial courts discretionary power is subject to appellate review and to reversal on showing of an abuse. *Lazow v. Lazow*¹⁰⁰ involved a suit to change a son's surname to his mother's maiden name. The defendant father, who had been served constructively in New York where he resided, appealed from a decree granting the petition and assigned as error the denial of his request for a postponement of the hearing. The district court found that the trial court had abused its discretion in that six days' notice of the trial was insufficient under the facts presented.

G. *Pleadings*

1. PLEADINGS REQUIRED OR ALLOWED

The pleadings which are allowed are a complaint, an answer, a reply if the answer contains a counterclaim denominated as such, and an answer to a cross-claim.¹⁰¹

In *Bergovey v. Atlantic Electric, Inc.*¹⁰² the plaintiff filed suit grounded on fraud against corporations in which he was an officer, director and stockholder and against another individual who was also an officer and director in the defendant corporations. In his complaint he sought injunctive relief, the appointment of a receiver and an accounting. The defendant counterclaimed, and the plaintiff replied. Thereafter, the defendant, with the court's leave,¹⁰³ filed an amended counterclaim in two counts, the second count of which was substantially identical with the original counterclaim. The plaintiff did not file a reply to the amended counterclaim, but he subsequently amended his complaint to ask for the dissolution of the corporations. Without answering the amended complaint and without notice to the plaintiff, the defendant

96. *Morris v. Truax*, 152 So.2d 515 (Fla. 2d Dist. 1963).

97. *CIA, Ecuatoriana de Aviacion, C.A. v. U.S. and Overseas Corp.*, 144 So.2d 338 (Fla. 3d Dist. 1962).

98. *Beck v. Humkey*, 146 So.2d 613 (Fla. 1st Dist. 1962).

99. FLA. R. CIV. P. 1.6.

100. 147 So.2d 12 (Fla. 3d Dist. 1962).

101. FLA. R. CIV. P. 1.7(a).

102. 140 So.2d 885 (Fla. 2d Dist. 1962).

103. FLA. R. CIV. P. 1.15(a).

moved for a decree pro confesso¹⁰⁴ on his counterclaim. After *ex parte* proceedings, the court entered the requested decree (also without notice to the plaintiff) granting the relief that the defendant had sought in the second count of his amended counterclaim. The plaintiff's subsequent motion to vacate the decree¹⁰⁵ was denied, but, by a separate order, the court continued the principal suit. On the plaintiff's appeal from the adverse decree, two issues were before the district court: 1. When the defendant has filed an amended counterclaim to which the plaintiff has not replied, can the reply to the original counterclaim stand over as a response to that portion of the amended counterclaim to which it is responsive (as was the practice under Equity Rule 36, prior to the adoption of the rules?¹⁰⁶); and, 2. Did the lower court abuse its discretion in refusing to vacate the decree pro confesso?

The appellate court reversed on the basis of an abuse of judicial discretion in denying the plaintiff's motion to vacate the decree. However, in dicta the court said that although a literal reading of Rule 1.15(a)¹⁰⁷ appeared to indicate that a responsive pleading to an amended pleading was mandatory when otherwise required, the rule must be read in the light of the avowed purpose of the rules "to secure the just, speedy, and inexpensive determination of every action."¹⁰⁸ Since the adoption of the 1954 Rules in no way impairs the inherent discretionary power of a chancellor and since he retains jurisdiction of a cause to review his previously entered orders, a reply to an original counterclaim which is responsive to an amended counterclaim should be sufficient to prevent a default for failure to answer the amended counterclaim.

2. THE COMPLAINT

a. Methods of Attack

Under the rules, technical forms of seeking relief are abolished.¹⁰⁹ The function of the complaint is to inform the defendant of the nature of the cause against him.¹¹⁰ It should contain a short and plain statement of the ultimate facts¹¹¹ on which the pleader relies and which are

104. FLA. R. CIV. P. 3.9.

105. FLA. R. CIV. P. 3.10.

106. FLA. R. CIV. P. 1.15(a).

107. FLA. R. CIV. P. 1.15(a).

A party shall plead in response to an amended pleading within the time remaining for response to the original pleading, or within 10 days after service of the amended pleading, which ever is longer, unless the court otherwise orders. *Ibid.*

108. FLA. R. CIV. P. A.

109. FLA. R. CIV. P. 1.8(a).

110. FLA. R. CIV. P. 1.8(b).

111. In *Cushen v. Cushen*, 143 So.2d 536 (Fla. 3d Dist. 1962), the defendant took an interlocutory appeal from an order denying her motion to dismiss a petition for a change of child custody on the ground that it did not allege the facts on which the charge was based. In sustaining the order the court said at 536:

The rules of civil procedure were designed to simplify pleading. If we are to retain

sufficient to state a cause of action.¹¹² If the complaint meets these requirements, but is "so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading,"¹¹³ the proper procedure for attacking the complaint is by a motion for a more definite statement and not by a motion to dismiss the complaint for failure to state a cause of action.¹¹⁴ An alternative way in which the defendant can obtain the necessary factual information is by the employment of the discovery devices provided for in the rules.¹¹⁵ If, however, the complaint entirely fails to state a claim (*e.g.*, when no ultimate facts relating to an essential element of the plaintiff's case have been alleged)¹¹⁶ it will be subject to a dismissal on the defendant's motion.¹¹⁷ If one part of the complaint is insufficient to state a claim for relief, the defective part can likewise be stricken on motion.¹¹⁸ However, a motion to strike is addressed to the complained-of paragraphs in their entirety, and if any of the allegations contained in said paragraphs are relevant, the motion to strike should be denied.¹¹⁹

The plaintiffs appealed from an order dismissing their complaint. The district court found that, although the plaintiffs had not complied with the procedural requirement of separate statements in numbered paragraphs,¹²⁰ the allegations of fact were sufficient to state a claim for relief on the theory either of a constructive trust or of estoppel by deed. A mere violation of the formal requirements of Rule 1.8(f) was not sufficient to sustain a motion to dismiss.¹²¹

b. Joinder of Inconsistent Causes of Action

The plaintiff brought suit to cancel a deed conveying real property on the alternative grounds that the grantor was either incompetent or

in all their vigor, the distinctions between 'ultimate facts' and 'evidentiary facts,' we will frustrate one of the purposes of the rules. The test is whether the complaint (petition here) is sufficient to state a cause of action.

112. FLA. R. Civ. P. 1.8(b); *Naples Builders Supply Co. v. Clutter Constr. Corp.*, 152 So.2d 478 (Fla. 3d Dist. 1963).

113. FLA. R. Civ. P. 1.11(e).

114. *Ibid.*; *Smith v. Platt Motors, Inc.*, 137 So.2d 239 (Fla. 1st Dist. 1962).

115. FLA. R. Civ. P. 1.21, 1.22, 1.24, and 1.25 (Depositions), 1.27 (Interrogatories to Parties), 1.28 (Production of Documents), 1.29 (Examination of Parties and Property), 1.30 (Admission of Facts and Genuineness of Documents). *Smith v. Platt Motors, Inc.*, *supra* note 114.

116. *Romans v. Warm Mineral Springs, Inc.*, 155 So.2d 183 (Fla. 2d Dist. 1963); *Saks v. Smith*, 145 So.2d 895 (Fla. 3d Dist. 1962); *Frisch v. Kelly*, 137 So.2d 252 (Fla. 1st Dist. 1962); *Stern v. Perma-Stress, Inc.*, 134 So.2d 509 (Fla. 1st Dist. 1961).

117. FLA. R. Civ. P. 1.11(b)(6). In passing upon such motion, all well-pleaded ultimate facts alleged in the complaint are taken as true and all reasonable inferences to be drawn from the facts are resolved in the light most favorable to the plaintiff. *O'Neal v. Crumpton Builders, Inc.*, 143 So.2d 344 (Fla. 1st Dist. 1961); *Leonard v. Browne*, 134 So.2d 872 (Fla. 1st Dist. 1961).

118. *Rudman v. Baine*, 133 So.2d 760 (Fla. 1st Dist. 1961).

119. *Lovi v. North Shore Bank*, 137 So.2d 585 (Fla. 3d Dist. 1962).

120. FLA. R. Civ. P. 1.8(f).

121. *Cook v. Katiba*, 152 So.2d 504 (Fla. 1st Dist. 1963).

had acted under the grantee's undue influence. The defendant took an interlocutory appeal from an order denying his motion to strike or dismiss the complaint on the ground that the counts were irreconcilable and mutually exclusive. In upholding the lower court's order, the district court¹²² adverted to the clear and unambiguous language of Rule 1.8(g): "A party may . . . state as many separate claims¹²³ or defenses as he has, regardless of consistency. . . . All pleadings shall be construed so as to do substantial justice."¹²⁴

c. Pleading Special Matters

Capacity: In the great majority of cases, the capacity of the party to sue or be sued is not in dispute. Under our simplified rules of pleading, it is unnecessary for the plaintiff to allege capacity in his complaint. Rather, the defendant who wishes to challenge the capacity of a party must raise the issue by a specific negative averment in his answer.¹²⁵

During the course of the trial, the defendant sought dismissal of the proceedings because of the plaintiff's failure to comply with Florida's "Fictitious Name Statute."¹²⁶ The act provides that compliance with its terms is a condition precedent to the right to maintain or defend any action in Florida courts. On appeal from an adverse judgment, the defendant assigned as error the denial of his motion. In affirming the lower court, the district court held¹²⁷ that the defendant had waived¹²⁸ the right to assert the plaintiff's incapacity when he failed to call the court's attention to such incapacity at a time no later than his answer.¹²⁹

Fraud: The rules¹³⁰ require that in all averments of fraud or mistake, the circumstances constituting fraud or mistake be pleaded with particularity.

The plaintiff corporation brought an action for conspiracy to de-

122. *Mather-Smith v. Fairchild*, 135 So.2d 233 (Fla. 2d Dist. 1961). In analogizing to Federal Rule 8(e)(2), *infra* note 124, the court moved that the 1954 Florida rules are patterned after the Federal rules, and insofar as is practicable, should be interpreted consistently with them.

123. In *Berwick Corp. v. Kleinginna Inv. Corp.*, 143 So.2d 684 (Fla. 3d Dist. 1962), the plaintiff sought, in separate counts, to recover his security deposit and damages on the theory that he had been constructively evicted by the landlord's breach of his covenant to keep the roof in repair. On the authority of the rules, the third district court affirmed the lower court's order denying defendant's motion to compel the plaintiff to elect which remedy his action would proceed upon.

124. FLA. R. CIV. P. 1.8(g). For cases interpreting analogous Fed. Rule 8(e)(2), See 2 MOORE, FEDERAL PRACTICE ¶ 8.32, at 1707 (2d ed. 1953).

125. FLA. R. CIV. P. 1.9(a); *Green v. Peters*, 140 So.2d 601 (Fla. 2d Dist. 1962).

126. FLA. STAT. § 865.09 (1963).

127. *Cor-Gal Builders v. Southard*, 136 So.2d 244 (Fla. 3d Dist. 1962).

128. FLA. R. CIV. P. 1.11(h).

129. The concurring opinion reasoned that it should be permissible to call the court's attention to a party's failure to comply with the statutory requirements not only at the pleading stage of the proceedings, but at any time prior to the entry of final judgment.

130. FLA. R. CIV. P. 1.9(b).

fraud and for gross negligence against its directors and officers and against the administratrix of its deceased manager's estate. On the plaintiff's appeal from an order dismissing its third amended complaint, the court affirmed the dismissal because it found that the requirement that the circumstances constituting fraud or mistake be pleaded with particularity applied where the complaint charged conspiracy to defraud. Mere legal conclusions are fatally defective unless substantiated by allegations of ultimate fact, and every fact essential to the cause of action must be pleaded distinctly, definitely and clearly.¹³¹

Conditions Precedent: The plaintiff had brought an action on an insurance policy and generally alleged compliance with all conditions precedent.¹³² The defendant's answer was a general denial of the allegation of performance of conditions precedent and an averment of non-cooperation as an affirmative defense. On the plaintiff's appeal from an adverse judgment, *held:* reversed. The district court noted that Rule 1.9(c) requires a denial of the performance of conditions precedent to be made specifically and with particularity. Apparently, when this has been done, the plaintiff then has the burden of proving substantial compliance, but when non-cooperation was averred generally as an affirmative defense, the burden of proof rested with the defendant, who was not entitled to a directed verdict at the close of the plaintiff's case.¹³³

Special Damages: The requirement¹³⁴ that special damages must be specifically stated must be read *in pari materia* with the provision permitting amendment of the pleadings to conform with the evidence.¹³⁵

The defendant in a negligence action arising from an automobile collision appealed from an adverse judgment and erroneously urged that the court had erred in instructing the jury respecting an item of special damages not raised in the pleadings, but concerning which testimony had been heard without objection at the trial. The plaintiff amended his complaint to conform to the evidence after a favorable verdict. The district court sustained the jury instructions.¹³⁶ "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."¹³⁷

131. *Ocala Loan Co. v. Smith*, 155 So.2d 711 (Fla. 1st Dist. 1963).

132. FLA. R. CIV. P. 1.9(c) provides:

In pleading the performance or occurrence of conditions precedent it is sufficient to aver generally that all conditions precedent have been performed or have occurred, a denial of performance or occurrence shall be made specifically and with particularity.

133. *W. J. Kiely & Co. v. Bituminous Gas Corp.*, 145 So.2d 762 (Fla. 3d Dist. 1962).

134. FLA. R. CIV. P. 1.9(g).

135. FLA. R. CIV. P. 1.15(b).

136. *Owca v. Zemzicki*, 137 So.2d 876 (Fla. 2d Dist. 1962).

137. FLA. R. CIV. P. 1.15(b).

3. DEFENSES

a. Raising Affirmative Defenses by Motion

Under Florida practice, affirmative defenses must be pleaded in the answer and cannot be raised by motion practice.¹³⁸ The statute of frauds,¹³⁹ statute of limitations,¹⁴⁰ res judicata and estoppel by judgment¹⁴¹ are affirmative defenses¹⁴² and must be asserted in the answer.

In a suit for declaratory decree and other relief, involving an alleged oral promise to convey or bequeath real property in exchange for specified personal services, the First District Court reversed a lower court order dismissing the plaintiff's third amended complaint for non-compliance with sections 725.01¹⁴³ and 731.051¹⁴⁴ of the Florida Statutes and remanded the cause with directions to permit the defendants a reasonable time in which to answer and interpose such defenses as they deemed advisable.¹⁴⁵

b. Waiver of Unpleaded Affirmative Defenses

An action was brought for specific performance of an oral agreement to devise real property. The defense of the statute of frauds¹⁴⁶ was raised for the first time on appeal. In affirming the decree ordering specific performance the court¹⁴⁷ noted that under the rules,¹⁴⁸ "a party shall

138. FLA. R. CIV. P. 1.8(d).

139. *Fletcher v. Williams*, 153 So.2d 759 (Fla. 1st Dist. 1963); *Cypen v. Frederick*, 139 So.2d 201 (Fla. 3d Dist. 1962).

140. *Hawkins v. Bay County Publishers, Inc.*, 148 So.2d 561 (Fla. 1st Dist. 1963).

141. *Sacks v. Rickles*, 155 So.2d 400 (Fla. 3d Dist. 1963).

142. FLA. R. CIV. P. 1.8(d).

143. FLA. STAT. § 725.01 (1963) requires agreements for the conveyance of real estate to be in writing.

144. FLA. STAT. § 731.051 (1963) provides that:

No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding or enforceable unless such agreement is in writing signed in the presence of two subscribing witnesses by the person whose executor or administrator is sought to be charged.

145. *Fletcher v. Williams*, 153 So.2d 759 (Fla. 1st Dist. 1963). The case contained a strong dissent which contended on the authority of federal case law interpreting FED. R. CIV. P. 8(e) and 2 MOORE, *FEDERAL PRACTICE* § 8.27, at 1841 (2d ed. 1951), that a distinction should be made between those cases in which the requirement of a writing is a pre-requisite to a right of action and those in which it is merely necessary to the enforcement of the action. In the former case the writing is an essential element of plaintiff's case, and the absence of an appropriate allegation should subject the complaint to dismissal on defendant's motion.

On such a motion under FLA. R. CIV. P. 1.11(b)(6), the dissent would imply inherent judicial power to apply the interchangeability rule that is expressed in FED. R. CIV. P. 12(b)(6) and treat the motion as one for a summary judgment when matters outside the pleadings had been introduced and not objected to. Affirmative defenses may be asserted in support of a motion for summary judgment even though no answer has been filed.

146. FLA. STAT. § 731.051 (1963). See *supra* note 129.

147. *Cypen v. Frederick*, 139 So.2d 201 (Fla. 1st Dist. 1962).

148. FLA. R. CIV. P. 1.11(h), subject to the particular exceptions specified therein.

be deemed to have waived all defenses and objections which he does not present either by motion or in his answer."¹⁴⁹

The plaintiff had obtained a summary judgment in an action against a surety on a promissory note. Subsequently, the court granted the defendant's motion to stay execution upon the judgment on the ground that the plaintiff had charged usurious interest concealed in the principal amount of the note. On the plaintiff's appeal, the order was affirmed.¹⁵⁰ A party is not precluded from asserting an affirmative defense of which it had no knowledge at the time of the trial in support of a motion to stay the execution of judgment, when to disallow the defense would be tantamount to giving force and effect to an agreement that is violative of public policy.¹⁵¹

c. Waiver of Defenses Not Raised by Motion

The defendant's former wife brought suit to obtain additional alimony, exclusive use of the home and child custody. Constructive service by publication was attempted to be made upon the husband. By motion¹⁵² the defendant challenged the jurisdiction of the court over the subject matter (and improperly included grounds going to the merits).¹⁵³ On the defendant's interlocutory appeal, the court affirmed the order denying the defendant's motion to dismiss, but it noted that had the motion included an allegation of lack of jurisdiction over the defendant's person,¹⁵⁴ the latter would have survived inclusion in the motion which contained grounds relating to the merits. In the absence of such an allegation, the court found that the defendant had waived the defense by making a general appearance.¹⁵⁵

d. Waiver of Defenses by Inconsistent Action

In a suit to obtain specific performance of a contract to sell real property, the vendor's Michigan receiver was found to have waived the defense of lack of jurisdiction over his person when he voluntarily appeared, applied for and obtained a stay of the performance and enforcement of the decree pro confesso that had been entered against him.¹⁵⁶

The defendant in an action arising from an automobile collision took an interlocutory appeal¹⁵⁷ from an order denying her motion to dismiss

149. FLA. R. CIV. P. 1.11(b) names seven defenses which may be asserted either by motion or in answer at defendant's option.

150. *Lambert v. Heaton*, 134 So.2d 536 (Fla. 1st Dist. 1961).

151. FLA. STAT. § 687.07 (1963) (criminal usury).

152. FLA. R. CIV. P. 1.11(b).

153. See FLA. R. CIV. P. 1.11(b).

154. FLA. R. CIV. P. 1.11(b)(2).

155. *St. Anne Airways, Inc. v. Webb*, 142 So.2d 142 (Fla. 3d Dist. 1962).

156. *Colburn v. Highland Realty Co.*, 153 So.2d 731 (Fla. 2d Dist. 1963).

157. FLA. APP. R. 4.2.

the complaint for lack of jurisdiction over her person. On her previous motion to quash and dismiss the service of process because of defective service, the court quashed the service of process, but refused to dismiss the complaint. On the same day, the defendant had filed an independent suit against the plaintiffs in the instant action based on the same occurrence. In affirmance of the lower court's order denying the defendant's motion to dismiss the complaint, the district court held that the defendant had submitted to the court's jurisdiction when she filed a complaint against the plaintiffs in the instant suit.¹⁵⁸

It is submitted that had the defendant asserted the defenses of insufficiency of service of process and lack of jurisdiction over the person by answer, incorporating into the answer a compulsory counterclaim, rather than by consecutive motions, the jurisdictional defense would not have been waived by the inclusion of the counterclaim.¹⁵⁹ The holding was predicated on a theory of waiver.¹⁶⁰ If the defendant had asserted her alternative allegations simultaneously in her original motion, and the court had deferred ruling on them,¹⁶¹ the jurisdictional defense would not have been lost by the defendant's subsequent filing of an answer including a compulsory counterclaim.

4. COUNTERCLAIMS

Rule 1.13(7) has been amended¹⁶² to enable a defendant to state as a cross-claim any claim "relating to any property that is the subject matter of the original action." The rule is now substantially the same as Federal Rule 13(g).¹⁶³ The federal rule was primarily designed to enable junior mortgagees, who had been made parties defendant in the foreclosure suit of a senior mortgage, to litigate priority among themselves to the surplus proceeds, if any, of the foreclosure sale.¹⁶⁴ Assuming that the Florida Supreme Court wished to accomplish the same result, the amended rule has superseded prior Florida case law which had disallowed junior mortgagees to settle prior rights among themselves.

5. NO THIRD-PARTY PRACTICE IN FLORIDA

Florida courts, unlike their federal counterparts do not recognize third-party practice.¹⁶⁵ The defendant's attempted appeal was dismissed when the record revealed that the interlocutory order sought to be ap-

158. *Shurden v. Thomas*, 134 So.2d 876 (Fla. 1st Dist. 1961).

159. FLA. R. CIV. P. 1.13(2).

160. See notes 152-155 *supra* and accompanying text.

161. FLA. R. CIV. P. 1.8(g); *Jones v. Jones*, 140 So.2d 318 (Fla. 3d Dist. 1962).

162. *In re Florida Rules of Civil Procedure*, 131 So.2d 475 (Fla. 1961).

163. FED. R. CIV. P. 13(g).

164. 1946 Committee Notes to FED. R. CIV. P. 13(g); 3 MOORE, *FEDERAL PRACTICE* 92-93 (2d ed. 1964).

165. FED. R. CIV. P. 14.

pealed had dismissed his cross-claim that sought to join third-party defendants in support of a claim that neither grew out of nor was germane to the plaintiff's action.¹⁶⁶

6. STRIKING SHAM, IRRELEVANT AND IMMATERIAL PLEADINGS

The defendant in a mortgage foreclosure suit appealed from an adverse summary decree entered pursuant to Rule 1.14, after the trial court had granted the plaintiff's unverified motion to strike as sham that portion of the defendant's answer denying that the plaintiff was the holder of the note and mortgage sued upon. The district court reversed. The plaintiff had neither complied with the express requirement of the rule that "a motion to strike shall be sworn to and shall set forth fully the facts on which the movant relies"¹⁶⁷ nor did the record reveal any circumstances that might relieve the plaintiff from strict compliance with the rule, such as an admission contained in a deposition of the defendant or affirmative evidence tending to prove plaintiff's ownership of the note and mortgage.¹⁶⁸

A pleading may be considered sham when its falsity clearly and indisputedly appears and it is evidently a mere pretense set up in bad faith and without color of fact. It follows that if there is, under the facts as established, an issue upon which the pleading could be found good in part, it ought not to be stricken in its entirety.¹⁶⁹

The plaintiff brought an action for conversion of personal property, claiming 5700 dollars in damages. In his deposition the plaintiff admitted that he had sold two-thirds of his interest in the property prior to the date of the alleged conversion. After the complaint had been stricken as sham, judgment for the defendant was reversed on appeal¹⁷⁰ on the ground that a substantially smaller claim could have been filed in good faith and the cause transferred to a court with a lesser jurisdictional limit.¹⁷¹

7. AMENDED AND SUPPLEMENTAL PLEADINGS

A party may amend a pleading to which a responsive pleading is required once as a matter of course before the responsive pleading has been served. Thereafter, amendments are by written consent of the adverse party or by leave of the court which shall be freely given when justice so requires.¹⁷² Thus, it was held to be an abuse of judicial dis-

166. *Shotkin v. Deehl*, 148 So.2d 538 (Fla. 3d Dist. 1963).

167. FLA. R. CIV. P. 1.14(b).

168. *Carapezza v. Pate*, 143 So.2d 346 (Fla. 3d Dist. 1962).

169. *Sapienza v. Karland, Inc.*, 154 So.2d 204, 207 (Fla. 3d Dist. 1963).

170. *Ibid.*

171. FLA. R. CIV. P. 1.39.

172. FLA. R. CIV. P. 1.15(a).

cretion to dismiss a complaint without leave to amend before a responsive pleading had been served.¹⁷³ However, it has been held not to be an abuse of judicial discretion to limit the time within which an amendment to the complaint may be made.¹⁷⁴ Rule 1.15 provides that the parties may consent to amendments after the time for amendment has expired "and there seems to be no reason why the parties cannot, by consent, limit the time for amendment."¹⁷⁵

Florida courts are committed to the view that leave to amend should be freely given. Dismissal of a complaint without leave to amend was held to be an abuse of discretion where the plaintiff had brought an action for breach of contract and was denied permission to amend his complaint to show that the named defendant was one and the same as the other party to the agreement.¹⁷⁶

On the same principle, the district court sustained an order permitting the plaintiff to amend his complaint, summons and sheriff's return to describe properly the defendant as being sued in his representative and not in his individual capacity.¹⁷⁷ The suit challenged the validity of the tax assessment and at the time the amendment was entered the statutory period for instituting such an action had run.¹⁷⁸ The statute made the comptroller a necessary party. The court noted that any persons may at any time be made parties if their presence is necessary to a complete determination of the cause.¹⁷⁹ An amendment which merely corrects the description of a party, and does not change the basic cause of action, relates back to the date of the original pleading.¹⁸⁰

The plaintiff filed a complaint charging gross negligence. On a previous appeal¹⁸¹ from an order dismissing the second count of the complaint, the district court had held that the plaintiff need only prove ordinary negligence. The plaintiff did not amend his complaint, and the defendant filed his answer of general denial. After the case came on for trial and the jury had been impaneled, the plaintiff moved for leave to remove the allegations of gross negligence from his complaint. The defendant moved for a continuance. The court denied the plaintiff's motion and at the close of his case granted the defendant's motion for a directed verdict on the ground that the plaintiff had not established a *prima facie* case of gross negligence. On the plaintiff's appeal from the

173. *Volpicella v. Volpicella*, 136 So.2d 231 (Fla. 2d Dist. 1962).

174. *Nenow v. Ceilings & Specialties, Inc.*, 151 So.2d 28 (Fla. 2d Dist. 1963).

175. *Id.* at 32. It is interesting to note that the limitation was by court order.

176. *American Ladder & Scaffold Co. v. Miami Ventilated Awning Co.*, 150 So.2d 268 (Fla. 3d Dist. 1963).

177. *Green v. Peters*, 140 So.2d 601 (Fla. 2d Dist. 1962).

178. FLA. STAT. § 192.21 (1963).

179. FLA. R. CIV. P. 1.17(a).

180. FLA. R. CIV. P. 1.15(c).

181. *Hale v. Adams*, 117 So.2d 524 (Fla. 1st Dist. 1960).

adverse judgment, it was held that the court had abused its discretion in disallowing the amendment which was strictly in accord with the law of the case established by the previous appeal. The determination made on the previous appeal had resolved the issue of negligence, and the defendant, therefore, was estopped from claiming insufficient notice of the applicable law prior to trial.¹⁸²

The court has discretionary power to permit the service of supplemental pleading setting forth the transactions, occurrences or events which have happened since the date of the original pleading. In a divorce proceeding, it was held that the trial court had not abused its discretion in permitting the defendant to amend his counterclaim to include an allegation of adultery reportedly committed four months subsequent to the filing of the original counterclaim.¹⁸³ The court noted that the amended counterclaim sought only the same relief as the original counterclaim, but on an additional ground, and that unless the additional claim were allowed, the defendant would have been deprived of a forum in which to litigate the issue of his wife's adultery.¹⁸⁴

H. Parties

1. NECESSARY AND INDISPENSABLE PARTIES

In a suit for the reduction of the annual ad valorem tax assessment, the defendants took an interlocutory appeal from an order denying their motion to dismiss the complaint for failure to join the state comptroller, who had been made a necessary and indispensable party by statute,¹⁸⁵ and from an order denying his motion to dismiss the complaint for failure to join the comptroller within the time for filing suit.¹⁸⁶ The plaintiff corporation had been permitted to amend its complaint to join the comptroller, but the 60-day statutory period for bringing the action had already lapsed. In affirming the lower court, the district court held that joinder of the comptroller was not jurisdictional. The original complaint had been timely filed and the act only provided that a suit could not be *maintained* unless the comptroller had been made a party. This means that an action may be *instituted*, but that it may not be carried to completion without his joinder. The reason for making the comptroller an indispensable party was to allow him an opportunity to present his views on the probable effect of the decree upon state revenues. For this purpose, his joinder was timely.¹⁸⁷

The divorced wife of the defendants' grantor brought suit to set

182. *Hale v. Adams*, 138 So.2d 761 (Fla. 1st Dist. 1962).

183. The court treated the amended counterclaim as a supplemental pleading.

184. *Scherer v. Scherer*, 150 So.2d 496 (Fla. 3d Dist. 1963).

185. FLA. STAT. § 196.14 (1963).

186. FLA. STAT. § 192.21 (1963).

187. *McNayr v. Cranbrook Invs., Inc.*, 146 So.2d 400 (Fla. 3d Dist. 1962).

aside an allegedly fraudulent conveyance of real property reportedly made while the grantor was in arrears with his obligations under a divorce decree. The plaintiff's husband, the grantor, had no notice of the hearing and did not appear. On appeal from an order setting aside the conveyance, the defendants urged as error the failure to join their grantor as a party defendant. In affirming the order, the court noted that in Florida the debtor-grantor is not an indispensable party in a suit to set aside a fraudulent conveyance. The record indicated that the defendants in the instant suit would have been unable to maintain an action against the plaintiff's former husband since the conveyance of the property to them had been either a gift or had been made for a grossly inadequate consideration.¹⁸⁸

The rules¹⁸⁹ provide that "any person may be made a defendant who has or claims an interest adverse to the plaintiff." The defendant appealed from an amended summary decree for the plaintiffs in a suit to enforce a settlement agreement, and the district court held that the trial court had correctly decided to retain jurisdiction over an individual defendant who was no longer an officer of the corporate defendant when it was found that she had a claim or interest adverse to the plaintiff.¹⁹⁰

2. MISJOINDER OF PARTIES

The plaintiffs gave perjured testimony regarding their marital status in an action for damages arising from an automobile accident. The trial court dismissed the complaint of both plaintiffs with prejudice. The district court reversed because the court lacked power to dismiss the complaint prior to an adjudication on the merits.¹⁹¹ Misjoinder of parties is not a ground for dismissal under the rules.¹⁹²

3. DROPPING PARTIES

An action was brought for damages arising from a coincident 4-car collision. Two of the defendants answered, counter-claimed and cross-claimed. At the pre-trial conference,¹⁹³ the plaintiff was erroneously permitted to non suit the counterclaiming defendants, and they to non-suit him. The remaining claims were severed¹⁹⁴ for purposes of trial. On an appeal from one of the noncounterclaiming defendants it was urged as error that the dismissal of the complaint and of the counter-

188. *Frell v. Frell*, 154 So.2d 706 (Fla. 3d Dist. 1963).

189. FLA. R. CIV. P. 1.17(a).

190. *Indian Lake Estates, Inc. v. Special Invs., Inc.*, 154 So.2d 883 (Fla. 2d Dist. 1963).

191. *Parham v. Kohler*, 134 So.2d 274 (Fla. 3d Dist. 1961).

192. FLA. R. CIV. P. 1.18; *Deauville Operating Corp. v. Town & Beach Plumbing Co.*, 137 So.2d 872 (Fla. 3d Dist. 1962).

193. FLA. R. CIV. P. 1.16.

194. FLA. R. CIV. P. 1.20(b).

claim as to some of the defendants were invalid partial dismissals.¹⁹⁵ In affirming¹⁹⁶ the lower court's action, it was noted that a motion for a nonsuit cannot properly be granted before trial.¹⁹⁷ The action was not joint and was, therefore, not an invalid partial dismissal under Rule 1.35, which would entirely divest the court of jurisdiction. Rather the motion should have been treated as one to drop some of the parties. As previously noted,¹⁹⁸ misjoinder of parties is not grounds for dismissal of an action.

I. *Dismissal of Actions*

1. ATTEMPTED ABANDONMENT OF CAUSE OF ACTION

The plaintiff appealed from an order dismissing its complaint with prejudice.¹⁹⁹ On a previous appeal of the same case, judgment and verdict for the plaintiff had been sustained on the issue of liability and the cause remanded for a new trial on the issue of damages. The plaintiff thereafter filed a new complaint in the same action which resulted in the above mentioned order dismissing the complaint with prejudice. By analogy to the cases that refuse to allow amendment of the pleadings to set up a new cause of action and to set up a different basis of relief after appellate mandate, the court held that a party may not abandon the cause thus litigated and proceed in a new complaint upon the same cause of action after the ruling of a district court has been returned.²⁰⁰

2. INVOLUNTARY DISMISSAL—INTERCHANGEABILITY WITH A MOTION FOR A DIRECTED VERDICT

The Florida rules,²⁰¹ unlike their federal counterparts,²⁰² provide that "[a]fter the plaintiff has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief." No distinction is made between jury and nonjury actions.²⁰³ Therefore, under the rules as presently written, the defendant in a jury action may move either for an involuntary dismissal or for a directed verdict.²⁰⁴

195. FLA. R. CIV. P. 1.35(a)(2).

196. *Ruis v. Halloway*, 139 So.2d 745 (Fla. 2d Dist. 1962).

197. *Welgoss v. End*, 112 So.2d 390 (Fla. 3d Dist. 1959).

198. See note 192 *supra* and accompanying text.

199. FLA. R. CIV. P. 1.35(b).

200. *Dixie Sightseeing Tours, Inc. v. Florida Transp. Co.*, 154 So.2d 196 (Fla. 3d Dist. 1963).

201. FLA. R. CIV. P. 1.35(b).

202. FED. R. CIV. P. 41(b).

203. In 1963, Federal Rule 41(b) was amended to provide that "[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." (Emphasis added.)

204. FLA. R. CIV. P. 2.7. In *McKee v. Fairmont Homes, Inc.*, 155 So.2d 733 (Fla. 2d Dist. 1963), the court affirmed an order granting the defendant's motion for an involuntary dismissal made at the conclusion of the plaintiff's case in a trial by jury.

3. INVOLUNTARY DISMISSAL FOR FAILURE TO PROSECUTE

A 1962 addition to Rule 1.35(b) permits the defendant to move for dismissal of the complaint for failure to prosecute.²⁰⁵ As in the case of dismissal for failure to prosecute under the statute,²⁰⁶ a similar dismissal under the rule should be without prejudice, unless otherwise provided.²⁰⁷ The federal position is contrary.²⁰⁸

The defendants in a negligence action sought to require the plaintiff to deliver a copy of the physician's report of his alleged injuries to the defendants' attorney. The following month, the court granted the plaintiff's request for a continuance. More than a year later, the plaintiff redocketed the case for trial and gave the defendants notice of the hearing date for the hearing on their motion for the production of the physician's report. Thereafter, the court granted the defendant's subsequent motion to dismiss the cause for lack of prosecution.²⁰⁹ In reversing, the district court reiterated that the statute "is not self-executing, but requires the moving party to seek dismissal before any affirmative action in the prosecution of the cause is taken subsequent to the required period for abatement."²¹⁰

What constitutes "good cause" depends upon the circumstances of the particular case. Reinstatement of an action has been denied when the prosecuting attorney left the law firm shortly after the action had ended in a mistrial and the plaintiff asserted that he had erroneously believed that the court would redocket the case *sua sponte*.²¹¹ The dissolution of a legal partnership (eleven months prior to the petition for reinstatement of the action) was held not sufficient good cause to justify the lower court's order granting reinstatement.²¹² The court in the same case intimated that settlement negotiations would not satisfy the statutory requirement.

4. REINSTATEMENT OF DISMISSED ACTIONS FOR GOOD CAUSE SHOWN

An action dismissed pursuant to section 45.19 of the Florida Statutes may be reinstated for good cause shown on motion by any party in interest made within one month after such order of dismissal. Although there is no similar express provision in the rules, it would logically seem to follow that the court could in the exercise of its inherent discretionary

205. *In re* Florida Rules of Civil Procedure, 139 So.2d 129, 130 (Fla. 1962).

206. FLA. STAT. § 45.19 (1963); *Sacks v. Rickles*, 155 So.2d 400 (Fla. 3d Dist. 1963); *Shew v. Kirby*, 135 So. 2d 770 (Fla. 2d Dist. 1961).

207. *Barns & Mattis, 1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276 (1963).

208. 5 MOORE, FEDERAL PRACTICE ¶ 41.11[2], at 1059 (2d ed. 1951).

209. FLA. STAT. § 45.19 (1963).

210. *Pollack v. Pollack*, 110 So.2d 474, 477 (Fla. 1st Dist. 1959).

211. *Schumaker v. Orange State Oil Co.*, 141 So.2d 628 (Fla. 2d Dist. 1962).

212. *Fort Walton Lumber & Supply Co. v. Parish*, 142 So.2d 346 (Fla. 1st Dist. 1962).

power reinstate a complaint so dismissed under circumstances similar to those in which statutory reinstatement would be appropriate.

Three days prior to trial the plaintiff obtained a continuance and the court ordered payment of costs as a condition precedent to re-docketing the case. The action was subsequently dismissed for failure to prosecute. Later, the plaintiff attempted to have the complaint reinstated and alleged, as the reason for his delay, the reported representation of the defendant's attorney to the effect that there might be a reduction in the assessed costs. The district court affirmed the trial court's order finding that the plaintiff had failed to demonstrate sufficient good cause for reinstatement of his complaint.²¹³

5. INVOLUNTARY DISMISSAL FOR INSUFFICIENCY OF FACTS—RES JUDICATA

The plaintiff instituted an action for breach of an implied warranty of fitness. The trial court granted the plaintiff fifteen days in which to amend his complaint. It is unclear from the opinion whether the plaintiff availed himself of this opportunity. Thereafter, in response to the defendant's motion,²¹⁴ the trial court dismissed the complaint with prejudice. In affirming the dismissal on appeal, it was held that the 1962 amendments²¹⁵ to Rule 1.35(b)²¹⁶ required the court expressly to overrule its prior decision in *Hammac v. Windham*²¹⁷ and to advert to the position of the Florida Supreme Court as expressed in *Kautzmann v. James*²¹⁸ prior to the adoption of the 1954 Florida Rules of Civil Procedure. Under the *Kautzmann* view, the determination of whether or not the dismissal of a complaint for failure to state a cause of action operates as an adjudication upon the merits (*i.e.*, is a dismissal with prejudice) depends upon the basis of the dismissal. If the dismissal is predicated upon the failure of the complaint to allege certain essential facts, which could be cured by amendment, the dismissal does not operate as an adjudication on the merits. However, when no legal right of recovery exists under any view of the facts as stated, dismissal of the complaint bars subsequent litigation on the same cause of action. The court then found that under the circumstances in the instant case the plaintiff had entirely failed to state a legal right to recovery. The Restatement of Judgments is in accord with this position.²¹⁹

213. *Beck v. Humpkey*, 146 So.2d 613 (Fla. 1st Dist. 1962).

214. FLA. R. CIV. P. 1.11(b)(6).

215. *In re* Florida Rules of Civil Procedure, *supra* note 205.

216. Prior to this amendment, Rule 1.35(b) provided that unless the court in its order of dismissal otherwise specified, "any dismissal not provided in this rule" shall operate as an adjudication upon the merits. The quoted words were deleted in the amended rule.

217. 119 So.2d 822 (Fla. 1st Dist.), *cert. denied*, 122 So.2d 408 (Fla. 1960); 16 U. MIAMI L. REV. 621 (1962). That case held that the subsequently-deleted provision in Rule 1.35(b) required any dismissal under Rule 1.11(b)(6) to operate as an adjudication on the merits unless the order provided otherwise.

218. 66 So.2d 36 (Fla. 1953).

219. RESTATEMENT, JUDGMENTS § 50 (1942).

6. STATUS OF THE NONSUIT

"The history of recent years has been that of a continuing limitation upon the nonsuit as known to the common law."²²⁰ It has been held that dismissal of an action prior to trial is governed by the rules,²²¹ and that, in the absence of a written stipulation signed by all of the parties, the plaintiff's absolute right to dismiss his suit disappears once an adverse party has served his answer or a motion for summary judgment whichever occurs first.²²² Thereafter, the plaintiff may dismiss his action only with leave of court and upon such terms and conditions as the court deems proper.²²³

In *Johns v. Puca*²²⁴ the plaintiff in a negligence action took a nonsuit when a court announced, at the close of the plaintiff's case, that it intended to grant the defendant's motion for a directed verdict and it moved to dismiss the defendant's compulsory counterclaim. The defendant appealed from an order granting the plaintiff's motion. In reversing the order appealed from, the appellate court held that the trial court should have permitted the trial to continue as to the counterclaim because the litigant ought not to be able to control the progress of a claim against him solely because of his speed in a race to the courthouse. Of course, the practical effect of this decision is to foreclose a plaintiff from taking a nonsuit in an action in which a compulsory counterclaim has been filed since each party's claim is a compulsory counterclaim with respect to the other. The rules require compulsory counterclaims to be prosecuted simultaneously or to be lost forever.²²⁵

In 1962, Rule 1.35 was amended.²²⁶ Among the changes made to the second section of the rule dealing with involuntary dismissals was the deletion of language relating to the plaintiff's statutory right to a nonsuit.²²⁷

Subsequently, and beyond the intended coverage of this *Survey*, the First District Court decided that in Florida, a plaintiff no longer has an absolute right to a nonsuit once an adverse party has either answered or moved for a summary judgment.²²⁸ The plaintiffs had instituted a negligence action. More than a year later, after extensive dis-

220. *Johns v. Puca*, 143 So.2d 568, 570 (Fla. 2d Dist. 1962).

221. FLA. R. CIV. P. 1.35.

222. FLA. R. CIV. P. 1.35(a)(1); *Roberts v. Roberts*, 133 So.2d 421 (Fla. 1st Dist. 1961).

223. FLA. R. CIV. P. 1.35(a)(2); *Conner v. Wagner*, 135 So.2d 441 (Fla. 3d Dist. 1961); *Welgoss v. End*, 112 So.2d 390 (Fla. 3d Dist. 1959).

224. 143 So.2d 568, 570 (Fla. 2d Dist. 1962).

225. FLA. R. CIV. P. 1.13(1).

226. *In re Florida Rules of Civil Procedure*, 139 So.2d 129, (Fla. 1962); *Barns & Mattis, 1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 287 (1963).

227. FLA. STAT. § 54.09 (1963).

228. *Dobson v. Crews*, 164 So.2d 252 (Fla. 1st Dist. 1964), *affirmed*, *Crews v. Dobson*, Case No. 33, 566 (Fla. July 1, 1965).

covery and pre-trial preparation, the cause came on for trial. When the jury had been impaneled and sworn, the plaintiffs moved for a nonsuit. The defendant moved to dismiss the complaint with prejudice.²²⁹ The defendant's motion was denied and the court announced that the plaintiffs had taken a nonsuit and that it would enter a judgment for appropriate costs against them; it then dismissed the jury.

On appeal, the defendant assigned as error the action of the lower court allowing the plaintiff to take a voluntary nonsuit, which did not operate as an adjudication on the merits, and the denial of his own motion to dismiss the complaint with prejudice.

The district court reversed the decision below and said that in reaching its conclusion it was unnecessary to analyze the effect of the omitted language under the 1962 revision of 1.35(b),²³⁰ because that language, by its inclusion in the section relating to involuntary dismissals, had referred only to the plaintiff's right to take an *involuntary* nonsuit to preclude the entry of an adverse ruling. In deciding that the plaintiff's right to a voluntary nonsuit had been superseded by the rules, the court adverted to the constitutional provision²³¹ relegating the regulation of judicial practice and procedure to the supreme court and to section 25.371 of the Florida Statutes which repeals and abrogates existing procedural statutes to the extent that they conflict with rules promulgated by the supreme court.²³² It found that the continued existence of the right contravened the underlying purpose of Rule 1.35(a) to limit the plaintiff's absolute right to discontinue his action to the very short period between the filing of the complaint and the service of an answer or a motion for summary judgment, whichever is shorter. The object of the rules is "to secure the just, speedy and inexpensive determination of every action."²³³ It best comports with this purpose to allow the plaintiff only a very brief period of unrestrained control over the litigation. Once the expenses of preparation for trial have begun to mount and the interests of the other parties may be adversely affected, a dismissal should be permitted only in the exercise of sound judicial discretion, and then only upon such terms and conditions as the court deems just.²³⁴ Obviously, to enable a plaintiff to pick up his hat and to abandon his cause when it has finally come to trial, after the other litigants have spent long months in preparation and, in all probability, incurred considerable

229. FLA. R. CIV. P. 1.35(b).

230. *Supra* note 216 and accompanying text.

231. FLA. CONST. art. V, § 3.

232. See also *In re Florida Rules of Civil Procedure*, *supra* note 205 at 129: "All rules, parts of rules, statutes, or parts of statutes, inconsistent with the amendments hereby approved and adopted are hereby repealed."

233. FLA. R. CIV. P. A.

234. This position has been adopted by the federal courts in interpreting analogous Federal Rule 41(a).

expense, defeats the purpose of the rule and well may work the very injustice the rule was designed to prevent.

In the instant case, the court found that the cause was still pending when the defendant's motion was made because the plaintiff's action was ineffective to terminate the trial and that, under the circumstances in the case, the trial court had abused its discretion in denying the defendant's motion to dismiss the complaint with prejudice. It is submitted that the district court erroneously found that an involuntary dismissal for failure to prosecute under Rule 1.35(b) would be a dismissal with prejudice, unless otherwise specified.²³⁵ The amended rule²³⁶ is stated in three paragraphs. The defendant's motion came within the purview of the first paragraph.²³⁷ The second paragraph provides for an involuntary dismissal where the plaintiff has failed to state a legally sufficient claim to relief, and the third paragraph provides that an order of involuntary dismissal "under the *foregoing* [2d] *paragraph*," with certain exceptions, not here relevant, shall operate as an adjudication on the merits unless otherwise specified. Interpreting the language in the third paragraph in its plain and usual meaning, ordinarily involuntary dismissals granted pursuant to the provisions in the second paragraph are automatically with prejudice, unless expressly otherwise. Conversely, involuntary dismissals based on failure to prosecute, as permitted by the first paragraph are generally without prejudice unless the order of dismissal otherwise specifies. If one adopts this interpretation of the rule, there is then no reason to distinguish the area in which the rule permits a defendant to move for dismissal under the rule from that in which a similar dismissal may be had under the statute²³⁸—the results are the same in either case.²³⁹ Of course, an order of dismissal for failure to prosecute is discretionary and may be with prejudice if the facts so warrant.

7. FORMER ADJUDICATION

The plaintiff in a negligence action to recover damages for personal injuries received in an automobile collision appealed from an adverse summary judgment. He had previously settled with his insurance company for damages to his car and assigned his right of action for property damage to the insurer. The insurance company sued the defendant for these damages and about a month later the plaintiff brought the instant action. The insurer's complaint was dismissed with prejudice and this dismissal was asserted in the defendant's answer to the complaint in the

235. *Dobson v. Crews*, 164 So.2d 252, 259 (Fla. 1st Dist. 1964), affirmed Case No. 33, 566 (Fla. June 7, 1965).

236. FLA. R. CIV. P. 1.35(b).

237. "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him." FLA. R. CIV. P. 1.35(b).

238. FLA. STAT. § 45.19 (1963).

239. Statutory dismissal for failure to prosecute is without prejudice. *Yinger v. Kasow*, 123 So.2d 758 (Fla. 3d Dist. 1960).

personal injury action. The answer also asserted that only a single cause of action arose from the defendant's alleged tortious act resulting in both personal and property damage and that the plaintiff's action violated the rule against splitting a cause of action. The district court reversed the lower court and predicated its decision²⁴⁰ on the ground that either (a) there was no splitting of a cause of action or (b) even if there were, the defendant had waived the defense by waiting until the first action had been dismissed before attempting to assert it. The defendant sought certiorari to review this decision. On rehearing of the petition for certiorari, the supreme court affirmed the result, but rejected the rationale of the district court; rather, it based its decision on the economic realities by which many plaintiffs whose family cars have been damaged in a collision are practically compelled to negotiate with their insurers for the repair of their automobiles before the extent of their personal injuries has been fully determined.²⁴¹

In recognizing the subrogation exception to the rule against splitting a cause of action, it receded from its former position in *Mims v. Reid*.²⁴²

J. Depositions and Discovery

1. NOTICE OF TAKING DEPOSITIONS

The defendant in a negligence action for damages arising from an automobile collision took the deposition of the plaintiff's physician after due notice. When the defendant attempted to introduce the deposition into evidence at the trial pursuant to section 90.23(2) of the Florida Statutes,²⁴³ the plaintiff objected and his objections were sustained. On the defendant's appeal from an adverse judgment, the trial court's order was upheld.²⁴⁴ The statutory notice required for taking the deposition of an expert witness must state the reasons therefor,²⁴⁵ because objection

240. *Scott v. Rosenthal*, 132 So.2d 347 (Fla. 3d Dist. 1961).

241. *Rosenthal v. Scott*, 150 So.2d 433 (Fla. 1963).

242. 98 So.2d 498 (Fla. 1957).

243. FLA. STAT. § 90.23(2) (1963). "The testimony of any expert or skilled witness may be taken at any time before the trial of any civil cause . . . upon reasonable notice in the manner now provided for taking depositions *de bene esse*. . . ." *Ibid*.

244. *Owca v. Zemicki*, 137 So.2d 876 (Fla. 2d Dist. 1962).

245. FLA. STAT. § 90.23(2). Notice for taking depositions *de bene esse* required that the reasons be stated. These have since been abolished. See *In re Amendments to Florida Rules of Civil Procedure*, 131 So.2d 475, 476 (Fla. 1961). *In re Florida Rules of Civil Procedures*, 139 So.2d 129, 130 (Fla. 1962), provided that amended rule 1.32(2) has superseded FLA. STAT. § 90.23 (2). The amendment states that "the testimony of any expert or skilled witness may be taken at any time before the trial of any civil cause . . . in the manner now provided for taking depositions under Rule 1.21 or 1.22." Under Rule 1.22(a)(1) the reasons for taking the deposition must be stated in the petition for permission to take the deposition before action or pending appeal and a copy of the petition must be served with the notice. Under Rule 1.21(a), the reasons are not an essential element of the notice. See *Vecsey v. Vecsey*, 115 So.2d 719 (Fla. 3d Dist. 1959). Query: Is a statement of the reasons for taking the deposition still an essential element of the notice for taking the deposition of an expert witness? Rule 1.32 requires that objections to the trial use of the testimony be made before the deposition is taken.

to the trial use of the expert testimony so taken must be made before the deposition has been taken.²⁴⁶ However, when a deposition is taken under the rules while an action is pending,²⁴⁷ the adverse party need not object to its admissibility until it is offered at the trial.²⁴⁸

2. USE OF DEPOSITIONS

In order to require a public improvements contractor to reimburse the city for a payment received pursuant to an allegedly *ultra vires* agreement, the defendant in a taxpayer's suit appealed from an adverse judgment. The question in the district court was whether the plaintiff had adequately established his necessary status as a taxpayer, which was a prerequisite to the maintenance of the class action. The trial court had found that he was necessarily a taxpayer as a citizen of the municipality. The district court affirmed the decree but predicated its decision on uncontroverted testimony in the plaintiff's deposition that he owned homestead property which was assessed for more than the constitutionally exempt amount, and he, therefore, must be an *ad valorem* taxpayer. The record apparently did not indicate whether the deposition had been introduced into evidence at the trial, but it had been considered by the chancellor without objection at a hearing on a motion for a summary decree which had been denied. The defendant's petition for a rehearing was denied,²⁴⁹ but the supreme court granted certiorari.²⁵⁰ In reversing the First District Court, it was held that Rule 1.36(c) does not have the effect of placing depositions, considered on a motion for summary judgment, in evidence for all purposes in the trial, but that to be considered as evidence in other stages of the action, they must be introduced as provided in the rules.²⁵¹

"The deposition of a party or of any one who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose."²⁵² The use of such a deposition, unlike the use of the deposition of a witness,²⁵³ is not conditioned upon the non-availability of a deponent.²⁵⁴

When the defendant relied on the deceased plaintiff's deposition in support of his motion for a summary judgment, which was denied, he

246. FLA. STAT. § 90.23(2) (1963); FLA. R. CIV. P. 1.32.

247. FLA. R. CIV. P. 1.21.

248. FLA. R. CIV. P. 1.21(f).

249. *R. L. Bernardo & Sons, Inc. v. Duncan*, 134 So.2d 297 (Fla. 1st Dist. 1961).

250. *R. L. Bernardo & Sons, Inc. v. Duncan*, 145 So.2d 476 (Fla. 1962).

251. FLA. R. CIV. P. 1.21(d).

252. FLA. R. CIV. P. 1.21(d)(2).

253. *Weber v. Berry*, 133 So.2d 327 (Fla. 2d Dist. 1961). The use of a witness' deposition is controlled by the provisions of FLA. R. CIV. P. 1.21(d)(3).

254. *Dickson v. Feiner's Organization, Inc.*, 155 So.2d 703 (Fla. 2d Dist. 1963); *Mon-salvatge & Co. v. Ryder Leasing, Inc.*, 151 So.2d 453 (Fla. 3d Dist. 1963).

was held²⁵⁵ to have waived the provisions of the dead man's statute²⁵⁶ at the final hearing in the suit.

The plaintiff appealed from an adverse summary judgment in an action to recover damages for breach of warranty and assigned as error the admission of a deposition which he had given in a concurrently pending independent action. The plaintiff had not submitted any affidavits or depositions in opposition to the defendant's motion. In reversing the summary judgment the court said that a deposition given in one action does not, in the absence of an admission, exhaust the facts upon which the plaintiff relied in an independent action. The plaintiff was not required to submit proofs countering those of the defendant until the defendant had first established a *prima facie* case.²⁵⁷

3. SCOPE OF DISCOVERY—LIMITATIONS ON THE "WORK PRODUCT" CONCEPT

The defendant in a negligence action sought certiorari to review a discovery order directing its general manager to answer a question requiring him to report a conversation that transpired between the manager and an employee after the plaintiff's accident. Certiorari was denied²⁵⁸ when the only part of the conversation included in the manager's report to the defendant was the employee's name and address. The conversation was not entitled to the protection accorded to "work products."

The defendant sought certiorari to review a discovery order quashing the defendant's notice of taking the deposition of the plaintiff's expert witness. The plaintiff had listed the expert as a prospective witness pursuant to a pre-trial order.²⁵⁹ In granting certiorari, the district court said (a) that discovery could be had in areas not within the work product limitation, and (b) that, although the work product privilege is not waived by listing the expert as a prospective witness, once the plaintiff relies on the expert's work product, the privilege no longer applies, and discovery may then be had of all relevant and otherwise unprivileged matters.²⁶⁰

Although the courts generally find that the reports and records of attorneys²⁶¹ and other experts²⁶² are, in the absence of a showing of compelling necessity, immune from discovery under the *Hickman v.*

255. *Bordacs v. Kimmel*, 139 So.2d 506 (Fla. 3d Dist. 1962).

256. FLA. STAT. § 90.05 (1963).

257. *Posey v. Pensacola Tractor & Equip. Co.*, 138 So.2d 777 (Fla. 1st Dist. 1962).

258. *Winn Dixie Stores, Inc. v. Belcher*, 144 So.2d 863 (Fla. 2d Dist. 1962).

259. FLA. R. CIV. P. 1.16.

260. *Dade County v. Bosch*, 133 So. 2d 578 (Fla. 3d Dist. 1961).

261. *Spector v. Alter*, 138 So.2d 517 (Fla. 3d Dist. 1962).

262. *Shawmut Van Lines, Inc. v. Small*, 148 So.2d 556 (Fla. 3d Dist. 1963) (insurance adjuster); *Ladies' Garment Workers' Union, Local 415 v. William Weitz, Inc.*, 141 So.2d 18 (Fla. 3d Dist. 1962) (bus agent).

*Taylor*²⁶³ doctrine, the experts themselves are subject to discovery on relevant, unprivileged matters.

In *Shell v. State Road Department*²⁶⁴ the Florida Supreme Court recognized the right of the condemnee in eminent domain proceedings to compel the production of surveys, appraisals and related matter which reflect the valuation of the defendant's land, thereby placing an additional limitation on the definition of a "work product."

4. DEPOSITIONS—ASSESSMENT OF COSTS

Allowing the expense of depositions as taxable costs in a civil action rests in the sound discretion of the trial court . . . [T]he courts are committed to the proposition that the proper administration of justice requires that costs of litigation be kept within reasonable bounds. . . .²⁶⁵

A court may refuse to assess the cost of depositions used at the trial against the losing party if it feels that the same facts could have been adduced by the less expensive method of affidavits and interrogatories.²⁶⁶ It may, on the other hand, sustain an order assessing costs even though the discovery order is subsequently modified.²⁶⁷ Generally, the cost of depositions used only for discovery purposes, and not employed on final hearing, will not be taxed against the opposing party.²⁶⁸

5. MOTION TO PRODUCE—FOR GOOD CAUSE SHOWN

Although the rules expressly provide that the proper device by which to obtain the production of documents and other materials for inspection or copying is, in the case of a party, by motion to the court showing good cause,²⁶⁹ or, in the case of a witness, by subpoena *duces tecum*,²⁷⁰ local practitioners still attempt to require such production by erroneously demanding it in the notice of a taking of a deposition.²⁷¹

6. FAILURE TO ATTEND THE TAKING OF A DEPOSITION OF WHICH NOTICE HAS BEEN RECEIVED

In an action to enforce an arbitration award, the plaintiff-union had been granted a partial summary judgment on the issue of liability, but

263. 329 U.S. 495 (1947).

264. 135 So.2d 857 (Fla. 1961); for a digest of the significant facts and analysis of the holding, see Massey, *Civil Procedure*, 16 U. MIAMI L. REV. 591, 624-25 (1962).

265. *Travis v. Blackmon*, 155 So.2d 698, 699 (Fla. 1st Dist. 1963). See FLA. STAT. § 58.13 (1963).

266. *Travis v. Blackmon*, *supra* note 265.

267. *Shamut Van Lines, Inc. v. Small*, *supra* note 262.

268. *Crane v. Stulz*, 136 So.2d 238 (Fla. 2d Dist. 1962).

269. FLA. R. CIV. P. 1.28.

270. FLA. R. CIV. P. 1.34(b).

271. *McKinley & Co. v. Arpine*, 143 So.2d 216 (Fla. 3d Dist. 1962); *Metz v. Smith*, 141 So.2d 617 (Fla. 3d Dist. 1962); *Ladies' Garment Workers' Union, Local 415 v. William Weitz, Inc.*, 141 So.2d 18 (Fla. 3d Dist. 1962); *Olin's Rent-a-Car System, Inc. v. Avis Rental Car System Inc.*, 135 So.2d 434 (Fla. 3d Dist. 1961).

the court had reserved jurisdiction for a trial to determine the amount due. The defendant gave notice to the plaintiff of the taking of its business agent's deposition and improperly²⁷² requested him to bring the plaintiff's membership records. The court denied the plaintiff's motion²⁷³ to quash the notice of the taking of the deposition on the ground that the testimony and records sought were privileged. When the business agent wilfully failed to appear at the deposition hearing on the appointed day, the court, after notice and hearing, entered an order granting the defendant's motion to vacate the partial summary judgment. On appeal,²⁷⁴ the order was sustained on the authority of Rule 1.31(d).²⁷⁵

K. Judgment on the Pleadings and Summary Judgment

1. JUDGMENT OR DECREE ON THE PLEADINGS

A motion for judgment or decree on the pleadings is proper after the pleadings are closed and within such time as not to delay the trial.²⁷⁶ The pleadings are closed when the answer has been filed if it does not contain a counterclaim or a cross-claim unless the court has ordered a reply to an answer. If a counterclaim or a cross-claim has been filed, there must be a reply or an answer respectively.²⁷⁷

A judgment on the pleadings for the plaintiff is proper only when the answer is legally insufficient to preclude the plaintiff from recovering, even though all of its allegations are true and provable.²⁷⁸ For the defendant, judgment on the pleadings is proper only when the complaint is legally insufficient to state a cause of action.

In a motion for judgment on the pleadings, the moving party admits for the purpose of the motion, the facts well pleaded by his adversary, despite their denial in the movant's pleadings;

272. See FLA. R. Civ. P. 1.34(b) and §§ 5 immediately preceding 1.34(b). The propriety of the notice was not in issue on the appeal.

273. FLA. R. Civ. P. 1.24(b).

274. Ladies' Garment Workers' Union, Local 415 v. William Weitz, Inc., 141 So.2d 18 (Fla. 3d Dist. 1962).

275. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, . . . the court on motion and notice may strike out all or any part of any pleading of that party or dismiss the action or proceeding or any part thereof or enter a judgment by default against that party. FLA. R. Civ. P. 1.31(d).

Repeated failure of the plaintiff's father to appear at the time noticed for the taking of his deposition resulted in dismissal of plaintiff's complaint with prejudice. The district court sustained the dismissal, but held that the record failed to support the "with prejudice" portion of the order. Thornton v. Board of County Comm'rs, 149 So.2d 393 (Fla. 3d Dist. 1963). Default judgment was entered upon defendants' failure to attend and submit themselves to the taking of depositions after being duly served with notice. On appeal, the default was affirmed, but the cause was remanded for further proof and for reassessment of plaintiff's damages.

276. FLA. R. Civ. P. 1.11(c).

277. FLA. R. Civ. P. 1.7(a); Riverside Bank v. Florida Dealers & Growers Bank, 151 So.2d 834 (Fla. 1st Dist. 1963).

278. Morris v. Truax, 152 So.2d 515 (Fla. 2d Dist. 1963).

and the movant also admits the untruth of his own allegations which have been denied by his adversary. . . .²⁷⁹ Averments in a pleading to which no responsive pleading is required are taken as denied.²⁸⁰

The district courts again noted²⁸¹ that the Florida rule on judgment on the pleadings, unlike its federal counterpart,²⁸² does not provide for the interchangeability of that motion with one for a summary judgment. Therefore, the court may not consider matters outside of the pleadings in deciding whether to grant a motion for judgment on the pleadings.

2. SUMMARY JUDGMENT

a. Introduction

Notwithstanding the cautionary language in the reported opinions suggesting judicial restraint in granting motions for summary judgment,²⁸³ the device continues to be the one most frequently used for terminating litigation. During the survey period, more than 193 of the cases disposed of in this manner were appealed.²⁸⁴ Approximately 43 per cent of these decisions were reversed.

The question properly determined on motion for summary judgment is whether or not there exist in the cause genuine issues of material fact. While the court may be convinced that a plaintiff will have insurmountable difficulties in proving his case, it should not by summary judgment prevent him from attempting to do so²⁸⁵

279. *Greater Miami Tel. Answering Serv. v. A-1 Answering Serv.*, 141 So.2d 619 (Fla. 3d Dist. 1962).

280. *FLA. R. CIV. P.* 1.8(e).

281. *Morris v. Truax*, *supra* note 278; *Greater Miami Tel. Answering Serv. v. A-1 Answering Serv.*, *supra* note 279.

282. *FED. R. CIV. P.* 12(c), 28 U.S.C. following § 723(e) (1958).

283. See, e.g., *Forston v. Atlantic Eng'r & Mfg. Corp.*, 143 So.2d 364, 368 (Fla. 2d Dist. 1962):

[T]he privilege of moving for summary judgment was not intended as a broad alternative method of trying cases; and yet the decisions are replete with reversals where this procedure was indiscriminately employed. Such resorts to summary procedure tend to retard rather than to promote the administration of justice.

In *Goodman v. Strassburg*, 139 So.2d 163, 164 (Fla. 3d Dist. 1962), the court noted in reversing a summary judgment for the plaintiff, "[G]enerally, summary judgments are not favored in actions bottomed upon charges of fraud, as the determination of this conduct is generally within the province of the trier of facts."

In *Glens Falls Ins. Co. v. Edgerly*, 155 So.2d 649, 651 (Fla. 1st Dist. 1963), it was said that the principle of restraint in granting motions for summary decrees, applies equally to actions at law and suits in equity.

The difference between the chancellor's authority to enter summary decrees and his authority to enter final decrees on the merits must be observed in the administration of justice.

284. Sixty-eight appeals were from summary judgments granted in negligence actions; the remaining one hundred twenty-five appeals covered summary judgments and decrees in miscellaneous suits. The percentage of reversal in the first group was 42.6%; in the second group it was 42.4%.

285. *Williams v. Caterpillar Tractor Co.*, 149 So.2d 898, 904 (Fla. 2d Dist. 1963).

A summary judgment may properly be granted only when there are no genuine issues of material fact, and the only question is one of law.

b. Timeliness

A claimant may move for a summary judgment or decree at any time after the expiration of twenty days from the commencement of the action or after the adverse party has moved for a summary judgment or decree whichever occurs first.²⁸⁶ Since the filing of one of the defenses enumerated in Rule 1.11(b) tolls the time for filing an answer,²⁸⁷ a motion for summary judgment may be made before the defendant has answered.²⁸⁸ "[A] trial court should not grant a motion for summary decree filed before the defendant has answered, unless it is clear that an issue of material fact cannot be presented."²⁸⁹ A court has inherent power over its docket and a motion for a summary judgment or decree may be granted while a Rule 1.11(b) motion is pending and, as yet, undisposed.²⁹⁰ Such a motion may or may not be accompanied by supporting affidavits.²⁹¹ When the motion is made after the pleadings are closed and is without supporting affidavits, etc., it has been held to serve the same office as a motion for judgment on the pleadings.²⁹²

c. The Motion and Proceedings Thereon

In an action to recover damages for personal injuries, the plaintiffs appealed from an adverse summary judgment. The plaintiff's motion to amend their complaint was granted and the amended complaint filed on the day preceeding the date set for the hearing on the defendant's motion for a summary judgment. In reversing the trial court, the appellate court held that the original complaint was deemed abandoned when the plaintiff filed an amended complaint, complete in itself. The rules require that the motion be served at least 10 days prior to the scheduled hearing.²⁹³ In the instant case the decision at the hearing was necessarily based on the amended complaint, and the 10-day notice re-

286. FLA. R. CIV. P. 1.36(a).

287. FLA. R. CIV. P. 1.11(a).

288. *Florida Dairy Farmers Fed'n v. Borden Co.*, 155 So.2d 699 (Fla. 1st Dist. 1963); *Cook v. Lichtblau*, 144 So.2d 312 (Fla. 2d Dist. 1962); *Edgewater Drugs, Inc. v. Jax Drugs, Inc.*, 138 So.2d 525 (Fla. 1st Dist. 1962).

FLA. R. CIV. P. 1.36(a) is identical to FED. R. CIV. P. 56(a). In the *Edgewater Drugs* case, *supra* note 288 at 529, the court noted that the federal rule had been amended prior to the adoption of the Florida rules to permit a motion for a summary judgment to be filed prior to the filing of an answer. In literally adopting the federal rule, it should be assumed that the Florida Supreme Court wished to achieve the same result.

289. *A. & G. Aircraft Serv., Inc. v. Drake*, 143 So.2d 703, 704 (Fla. 2d Dist. 1962).

290. *Evin R. Welch & Co. v. Mannheimer*, 147 So.2d 185 (Fla. 2d Dist. 1962).

291. FLA. R. CIV. P. 1.36(a).

292. *Levin v. Fisher*, 150 So.2d 730 (Fla. 3d Dist. 1963).

293. FLA. R. CIV. P. 1.36(c).

quirement was necessarily violated.²⁹⁴ Three proper procedural choices were available to the trial court. It might have:

- (1) postponed the hearing to meet the notice requirement of Rule 1.36(c);
- (2) denied the motion and set the matter for trial on the merits; or
- (3) entered a partial summary judgment pursuant to Rule 1.36(d) on the conceded issue of ownership, saving the other issue of negligence for later disposition.

The judgment or decree sought shall be rendered forthwith *if the pleadings, depositions and admissions on file, together with the affidavits*, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or a decree as a matter of law.²⁹⁵ (Emphasis added.)

In spite of the plain language of the rule, the district courts of appeal apparently are not in accord as to whether a motion for summary judgment should be denied when the proofs raise issues of material fact not raised by the pleadings.

In *Mark Leach Health Furniture Co. v. Thal*²⁹⁶ the plaintiff appealed from an adverse judgment dismissing his complaint with prejudice when he failed to appear at the trial. The action was based upon a promissory note and the defendant's answer to the complaint was a general denial.²⁹⁷ On the plaintiff's request for admissions of fact,²⁹⁸ the defendant had admitted all of the material allegations of the complaint, but had stated additional facts which, if proved, would establish an affirmative defense of failure of consideration. The defendant's affidavit in opposition to the plaintiff's motion for summary judgment tended further to substantiate his affirmative defense. Nevertheless, the second district court of appeal held that the trial court had erred in denying the plaintiff's motion when the defendant's admissions resolved all of the issues raised by the pleadings in favor of the plaintiff and when the defendant did not seek to amend his answer to include additional allegations of fact, since affirmative defenses not raised in the answer are deemed waived.²⁹⁹ It is submitted that such a conclusion contravenes the language and the spirit of the rules, which are designed as a means and not as an end.

The position of the Third District Court of Appeal, as expressed in *Hart Properties, Inc. v. Slack*,³⁰⁰ appears to comport much better with the liberal purpose of the rules to release justice from the chains of

294. *Babb v. Lincoln Auto Finance Co.*, 133 So.2d 566 (Fla. Dist. 1961).

295. FLA. R. CIV. P. 1.36(c).

296. 143 So.2d 65 (Fla. 2d Dist. 1962).

297. FLA. R. CIV. P. 1.8(c).

298. FLA. R. CIV. P. 1.30(a).

299. FLA. R. CIV. P. 1.8(d).

300. 145 So.2d 285 (Fla. 3d Dist. 1962).

form. In affirming an order denying the defendant's motion for a summary judgment in a negligence action, the appellate court held that "[w]here the facts show an issue not framed in the pleadings, the trial judge will not be reversed for failing to grant a summary judgment, even though his failure to enter a directed verdict might be error if the same situation existed at the close of the plaintiff's case."³⁰¹

Florida courts refuse to consider affidavits in support of or opposed to a motion unless they have been filed prior to the date of the actual hearing.³⁰²

d. Competent Evidence

Summary judgment proceedings are evidentiary in nature, intended as a means of terminating litigation when nothing would be accomplished by a further investment of time and money in a trial on the merits.³⁰³ When the plaintiff moves for a summary judgment or decree, he has the burden of proving each material allegation of his complaint prior to being entitled to such a judgment or decree as a matter of law.³⁰⁴ If the defendant has answered and has asserted an affirmative defense, the plaintiff's affidavit in support of his motion must refute it.³⁰⁵

. . . [S]ummary judgment is a drastic remedy In the absence of some proof contradicting or denying or in opposition thereto, the mere *pleading* of this affirmative defense created a genuine issue so as to any material fact and that the movant is entitled to a judgment as a matter of law. *The defendants were under no duty to submit evidentiary matter to establish their affirmative defense.*³⁰⁶

Once the movant has met his burden of establishing his right to summary relief by the introduction of adequate competent evidence, the adverse party can no longer rest on the paper issues created by the pleadings, but he must overcome the movant's proof with adequate evidence of his own.³⁰⁷ The issues raised by affidavits may be overcome by testimony contained in depositions³⁰⁸ and, even, by findings of fact in another related suit between the same parties.

In *Jenkins v. Dickey*³⁰⁹ the defendant in an action on a promissory

301. *Id.* at 286.

302. *Hardcastle v. Mobley*, 143 So.2d 715 (Fla. 3d Dist. 1962); *Siciliano v. Hunerberg*, 135 So.2d 750 (Fla. 2d Dist. 1961).

303. *Edgewater Drugs, Inc. v. Jax Drugs, Inc.*, 138 So.2d 525 (Fla. 1st Dist. 1962).

304. *Langley v. New Deal Cab Co.*, 138 So.2d 789 (Fla. 1st Dist. 1962).

305. *Skaf's Jewelers, Inc. v. Antwerp Import Corp.*, 150 So.2d 260 (Fla. 2d Dist. 1963).

306. *Harrison v. McCourtney*, 148 So.2d 53, 55-56 (Fla. 2d Dist. 1962) (Emphasis added.)

307. *FLA. R. Civ. P. 1.36(c)*; *Gibbs v. American Nat'l Bank*, 155 So.2d 651 (Fla. 1st Dist. 1963); *City of Tarpon Springs v. Gerecter*, 155 So.2d 566 (Fla. 2d Dist. 1963); *Lanzner v. City of North Miami Beach*, 141 So.2d 626 (Fla. 3d Dist. 1962).

308. *Rosenhouse v. Kimbrig*, 147 So.2d 354 (Fla. 2d Dist. 1962).

309. 151 So.2d 54 (Fla. 2d Dist. 1963).

note appealed from an adverse summary judgment. The motion had been supported and opposed by affidavits which appeared to create genuine issues of material fact. However, there had previously been a chattel mortgage foreclosure suit between the same parties in which the defendant had asserted the same defenses that were raised by the affidavit in opposition to the plaintiff's motion for a summary judgment. The issues in that suit were resolved in favor of the plaintiff. The record in the equity suit was before the court in the action at law on the promissory note. In affirming the summary judgment, the appellate court held that the trial court had properly taken judicial notice of the chancery proceedings when the record of those proceedings indicated that substantially the same defenses had been resolved in the plaintiff's favor after a hearing on the merits in the foreclosure suit.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein.³¹⁰

Such affidavits may not be based on hearsay evidence³¹¹ or conclusions of law,³¹² nor may they allege a parol agreement when parol evidence would be inadmissible to vary the terms of a written agreement in an action on a contract.³¹³

e. Review of Summary Judgments

The rules now provide for a motion to rehear a summary judgment,³¹⁴ which must be made within 10 days of its entry.³¹⁵ Once the time within which such a motion may be filed has lapsed, the trial court loses jurisdiction of the cause, and, unless the requirements of Rule 1.38³¹⁶ have been met, the appropriate method of review is by appeal.³¹⁷

When a notice of appeal is filed by the same party who has filed a timely and "undisposed of" petition for a rehearing, the petition for a rehearing is deemed abandoned, and the appellate court acquires jurisdiction to hear the appeal. However, while there is pending a timely

310. FLA. R. CIV. P. 1.36(e).

311. *Harrison v. Consumers Mortgage Co.*, 154 So.2d 194 (Fla. 1st Dist. 1963).

312. *Deerfield Beach Bank v. Mager*, 140 So.2d 120 (Fla. 2d Dist. 1962).

313. *Evans v. Borkowski*, 139 So.2d 472 (Fla. 1st Dist. 1962).

314. FLA. R. CIV. P. 2.8(a).

315. FLA. R. CIV. P. 2.8(b).

316. FLA. R. CIV. P. 1.38 provides for relief from judgments, orders or decrees in cases when there has been a clerical mistake or when an error has resulted from a mistake, inadvertence or excusable neglect, or fraud or is shown to have been made by newly discovered evidence, which was in existence at the time of the trial, but could not have been discovered in the exercise of due diligence then.

317. *State v. Gooding*, 149 So.2d 55 (Fla. 1st Dist. 1963). The trial court lacked jurisdiction to vacate a summary decree on plaintiff's motion filed 36 days after the decree was entered.

petition for a rehearing of the adverse party, a party may not file a notice of appeal.³¹⁸

· L. *Relief from Judgments, Decrees, or Orders*

In a negligence action, the trial court granted the defendant's motion to vacate a default judgment on the ground that its failure to answer was occasioned by the negligent inadvertence of its administrative staff in not relaying the summons and the copy of the complaint to its counsel. Thereafter, the defendant prevailed on its motion for a summary judgment, and the plaintiff appealed, challenging the jurisdiction of the court to vacate the default and charging an abuse of judicial discretion. While the district court acknowledged the inherent power of the trial court over its interlocutory orders, it held³¹⁹ that the lower court had abused its discretion, because the inadvertence of one's administrative employees was not sufficiently good cause to justify setting aside the default. Reinstatement of the default was ordered. The supreme court granted the defendant's petition for certiorari and in a far-reaching opinion reversed the district court decision and remanded the cause for further proceedings.³²⁰ It noted that motions to vacate defaults should be liberally construed in favor of the movant to permit an adjudication on the merits, and that a century earlier it had recognized³²¹ that the inadvertence of an agent was not such gross and culpable negligence of the defendant as would preclude the vacation of a default order.

Clerical mistakes may be corrected at any time before the record on appeal is docketed without the appellate court's permission and, thereafter, with its permission.³²² Other relief from orders, judgments and decrees may be had within a reasonable time, which in the case of mistake, in advertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation or other misconduct of an adverse party shall not be longer than one year after the decree, order or judgment has been entered.³²³

*Hartley v. Hartley*³²⁴ is an interesting case in which a wife received notice of the hearing on her husband's petition to modify a final divorce

318. *Scott-Whitaker Co. v. Joyce Properties, Inc.*, 155 So.2d 661 (Fla. 3d Dist. 1963).

319. *Barber v. North Shore Hosp. Inc.*, 133 So.2d 339 (Fla. 3d Dist. 1961).

320. *North Shore Hosp., Inc. v. Barber*, 143 So.2d 849 (Fla. 1962). Prior to this decision, the third district court of appeals had granted certiorari to reverse a trial court order in a negligence action arising out of an automobile collision on the ground that the defendant co-owner had failed to answer the complaint because he had thought that his co-defendant had responded. On the handing down of the decision in the principal case the district court granted a rehearing and denied the petition for certiorari. *Martin v. Pattison*, 144 So.2d 66 (Fla. 3d Dist. 1962). See also *Ross v. Baird*, 143 So.2d 538 (Fla. 3d Dist. 1962).

321. *Waterson v. Seat*, 10 Fla. 326 (1863).

322. FLA. R. CIV. P. 1.38(a).

323. FLA. R. CIV. P. 1.38(b); *Sun Fin. Corp. v. Friend*, 139 So. 2d 484 (Fla. 3d Dist. 1962).

324. 134 So.2d 281 (Fla. 2d Dist. 1961).

decree and terminate his obligation to make alimony payments on the day after the hearing had been held. The court denied both the wife's motion to quash the order terminating the husband's obligation and her later motion to vacate the order which was supported by affidavits indicating that she was in New York when the notice was mailed and had a meritorious defense to the petition. On appeal, the district court commented that a motion to vacate is not subject to the 10-day limitation of a motion to quash. In reversing the order the appellate court held that the trial court had abused its discretion in denying the former wife's motion as she was unquestionably entitled to adequate and proper notice of the new proceedings and to an opportunity to be heard before modification of a decree affecting her rights could be entered.

When the basis for a motion to vacate is one subject to the one-year limitation under the Rule, the time for making it is not tolled by taking an appeal.³²⁵ Neither is the time for taking an appeal tolled by filing a motion to vacate.

II. ACTIONS AT LAW ONLY

A. *Jury Trials*

1. WAIVER

The absolute right to a trial by jury exists only in such cases as has been declared by the Constitution or by statute.³²⁶ In other cases jury trials are permissive, not mandatory.³²⁷ Even when an absolute right to a jury trial exists, it may be waived by failure to make a timely demand.³²⁸ Thereafter, the right to a trial by jury is discretionary with the court.³²⁹ The plaintiff was found to have waived his right to a jury trial in an action to recover damages for breach of contract when he dismissed his complaint containing a timely demand for a jury trial against the original defendants and subsequently filed an amended complaint, not containing such a demand against the defendant appellee. In affirming the trial court's order denying the plaintiff a jury trial, the appellate court held that the amended complaint did not relate back³³⁰ to the date of original complaint and that the right to a jury trial had been waived by the plaintiff's failure to make a timely demand.³³¹

The defendant in a suit to foreclose an architect's lien filed a compulsory legal counterclaim for damages for the alleged negligent performance of the plaintiff's services and made a timely demand for a jury

325. *Seven-Up Bottling Co., Inc. v. George Constr. Corp.*, 156 So.2d 167 (Fla. 3d Dist. 1963).

326. FLA. R. CIV. P. 2.1(a).

327. *Gerstein v. "Pleasure Was My Business,"* 136 So.2d 8 (Fla. 3d Dist. 1961).

328. FLA. R. CIV. P. 2.1(b); *Phillips v. Blum*, 139 So.2d 459 (Fla. 3d Dist. 1962).

329. FLA. R. CIV. P. 1.15(e); *Bittner v. Walsh*, 132 So.2d 799 (Fla. 1st Dist. 1961).

330. FLA. R. CIV. P. 1.15(c).

331. *Bardee Corp. v. Arnold Altex Aluminum Co.*, 134 So.2d 268 (Fla. 3d Dist. 1961).

trial of the issues presented by the counterclaim. On the plaintiff's motion, the trial court struck the demand for a jury trial and the defendant took an interlocutory appeal. The district court affirmed the order on the ground that the legal issues of the counterclaim were so interwoven with the equitable issues of the principal suit that granting the counterclaimant's demand for a jury trial rested in the exercise of the chancellor's broad discretionary power.

The defendants sought supreme court review of this decision³³² by the dual approach of a petition for certiorari based on conflicting decisions and by direct appeal on the theory that the district court had initially construed a controlling provision of the Florida Constitution.³³³ After consolidating the appeals for its consideration and disposition, the supreme court held that when a litigant has made a timely demand for a jury trial of legal issues triable as of right by a jury, the court must grant the demandant's request. Prior to the adoption of the rules, the defendant in an equitable suit was not obligated to file a legal counterclaim. Under present Florida practice, the defendant is obligated to file any claim legal or equitable that he may have against the plaintiff arising out of the same transaction or occurrence or be forever barred from prosecuting that claim.³³⁴ The court found that an interpretation of the rule permitting the defendant to waive his absolute right to a jury trial of a compulsory legal counterclaim by asserting it in an equitable action would render the rule unconstitutional.³³⁵ In dictum the court indicated that a timely demand for a jury trial would preserve the defendant's right to such a trial even if the legal counterclaim were permissive.

The United States Supreme Court has interpreted the federal counterparts³³⁶ to Florida Rules 1.13(1) and 2.1 in the light of the seventh amendment³³⁷ and has reached a similar conclusion.³³⁸

2. PEREMPTORY CHALLENGES OF JURORS

On the trial of any civil cause in any court each party [is] entitled to three peremptory challenges of jurors; provided, that where the number of parties on opposite sides . . . are unequal, [each side shall have] the same aggregate number of peremptory challenges [to be divided as provided by the statute].³³⁹

332. *Hightower v. Bigoney*, 145 So.2d 505 (Fla. 2d Dist. 1962).

333. FLA. CONST. DECL. OF RIGHTS § 3: "The right of trial by jury shall be secured to all and remain inviolate forever."

334. FLA. R. CIV. P. 1.13(1).

335. *Hightower v. Bigoney*, 156 So.2d 501 (Fla. 1963).

336. FED. R. CIV. P. 13(a), § 38.

337. U.S. CONST. amend. VII.

338. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). See 2B BARRON & HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE*, § 894 (Wright ed. 1961); WRIGHT, *FEDERAL COURTS*, § 92, at 353-56 (1963).

339. FLA. STAT. § 54.11 (1963).

A negligence action was brought by a husband and wife, in which the husband sought to recover for his own personal injuries in addition to his claim for expenses incurred for treatment of his wife's injuries. The appellate court held that the trial court had committed reversible error in denying the defendant the same number of peremptory challenges as the plaintiffs had been granted.³⁴⁰

In an ejectment action, the trial court erroneously permitted each side an excessive number of peremptory challenges because it had failed to treat multiple parties with a common interest as a single party. However, "error in a matter concerning a jury must be prejudicial to be reversible [and] the allowance of an excessive number of peremptory challenges is not a ground for reversal of [a] judgment based upon the verdict rendered where it appears that the jury was impartial."³⁴¹

B. Jury Instructions

In an action for damages incurred in a railroad crossing accident, the court independently instructed the jury on the statutory presumption of negligence. After the jury had retired the defendant moved for a mistrial which the court denied. In allowing the defendant the advantage of his motion on appeal from an adverse judgment, the appellate court held that the requirement in the rules³⁴² that a party must object to proposed jury instructions at the conference called for that purpose or be precluded from assigning such charges as error did not apply to an instruction given by the court without prior notice. Further, it was unnecessary for the defendant to object to such instruction before the jury retired, since the unfavorable impression created by the erroneous charge could not easily be removed from the minds of the jurors.³⁴³

The plaintiff sought damages for trespass to land and requested the court to instruct the jury concerning the burden of proving an affirmative defense in the defendant's answer. The requested instruction was denied. On appeal from an adverse judgment, the district court held that the plaintiff's failure to object to the denial of his requested instruction did not bar appellate review of its propriety, when he had filed written requests.³⁴⁴ One need only object to a proposed instruction—not to the denial of a proposed instruction.³⁴⁵

340. *Funland Park, Inc. v. Dozier*, 151 So.2d 460 (Fla. 3d Dist. 1963).

341. *Bailey v. Deverick*, 142 So.2d 775, 777 (Fla. 2d Dist. 1962).

342. FLA. R. CIV. P. 2.6(b).

343. *Louisville & N.R.R. v. Flournoy*, 136 So.2d 32 (Fla. 1st Dist. 1961).

344. *Hattaway v. Florida Power & Light Co.*, 133 So.2d 101 (Fla. 2d Dist. 1961).

345. FLA. R. CIV. P. 2.6(b) provides:

[I]t shall be the duty of the parties to the cause to file written requests that the court charge the jury as set forth in such requests. The court shall then require counsel to appear before it for the purpose of a conference to settle the charges to be given. At such conference all objections shall be made and ruled upon
No party may assign as error the giving of any charge unless he objects thereto at

In *Jayess Investments, Ltd. v. Barbee Foods, Inc.*³⁴⁶ the court held that the defendant was precluded from appellate review of the trial court's alleged error in failing to instruct the jury generally on the subject of the defendant's claim of right. The case involved a tenant's action against his landlord to recover damages for an alleged wrongful termination of the tenant's occupancy of the premises under a lease. The rules³⁴⁷ require a party to request a proper instruction before he can claim error for failure to give instruction.

C. Directed Verdict

1. IN GENERAL

Florida courts³⁴⁸ have espoused "the most favorable evidence rule" in determining whether a motion for a directed verdict should be granted. Under this view, the court is not warranted in granting a motion for a directed verdict unless the evidence as a whole, with all reasonable deductions to be drawn therefrom, points to only one possible conclusion. Such a motion should be granted with great caution in comparative negligence cases, such as actions governed by admiralty law³⁴⁹ and actions based upon railroad crossing accidents.³⁵⁰ When the doctrine of comparative negligence obtains, a plaintiff's contributory negligence reduces the amount of damages recoverable, but it does not bar recovery. In such cases, a motion for a directed verdict may be granted only when the evidence is legally insufficient to establish any liability on the defendant's part and necessarily includes a judicial finding that the sole proximate cause of the plaintiff's injuries was his own negligence.³⁵¹

In a malpractice suit against his former attorney, the plaintiff appealed from a judgment entered pursuant to a verdict directed for the defendant at the close of the plaintiff's case. The plaintiff had been injured in the course of his employment, allegedly by the negligence of a third-party tortfeasor. Thereafter, he employed the defendant to prosecute an action against the alleged tortfeasor, but the defendant neglected to do so within one year, thus subjecting the plaintiff to the statutory provision³⁵² which permits a Workmen's Compensation insurance carrier to bring an action against the alleged tortfeasor if the insured party has not done so. The tortfeasor-defendant in the insurance

such time, nor the failure to give any charge unless he shall have requested the same. (Emphasis added.)

346. 155 So.2d 853 (Fla. 3d Dist. 1963).

347. FLA. R. CIV. P. 2.6.

348. See, e.g., *Garris v. Robeison*, 146 So.2d 388 (Fla. 2d Dist. 1962); *Jones v. Royal Palm Ice Co.*, 145 So.2d 887 (Fla. 3d Dist. 1962); *Massaline v. Rich*, 137 So.2d 10 (Fla. 1st Dist. 1962).

349. *Cashell v. Hart*, 143 So.2d 559 (Fla. 2d Dist. 1962).

350. *Florida East Coast Ry. v. Haywood*, 145 So.2d 533 (Fla. 3d Dist. 1962); *Ely v. Atlantic Coastline R.R.*, 138 So.2d 521 (Fla. 2d Dist. 1962).

351. *Ely v. Atlantic Coastline R.R. Co.*, *supra* note 350.

352. FLA. STAT. § 440.39(4)(a) (1963).

carrier's action had propounded interrogatories to the plaintiff. In the instant action there was competent testimony which, if believed by a jury, would establish that the plaintiff had relied on the defendant-attorney's advice in failing to answer the interrogatories propounded to him in the carrier's action. The carrier's suit was dismissed with prejudice.³⁵³ A subsequent suit against the third-party tortfeasor, brought by the defendant on his client's behalf, was also dismissed when the tortfeasor asserted the affirmative defense of *res judicata*. In reversing the judgment entered on the verdict directed for the defendant, the appellate court noted that there was sufficient evidence from which a jury might infer that the defendant had

wanted the suit dismissed, and used the interrogatories as a means of procuring that result. [He may not have wished it] dismissed with prejudice although this was the . . . result. An attorney practicing as an officer of the court is charged with the knowledge that under the Rules of Procedure the action of his client in refusing to submit to discovery may subject that client to the possibility of the loss of his cause of action.³⁵⁴

It is interesting to note that the court, by way of obiter dictum, commented that involuntary dismissals for failure to comply with the rules were automatically with prejudice unless otherwise provided and that that portion of the rule remains unchanged by the revision of the Rules in 1962.³⁵⁵ It is submitted that the restatement of Rule 1.35(b) in three paragraphs was designed to accomplish precisely the opposite result and that, as now worded, an involuntary dismissal for failure to comply with the rules is automatically without prejudice unless the order of dismissal otherwise provides.³⁵⁶

2. DIRECTED VERDICT—NON-APPEARANCE AT TRIAL

When the appealing plaintiffs had failed to appear at the appointed time, the court proceeded with the trial and directed the jury to return a verdict adverse to the plaintiffs on the issue of liability and for the \$75,000 damages which the plaintiffs had sought. The district court affirmed the judgment and sustained the order denying the plaintiff's motion for a new trial. The appealing parties had had notice of the impending trial and their failure to appear emanated from their own mistake.³⁵⁷

3. DIRECTED VERDICT—JURY NOT PRESENT

After the jury had been empanelled and prior to the commencement of the trial, the plaintiff amended his complaint with the court's permis-

353. FLA. R. CIV. P. 1.35(b).

354. *Suritz v. Kelner*, 155 So.2d 831, 833 (Fla. 3d Dist. 1963).

355. *In re Florida Rules of Civil Procedure*, 139 So.2d 129, 130 (Fla. 1962).

356. See notes 216, 217 *supra* and accompanying text.

357. *Holt Industries, Inc. v. Airtronics Int'l Corp.*, 139 So.2d 731 (Fla. 3d Dist. 1962).

sion. While the jury was still not present, a colloquy occurred between the judge and the litigants' attorneys which terminated in the court's decision that the case was controlled by a statute urged by the defendant. The court announced that it would treat the previous discussion as the plaintiff's opening remarks to the jury and direct a verdict for the defendant. The district court reversed holding that a verdict may not be directed at the conclusion of the voir dire (opening statements).³⁵⁸

4. NEW TRIAL MOTION NOT PREREQUISITE TO APPELLATE REVIEW OF AN ORDER DENYING A MOTION FOR A DIRECTED VERDICT

On appeal from an adverse judgment in an automobile negligence action, the plaintiff urged as error the denial of his motion for a directed verdict on the issue of liability. It should have left for the jury's determination the issue of which of the two defendants was negligent or whether they were jointly liable. The defendant asserted that the appellate court could not review the order denying the plaintiff's motion when the plaintiff had not moved for a new trial prior to taking an appeal. The district court disagreed. The issue on appeal was not whether the verdict was contrary to the manifest weight of the evidence (for which a motion for a new trial would have been a prerequisite to appellate review). Rather, the test was whether there was any evidence in the record which could lawfully support the jury's verdict for the defendants. Predicated on the latter test, the appellate court held that the lower court had erred in denying the plaintiff's motion because the record affirmatively established that the plaintiff was free of any negligence which was the proximate cause of the collision.³⁵⁹

5. ALTERNATIVE MOTIONS FOR A RESERVED DIRECTED VERDICT (JUDGMENT N.O.V.) AND FOR A NEW TRIAL—TIME FOR APPEALING

Upon the return of a jury verdict for the defendant, the plaintiff moved in the alternative for judgment n.o.v. or for a new trial. The court entered an order denying his motion for a new trial and the plaintiff appealed. The appeal was dismissed on the defendant's motion because it only sought review of the order denying plaintiff's motion for a new trial and the record did not indicate the disposition of his motion for judgment n.o.v. Thereafter, the trial court entered an order correcting

358. *Croom-Johnson, Inc. v. Rand Broadcasting Co.*, 139 So.2d 741 (Fla. 3d Dist. 1962).

359. *Sheehan v. Allred*, 146 So.2d 760 (Fla. 1st Dist. 1962). There was a dissenting opinion which reasoned that the trial court had properly denied the plaintiff's motion for a directed verdict. Where either of the defendants against whom a directed verdict was sought would have been entitled to a jury verdict and judgment in his favor, the jury ought not to be placed in the position of having to decide against one of them, since under the evidence, it could have found for either of the defendants.

and clarifying the order previously appealed, so that the record would correctly reflect *nunc pro tunc* that both motions had been disposed of in the original order. Again the plaintiff appealed and the defendant filed a motion to dismiss the appeal—this time on the ground that the 60 days had passed and the appeal was untimely.³⁶⁰ In denying the motion to dismiss the appeal, the appellate court noted that a timely appeal for judgment notwithstanding the verdict tolls the time for taking an appeal³⁶¹ and that an order on a motion has not been rendered until it has been written, signed and made a matter of record.³⁶² On this basis, the motion for judgment n.o.v. was not disposed of until the second order was entered. The *nunc pro tunc* provision of that order could not operate to adversely affect the running of the appeal time.³⁶³

D. New Trial

1. SUSPENSION OF THE 10 DAY LIMITATION PROVISION

In a case of first impression in Florida³⁶⁴ it was held that, when there has been a timely motion for a new trial and/or for judgment n.o.v., the court may grant a new trial on its own initiative for a reason not stated in the motion even though more than 10 days have passed from the rendition of the verdict. Once the finality of the judgment has been suspended³⁶⁵ by a timely motion for a new trial or for a reserved directed verdict, the reason for the 10 day limitation disappears.

The holding of the *Kaufman* case was incorporated into the rules by a 1962 amendment:

Not later than 10 days after entry of judgment *or within the time of ruling on . . . a timely motion for a new trial* made by a party in actions tried by a jury, the court of its own initiative may order a rehearing or a new trial for any reason for which it might have granted a rehearing or a new trial on motion of a party.³⁶⁶ (Emphasis added.)

2. MUST A MOTION FOR A NEW TRIAL BE FILED WITHIN 10 DAYS?

*Miami Transit Co. v. Ford*³⁶⁷ posed the interesting question of whether a motion for a new trial which had been served on the plaintiff's counsel within the required 10-day period³⁶⁸ would be untimely if not filed with the clerk of the court until 6 days later when the stipulated

360. FLA. APP. R. 3.2(b).

361. FLA. APP. R. 1.3.

362. *Ibid.*

363. *Stupp v. Cone Bros. Contracting Co.*, 135 So.2d 457 (Fla. 2d Dist. 1961).

364. *Kaufman v. Sweet Et Al. Corp.*, 144 So.2d 515 (Fla. 3d Dist. 1962).

365. FLA. APP. R. 1.3.

366. FLA. R. CIV. P. 2.8(d).

367. 149 So.2d 87 (Fla. 3d Dist.), *rev'd*, 155 So.2d 360 (Fla. 1963).

368. FLA. R. CIV. P. 2.8(b).

grace period had run. The motion was denied and the defendant appealed. The district court concluded that late filing had rendered the motion untimely and ineffective to toll the running of the time for taking an appeal³⁶⁹ and held that the appeal, filed 72 days after judgment had been entered, was thus untimely and dismissed. The supreme court granted certiorari. In reversing, it was held that only service of the motion within the 10 day period is critical under the rules.³⁷⁰ The provision³⁷¹ that "[a]ll original papers, copies of which are required to be served upon parties, shall be filed with the court either *before* service or *immediately* thereafter" should be interpreted in the light of its federal counterpart.³⁷² "Immediately" in the Florida rules should be interpreted to mean the same meaning as the corresponding phrase "within a reasonable time" in Federal Rule 5(d).

3. NEW TRIAL MOTION NOT PREREQUISITE TO APPELLATE REVIEW OF JURY INSTRUCTIONS

By statutory provision³⁷³ an appellate court in Florida may review an alleged erroneous charge to the jury, even though no exception or objection was taken to the ruling and even though no motion was made for a new trial.³⁷⁴

4. APPELLATE REVIEW OF NEW TRIAL ORDERS

Although an order granting a new trial on the ground that the verdict was so excessive as to "shock the court's judicial conscience" is an exercise of the broad discretionary power inherent in the court's authority,³⁷⁵ a trial court's judicial conscience is not exempt from appellate review.³⁷⁶

[A] new trial should be granted only where substantial rights have been so violated as to make it reasonably clear that a fair trial was not had. It is an abuse of discretion to grant a new trial when the verdict finds ample support in the record and no illegal evidence is shown to have gone to the jury and nothing can be accomplished except to have another jury review the cause³⁷⁷

However, "it requires a stronger showing to upset an order granting a motion for a new trial than an order denying one."³⁷⁸

369. FLA. APP. R. 1.3, 3.2(b).

370. FLA. R. CIV. P. 2.8(b).

371. FLA. R. CIV. P. 1.4(d) (Emphasis added.)

372. FED. R. CIV. P. 5(d).

373. FLA. STAT. § 59.07(2) (1963).

374. *Smith v. McCullough Dredging Co.*, 152 So.2d 194 (Fla. 3d Dist. 1963).

375. *MacLaughlin v. Red Top Cab and Baggage Co.*, 133 So.2d 560 (Fla. 3d Dist. 1961).

376. *Bailey v. Simpson*, 148 So.2d 729 (Fla. 3d Dist. 1963).

377. *Cobb v. Brew*, 155 So.2d 814, 815-16, (Fla. 1st Dist. 1963).

378. *Russo v. Clark*, 147 So.2d 12 (Fla. 1962), *affirming* 133 So.2d 764 (Fla. 2d Dist. 1961).

5. NEW TRIAL ORDER MUST STATE GROUNDS

During the survey period, the Florida bench and bar have demonstrated a continuing disregard for section 59.07(4) of the Florida Statutes³⁷⁹ and for Rule 2.8(f).³⁸⁰ Both provide that in actions tried by a jury every order granting a new trial shall specify the particular and specific grounds therefore. Case law has construed the language to be mandatory.³⁸¹ It is immaterial that reference to the motion will reveal the grounds for the order.³⁸²

III. SUITS IN EQUITY ONLY

A. *Intervention*

Anyone claiming an interest in pending litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.³⁸³

In a suit for additional alimony, etc., the petitioning corporation took an interlocutory appeal from an order denying its petition to intervene. The court had entered an order impounding rents due the appealing petitioner. In reversing the order, the appellate court found that the petitioner came directly within the purview of Rule 3.4 and that the order impounding the rents was an unconstitutional interference with contract rights and denial of due process when the petitioner had not been served and made a party to the suit.³⁸⁴

B. *Class Action*

The plaintiff, in a taxpayer's suit for declaratory and other relief, was held³⁸⁵ to have met the requirements for maintaining a class action under the rules.³⁸⁶ Although the determination that a suit is a class action must depend upon the facts in the individual case, the court³⁸⁷ suggested the following guide lines:

(1) The complaint should allege facts showing the necessity

379. FLA. STAT. § 59.07(4) (1963).

380. FLA. R. CIV. P. 2.8(f).

381. State Rd. Dept. v. Mutillo, 155 So.2d 179 (Fla. 2d Dist. 1963); Hutchins v. City of Hialeah, 153 So.2d 864 (Fla. 3d Dist. 1963); A. & P. Bakery Supply & Equip. Co. v. H. Hexter & Son, Inc., 149 So.2d 883 (Fla. 3d Dist. 1963); Morton v. Staples, 141 So.2d 806 (Fla. 1st Dist. 1962); Webb's City Inc. v. Lugerner, 138 So.2d 531 (Fla. 2d Dist. 1962); Ponte v. Lattin, 135 So.2d 260 (Fla. 3d Dist. 1961).

382. Hammett v. Lyte Lyne, Inc., 150 So.2d 235 (Fla. 1963), *reversing* 142 So.2d 745 (Fla. 2d Dist. 1962).

383. FLA. R. CIV. P. 3.4.

384. St. Anne Airways, Inc. v. Webb, 142 So.2d 142 (Fla. 3d Dist. 1962).

385. Port Royal, Inc. v. Conboy, 154 So.2d 734 (Fla. 2d Dist. 1963).

386. FLA. R. CIV. P. 3.6.

387. Port Royal, Inc. v. Conboy, *supra* note 385, at 736-37.

for bringing the action as a class suit and the plaintiff's right to represent the class.

- (2) The plaintiff should allege that he brings the suit on behalf of himself and others similarly situated.
- (3) The complaint should allege the existence of a class, described with some degree of certainty, and that members of the class are so numerous as to make it impracticable to bring them all before the court.
- (4) It should be made clear that the plaintiff adequately represents the class; generally, the interest of the plaintiff must be coextensive with the interest of the other members of the class.
- (5) A class suit is maintainable where the subject of the action presents a question of common or general interest, and where all the members of the class have a similar interest in obtaining the relief sought.
- (6) The common or general interest must be in the object of the action, in the result sought to be accomplished in the proceedings, or in the question involved in the action. There must be a common right of recovery based upon the same essential facts.

C. *Setting Aside a Default*

When a defendant in an equity suit has defaulted in answering the complaint, the court may proceed to a decree which will become final, unless the court shall vacate the default or enlarge the time for serving an answer for cause shown upon motion and affidavit within 10 days of the entry of the decree.³⁸⁸ Failure to file the motion within the stipulated 10-day period is jurisdictional.³⁸⁹ Failure to file an affidavit with the motion will preclude its consideration where "the grounds of the application to open a default are [not] evident on the face of the record."³⁹⁰ Although granting a motion to vacate a default is discretionary with the court, "in a case of reasonable doubt, where there has been no trial upon the merits, the discretion of the trial judge is usually exercised in favor of granting the application so as to permit a determination of the controversy upon its merits."³⁹¹

D. *Interpleader*

To avoid double or multiple liability the rules³⁹² now provide for interpleader—both strict interpleader and a bill in the nature of interpleader. The device is available both to defendants and to plaintiffs.³⁹³

388. FLA. R. CIV. P. 3.10.

389. *Hickman v. Hickman*, 147 So.2d 555 (Fla. 2d Dist. 1962).

390. *Thomason v. Jernigan*, 146 So.2d 905, 906 (Fla. 1st Dist. 1962).

391. *Simon v. Leach*, 148 So.2d 739, 740 (Fla. 3d Dist. 1963).

392. FLA. R. CIV. P. 3.13.

393. *Ibid.* See also *Bradford Builders, Inc. v. Phillips Petroleum Co.*, 154 So.2d 189 (Fla. 2d Dist. 1963); *Barns & Mattis*, 1962 *Amendments To The Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 302 (1962).

In the case of strict interpleader, the initiating party is a mere stakeholder of a common fund or thing to which two or more persons claim the right of ownership through a common source. The stakeholder has no interest in the subject matter of the litigation, is not independently liable to any of the claimants, and has not in any way contributed to the existence of the conflicting claims.³⁹⁴ In *Riverside Bank of Jacksonville v. Florida Dealers and Growers Bank*,³⁹⁵ the First District Court held that a counterclaim may properly be asserted when the action is a bill in the nature of interpleader rather than one for strict interpleader.

E. Rehearing

No rehearing shall be granted unless the petition is served within ten days after the recording of the decree.³⁹⁶ In *Bradford Builders, Inc. v. Phillips Petroleum Co.*³⁹⁷ a building contractor brought suit to determine the rights of the respective parties against its employer and various subcontractors employed by the builder. The court entered an order dismissing the corporate defendant, conditioned upon its payment into the registry of the amount alleged to be due; then the plaintiff moved to amend the order to require the corporate defendant to pay interest in addition to the principal amount. The court denied the plaintiff's motion on the ground that it had not reserved jurisdiction in the dismissal order and, therefore, was without jurisdiction to compute interest even if owed. On the plaintiff's appeal, the appellate court disagreed. It held that the motion to amend was equivalent to a petition for a rehearing³⁹⁸ and that, within the purview of that rule, "within" means "not later than." Therefore, "[a] timely petition for a rehearing after a final decree preserves the jurisdiction of court for the purpose of disposing of the petition on its merits, even if filed after announcement, but before the decree is actually entered."³⁹⁹

The appellee moved to dismiss an appeal taken 61 days after the recording of a final decree as untimely. In denying the motion, the district court held⁴⁰⁰ that it was incumbent upon the movant to establish whether or not a timely petition for a rehearing had been filed. Although a petition for a rehearing does not operate to stay the proceedings unless so ordered by the court,⁴⁰¹ it does toll the time for taking an appeal.⁴⁰²

394. *Riverside Bank v. Florida Dealers & Growers Bank*, 151 So.2d 834 (Fla. 1st Dist. 1963).

395. *Ibid.*

396. FLA. R. CIV. P. 3.16(a).

397. 154 So.2d 189 (Fla. 2d Dist. 1963).

398. FLA. R. CIV. P. 3.16(a).

399. *Bradford Builders, Inc. v. Phillips Petroleum Co.*, 154 So.2d 189, 190 (Fla. 2d Dist. 1963).

400. *Fair v. Fair*, 150 So.2d 266 (Fla. 2d Dist. 1963).

401. FLA. R. CIV. P. 3.16(b).

402. FLA. APP. R. 1.3.