7-1-1955

Appellate Procedure . .. In Florida... Adjusted to the New 1955 Supreme Court Rules

Fuller Warren

MIAMI LAW QUARTERLY

VOLUME 9 SUMMER, 1955 NUMBER 4

APPELLATE PROCEDURE . . . IN FLORIDA . . . ADJUSTED TO THE NEW 1955 SUPREME COURT RULES

FULLER WARREN*

INTRODUCTION

There is something of a tone of arbitrariness when one uses the word "rule." There is a tone of something inflexibly applied and incapable of human adjustment. Nothing could be further from the truth in the case of the 1955 Florida Supreme Court Rules. On the contrary, these rules are rigid enough to promote impartiality, flexible enough to enable an adjustment to the human element of the litigants, and explicit enough to assure clarity. These, of course, are the objectives of a well formulated procedural code. In the parlance of naval phraseology, "The 1955 Rules have achieved their mission."

The prescriptive details of the rules themselves will be explored in the sections that follow. It is well, though, first to summarize the cardinal principles that the Supreme Court of Florida has applied in construing the rules in the past. To a degree, these cardinal principles express attitudes; and it is reasonable to say that such attitudes will continue to prevail in the interpretation of the new rules. Attitudes, like traditions, form a wholesome link between the past and the present.

Thus, the supreme court has stated that properly enacted rules[1] are binding upon both the courts and the litigants.[2] The concept that there is "equity in equality" applies with full force. Correspondingly, litigants are charged with notice of the contents of the rules themselves.[3] Ignorance of rules (like ignorance of the law) is no excuse. As a general doctrine of semantic construction, it has been held that rules should be analyzed like statutes.[4] As a general doctrine of expeditiousness, it has been held that rules should be applied to achieve a speedy and fair adjudication of

*Former Governor State of Florida; member Florida Bar.

1. It has been held that a court may not establish rules of practice that are contrary to statutes. Fisher v. Rowe, 110 Fla. 141, 148 So. 588 (1933).

2. Bryan v. State, 94 Fla. 909, 114 So. 773 (1927); Morgan v. Eaton, 59 Fla. 557, 51 So. 814 (1910).

3. Russ v. Solomon, 152 Fla. 348, 12 So.2d 121 (1943).

4. Merchants' National Bank of Jacksonville v. Grunthart, 39 Fla. 388, 22 So. 685 (1897).

cases.[5] As to constitutionality, the supreme court clearly has the authority to prescribe its own rules. In the language of the court itself:

> If not limited in the Constitution, the great weight of authority in this country supports the view that courts have inherent power to make rules governing contempt, admissions to the bar, and for the conduct of the business brought before them. They have no power to affect substantive law or jurisdiction.[6]

In summary, these basic tenets supply the philosophy of the court. Philosophies are important in rule-making as elsewhere. Philosophies provide the perspective from which details can be viewed, and perspective is the material that adds force to the details.

With this background of perspective, it is well next to shift consideration to the detailed requirements of the rules themselves.

The Court

The court is authorized to sit as a single body or in divisions.[7] For some few types of cases, it is mandatory that a judgment be rendered by the two divisions of the court and the chief justice. These few types of cases, of course, are of such a nature as to require the concerted action of the entire court.[8] The prerogatives of the court are broad enough. In addition to its adjudicative responsibilities in contested cases, the court has the power to grant or deny writs of "mandamus, prohibition, quo warranto, certiorari, habeas corpus, and all writs necessary to the complete exercise of the jurisdiction of the court."[9] An individual justice may also issue a writ of habeas corpus, but this power is to be exercised only in an extreme emergency.[10] The rule permitting a writ of habeas corpus by an individual justice is desirable. It permits speedy action by an individual justice of the court; and in many criminal situations, such prompt action is particularly necessary to preserve an accused's civil rights.

The chief justice is made the "administrative officer of the court"[11] in addition to his regular judicial duties.[12] Thus, for example, the chief justice has the power to call circuit judges to fill temporary vacancies in the court;[13] or to reassign cases where a justice has not prepared an opinion within the time designated in the rules.[14] Other administrative duties of the chief justice are prescribed in the rules. The concept of a chief justice

5. Demos v. Walker, 99 Fla. 302, 126 So. 305 (1930).
6. Petition of Florida State Bar Association for Promulgation of New Florida Rules of Civil Procedure, 145 Fla. 223, 199 So. 57 (1940).
7. Fla. Sup. Ct. Rule 1(1).
8. Fla. Sup. Ct. Rule 1(3)(b).
9. Fla. Sup. Ct. Rule 1(3)(c).
10. Fla. Sup. Ct. Rule 1(3)(d).
11. Fla. Sup. Ct. Rule 4(a).
12. Fla. Sup. Ct. Rule 4(c).
13. Fla. Sup. Ct. Rule 4(d) refers to such temporary vacancies as those caused by an "absent, disqualified, or disabled justice."
14. Fla. Sup. Ct. Rule 4(f).

as an "administrative officer" has been the target of much discussion and deliberation, although the concept can hardly be viewed as completely unorthodox. It has been tried elsewhere.[15] Florida has accordingly joined that group of states that are seeking to improve the functioning of courts through their more efficient organization. The chief justice as an "administrative officer" is part of this effort. Its operation and effect will warrant watching in Florida as elsewhere.[16]

The rules provide for the duties of the (1) clerk,[17] (2) sheriff,[18] and (3) marshall.[19] They also provide for a library.[20] The duties and prerogatives of these officers correspond to those typically assigned to them in other courts. The offices, though unquestionably essential to the functioning of the supreme court, have no features that might be categorized as distinctive Florida law.

Regular terms of the court begin the "second Tuesday in January and June."[21] Special terms may be called whenever a majority of the justices so decide.[22] It is also provided that undecided cases at one term shall be continued to the following term.[23] The nature of the rules therefore makes it clear that the court must decide all of the cases brought before it. For this reason it is important that the volume of litigation be held within reasonable bounds. It is desirable that the court have an adequate amount of time to consider those cases brought before it, for adequate consideration involves adequate time.

The sessions of the court are public, "except conference sessions set aside for the discussion and consideration of pending cases and the formulation of opinions by the court."[24] Public sessions, of course, are important; in fact, they are a part of the spirit of the constitution itself.[25]

Motion days are on Monday.[26] This is the same rule that existed previously.[27] Motions, of course, may be heard at other times if the court feels that such a hearing is warranted. Oral arguments are heard from Tuesday through Friday.[28]

---

15. N.J. STAT. ANN. § 2A:12-1.
16. Woelper, *The Administrative Office of the Courts of New Jersey*, 25 N.Y.U.L.Q. REV. 56 (1950).
17. FLA. SUP. CT. RULE 2.
18. FLA. SUP. CT. RULE 3.
19. FLA. SUP. CT. RULE 4.
20. FLA. SUP. CT. RULE 5.
21. FLA. SUP. CT. RULE 6(1).
22. FLA. SUP. CT. RULE 6(2).
23. FLA. SUP. CT. RULE 6(3).
24. FLA. SUP. CT. RULE 7(1).
25. U.S. CONST. Art. VI. FLA. CONST. Declaration of Rights, § 11.
26. FLA. SUP. CT. RULE 7(2).
27. FLA. SUP. CT. superseded RULE 3.
28. FLA. SUP. CT. RULE 7(3).

Attorneys

An attorney may be anyone licensed to practice in Florida.[29] Comity may also be extended to foreign attorneys seeking to practice in a particular case.[30] Clerks and secretaries of the justices are prohibited from practicing before the court during the tenure of their appointments.[31] This is the same rule followed by the Supreme Court of the United States.[32]

The attorney is an agent of his client,[33] but he is likewise an officer of the court. His position of agency is therefore under the court's surveillance. Accordingly, an attorney of record is not permitted to withdraw except with the approval of the court itself.[34] Correspondingly, additional attorneys may not appear in a case after the proceedings have been filed or docketed unless the court consents to the appearance of such counsel.[35] It is plain that the court has imposed positive and unequivocal duties upon the counsel that appear before it.

It is also not improper that "duties" carry with them "rights". The court has accordingly not forgotten the rights of counsel. Thus, the court has previously held that it may require a client to pay his attorney's fees before permitting the substitution of other counsel.[36] An early case prohibited an attorney from signing his client's appeal bond.[37] In another early instance, the court indicated that an attorney signing such a bond might be held in contempt of court.[38]

In general, the new rules have continued the concepts of the previous rules insofar as attorneys are concerned. The most noteworthy distinction is the insertion of a provision (in the new rules) requiring the court's consent to the appearance of additional attorneys after a case has been filed or docketed.[39]

Jurisdiction of Appeals

The writ of error is abolished and the appeal substituted. This was the regulation under the previous rules,[40] and it has likewise been continued under the 1955 rules.[41]

Appeals from final orders, judgments or decrees must be taken within 60 days from their rendition, unless the court or an express statute provides

---

29. Fla. Sup. Ct. Rule 8.
30. Fla. Sup. Ct. Rule 9.
31. Fla. Sup. Ct. Rule 10.
32. U.S. Sup. Ct. Rule 3. The Rules of the Supreme Court of the United States also prohibit practice for a period of two years after the termination of a clerk's or secretary's appointment. The two year period does not appear in the Florida Rules.
33. Fla. Sup. Ct. Rule 11(1).
34. Fla. Sup. Ct. Rule 11(2).
35. Fla. Sup. Ct. Rule 11(3).
36. Vosges Syndicate v. Everglades Club Co., 122 Fla. 267, 164 So. 881 (1935).
37. Gordon v. Camp, 2 Fla. 23 (1848).
38. Love v. Sheffelin, 7 Fla. 40 (1857).
39. See note 35 *supra*.
40. Fla. Sup. Ct. Rule 2(a).
41. Fla. Sup. Ct. Rule 12(1).

otherwies.[42] The supreme court, in construing the previous rules, has granted an extension of time upon the showing of good cause. For example, in one case the supreme court granted additional time to file a transcript where the delay was occasioned by a belief by the appellant that the parties could settle their case.[43] It is not clear, however, whether or not such extensions would be granted under the 1955 rules.

The appeal is deemed to have been commenced when notice thereof has been filed in the clerk's office from whence the appeal is being taken.[44] Such notice should be recorded in the minutes of the court;[45] also, the filing of the notice gives the supreme court jurisdiction of the case itself.[46] Considerable data is required in the notice. The rules themselves prescribe the information that must be included.[47]

The summons and severance is abolished.[48] In construing a similar regulation in the previous rules,[49] the supreme court emphasized the need of including the names of all parties in either the caption or in the body of the entry of appeal. This included both the appellants and appellees.[50] In another case the court indicated that the use of the abbreviation "et. al." would be ineffective as to parties to whom it sought to apply.[51] In spite of the apparent language of the rule's liberality as to parties, the court has insisted upon being informed as to the litigants involved. There have been a number of other cases construing the previous, comparable rule.[52] These cases form a pool of accumulated evperience, and they can still be of service for precedents.

Interlocutory appeals are taken by proceedings in the nature of certiorari.[53] As in the case of appeals from final judgments, the appeal petition from an interlocutory decree must be taken within 60 days.[54] It is not clear whether the court could properly extend this period upon the showing of good cause, although a previous precedent would seem to show that the court might exercise such a prerogative.[55] Frivolous or dilatory appeals may be dismissed by the court with costs imposed upon the petitioner.[56] It is commendatory that the rules impose costs upon the offender of a frivolous or dilatory appeal. The appellate procedures should

42. FLA. SUP. CT. RULE 12(2).
43. Magnant v. Peacock, 156 Fla. 688, 24 So.2d 314 (1945).
44. FLA. SUP. CT. RULE 12(3).
45. FLA. SUP. CT. RULE 12(6).
46. FLA. SUP. CT. RULE 12(5).
47. FLA. SUP. CT. RULE 12(4).
48. FLA. SUP. CT. RULE 13.
49. FLA. SUP. CT. Superseded RULE 13.
50. Buck v. All Parties, 86 Fla. 86, 97 So. 313 (1923).
51. Lessic v. Booske, 86 Fla. 251, 97 So. 383 (1923).
52. See note 49 *supra*.
53. FLA. SUP. CT. RULE 14(1).
54. FLA. SUP. CT. RULE 14(2).
55. Magnant v. Peacock, 156 Fla. 688, 24 So.2d 314 (1945).
56. FLA. SUP. CT. RULE 14(4).

aid in the administration of justice. These procedures should not (through the media of frivolous or dilatory appeals) be permitted to frustrate the judicial process. In this same vein, there is much to be said for imposing punitive costs upon a plaintiff in the trial court where he brings a case obviously designed to harass or intimidate a defendant. Here too, the trial courts should not permit themselves to be used for purposes of duress, and where a petitioner is clearly attempting such an unwarranted objective, it is only proper that his action be promptly dismissed with punitive costs taxed to him. A further deterrent should also include the defendant's attorney's fees.

Appeals from commissions and boards are governed by the supreme court's rules, insofar as they are applicable.[57] Thus, no particular effort is made to prescribe an appellate formula for administrative law agencies. Such a viewpoint appears logical enough. Any particular problems arising can be taken into consideration by the court without the need of formulating a separate portfolio of rules for these agencies. In this connection, it has previously been held that a writ of certiorari will lie to review the orders of administrative boards.[58]

A special procedure is provided for the review of orders of the Florida Industrial Commission. Thus, it would appear that the review of such orders must follow the especially prescribed procedure,[59] whereas the orders of other agencies are merely adapted to the general appellate procedures of the court.[60]

The 1955 rules make but a brief mention of appeals in criminal cases, and in effect, it is simply stated that these appeals are to be prosecuted in accordance with Chapter 924 of the Florida Statutes.[61]

The 1955 rules state that they shall be applicable to proceedings involving probate, guardianship, or estates of infants.[62] Here too, the general rules are adapted to special types of proceedings. This follows the broad policy of making the rules as flexible as possible so that a different portfolio of rules is not required for each particular category of proceedings. Such flexibility is desirable. Rules of any sort should be kept to minimum, and the flexibility of the 1955 rules has enabled the accomplishment of this objective.

The lower court has the discretion to grant supersedeas (upon the posting of reasonable bond) for an appeal from an interlocutory order.[63] In the case of a final judgment or decree, supersedeas is automatic—and

57. FLA. SUP. CT. RULE 15.
58. Greater Miami Development Corp. v. Pender, 142 Fla. 390, 194 So. 867 (1940).
59. FLA. SUP. CT. RULE 16.
60. See note 57 *supra*.
61. FLA. SUP. CT. RULE 17. Appeals are also subject to Rule 35, which basically prescribes the time for filing a transcript of the record and the details of the brief itself.
62. FLA. SUP. CT. RULE 18.
63. FLA. SUP. CT. RULE 19(1).

usually conditioned only upon the posting of the bond.[64] A motion must naturally be made for supersedeas[65] and an *adequate* bond must be posted.[66] An aggrieved litigant is also granted the right of review where he alleges either an arbitrary refusal by the court to grant supersedeas or an unreasonable bond.[67] As might be expected, a bond is not required of a state or any of its political subdivisions or agencies where they have prosecuted an appeal.[68] Little would seem to be gained by requiring a bond in such instances.

Supersedeas and the posting of bond was naturally required by the previous rules.[69] Iittle difficulty was experienced with these provisions under the previous rules, and it is anticipated that the new rules will be equally simple in their application. Many of the potential problems such as "unreasonable amounts for bonds" or "arbitrary refusals to grant supersedeas" simply do not arise in practice. These potential problems are therefore more academic than practical. Supersedeas is a natural and essential part of the appellate procedure,[70] and in general, the objective is to preserve the status quo of the litigants pending an outcome of the appeal. Both the staying order and the bonding requirement are understandably essential in achieving this goal.

Extraordinary Writs

Extraordinary writs are the means for enforcing a court's responsibilities and prerogatives. In effect, they form the media for achieving effective action. The 1955 rules, of course, provide for the extraordinary writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and staying writs.[71] The rules provide that applications for these writs will not be heard when they involve questions of fact which will require the taking of testimony.[72] Thus, the entire factual record must have been achieved before the application for the writ is submitted. Oral arguments are permitted upon the writs.[73] It is only provided that *no new testimony* be introduced.

Each of these extraordinary writs is important as an adjunct to the court's functioning, and each of the writs will accordingly be discussed.

In a general way, mandamus petitions must apply to a state officer or agency.[74] It serves to test whether or not such an officer or agency should

64. Fla. Sup. Ct. Rule 19(2)(3).
65. Fla. Sup. Ct. Rule 19(5).
66. Fla. Sup. Ct. Rule 19(6).
67. Fla. Sup. Ct. Rule 19(10).
68. Fla. Sup. Ct. Rule 18(12).
69. Fla. Sup. Ct. superseded Rule 35.
70. A supersedeas and bonding requirement is a typical part of a procedural code. For example, these requirements appear in U.S. Sup. Ct. Rule 36, and are less detailed than the Florida supersedeas requirements, but seek to achieve the same objective.
71. Fla. Sup. Ct. Rules Part IV.
72. Fla. Sup. Ct. Rule 20(3).
73. Fla. Sup. Ct. Rule 20(5).
74. Fla. Sup. Ct. Rule 21(1).

be required to perform a recited duty. It has also been held that a specific application must be made for a writ of mandamus.[75]

Applications may be made for a writ of certiorari.[76] The writ is broad in its scope, and it is therefore designed to inquire into a wide range of errors. For this reason, the court has understandably insisted upon a clear-cut showing of a defect in jurisdiction or some other fundamental irregularity. The tenor of the past decisions has been an emphasis upon explicitness.[77]

The rules provide for the writ of prohibition,[78] and as elsewhere, the writ is designed to prevent contemplated official action. Thus, for example, it has been used in one Florida case where it was sought to prevent judicial action by an allegedly disqualified judge.[79]

Quo warranto may be invoked to test the right of an office holder. The writ itself is brought in the name of the state by the attorney general. Also, the writ may be brought by any person claiming an office or franchise, if the attorney general refuses to issue the writ.[80] The procedure itself is governed by the rules on mandamus.[81]

Habeas corpus is, of course, a basic prerogative of the court.[82] It is also provided that notice of the application must be given to the attorney general.[83]

Any necessary constitutional writs may be issued upon proper application.[84] Where necessary, the court may also permit the case to be disposed of on its merits by allowing the attorneys to file briefs, and the case thereafter disposed of without further arguments.[85]

Certified Questions

The rules provide for the certification of a question of law that has not heretofore been determined in the state. Thus, the circuit judge is given the power of making such a certification where there is such a question pending in a case before him.[86]

The rules make it clear that the certification is to be effected by the judge of the circuit court—not counsel. It is the judge's prerogative to decide whether he is to (1) rule upon the unique question himself, or (2) certify it.

Certified questions were also permitted by the previous rules of the Supreme Court of Florida.[87] In this connection, the entire topic of

75. State *ex rel.* Watson v. Lee, 150 Fla. 496, 8 So.2d 19 (1942).
76. Fla. Sup. Ct. Rule 22(1).
77. Great American Insurance Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932).
78. Fla. Sup. Ct. Rule 23.
79. Department of Public Safety v. Koonce, 147 Fla. 616, 3 So. 2d 331 (1941).
80. Fla. Sup. Ct. Rule 24(1).
81. Fla. Sup. Ct. Rule 24(2).
82. Fla. Sup. Ct. Rule 25(1).
83. Fla. Sup. Ct. Rule 25(2).
84. Fla. Sup. Ct. Rule 26(1).
85. Fla. Sup. Ct. Rule 26(2).
86. Fla. Sup. Ct. Rules Part V.
87. Fla. Sup. Ct. Superseded Rule 38.

certified questions focuses attention upon one of the broader philosophical facets of appellate procedure, and for this reason, the topic deserves at least a brief discussion.

It is an axiom of adjective law that the expense and time of litigation should be reduced to a minimum. For this reason, there is much to be said for the practice of certifying a question for decision. By definition, the question must be "without controlling precedent in this State."[88] The certification procedure therefore eliminates the circuit court's rendering a decision that might later be reversed on appeal. It is fair enough to place the trial of facts completely within the purview of the circuit judge, but the certification of law avenue permits a convenient means for obtaining the most authoritative decision upon a unique question of law.

It should be emphasized that the certification procedure is subject to strict construction.[89] The question must be capable of narrow definition, and certain in its scope. It must not degenerate to mere speculation or conjecture. This element of certainty is a necessary requirement, since the supreme court must definitely be able to determine what it is being asked. However, if there is such certainty, the question need not necessarily confine itself to substantive law. The court, for example, has permitted a certified question on an important phase of procedural law.[90]

Philosophy is noted by the presence of fine lines that delineate the scope of a major doctrine. As noted earlier, the rule of certified questions involves some of the most interesting phases of procedural philosophy. Often, for example, the supreme court must decide whether it is being called upon to decide a "factual" or a "legal" question.[91] The delineation is not always easy. In all instances, too, the supreme court must assure itself that the question itself is explicit enough to warrant a certification.

The certification procedure has generated a certain amount of litigation under the previous rules, although the volume of these cases has not been unwieldy. In general, the procedure is founded upon a sound enough premise, and in general, it can be said to be a valuable part of the appellate procedure.

Conclusion

A conclusion may appropriately be a parting view at what has transpired. It may also appropriately be an opportunity for appraisal.

The 1955 supreme court rules have accomplished a wholesome objective. The new rules, of course, have embodied large segments of the previous rules; but this is as it should be. One should not change things just for

88. Fla. Sup. Ct. Rule 27(1).
89. Lanier v. Florida Louisiana Red Cypress Co., 152 Fla. 428, 12 So.2d 117 (1943).
90. Malcolm v. Stark 38 So.2d 469 (Fla. 1949).
91. The question in Cerny v. Cerny, 152 Fla. 333, 11 So.2d 777 (1943), might conceivably have been categorized as either "factual" or "legal."

the sake of having everything new. What is good should be kept. This has been done in the case of the 1955 rules. Modifications have been made where appropriate. The rules have retained their simplicity and brevity. Both are desirable. The previous rules generated only a very small amount of litigation, which speaks well for their clarity. This element of clarity has likewise been preserved in the 1955 rules.

The limitations of space have necessitated a restriction of the discussion to the rules governing the supreme court's organization and jurisdiction.[92] Economy of space has prevented a discussion of the practice phase of the rules.[93] The rules themselves are not difficult. Their simplicity was an objective of their draftsmen, and this goal has been achieved. They do, though, require some element of analysis, and their comprehension is clearly the responsibility of every attorney practicing before the Supreme Court of Florida.

92. FLA. SUP. CT. RULE, Parts I-V.
93. FLA. SUP. CT. RULE, Part VI.