5-1-1954

Civil Procedure

Milton S. Marcus

Donald H. Norman

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Milton S. Marcus and Donald H. Norman, Civil Procedure, 8 U. Miami L. Rev. 450 (1954)
Available at: http://repository.law.miami.edu/umlr/vol8/iss3/19

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.
Venue

Florida Revenue Act.—The Supreme Court has several times been called upon to interpret the venue provisions of the Florida Revenue Act.1 In Gay v. Jacksonville Symphony Ass'n,2 the association sought a declaratory decree for construction of part of the act in the Circuit Court of Duval County. The defendant-State Comptroller moved for dismissal on the ground that the action for construction should have been brought in the Circuit Court of Leon County, the official residence of the comptroller. On appeal from a denial of the motion to dismiss, the Supreme Court held that the revenue statute provision does not allow suit in other than Leon County, where the comptroller objects to venue, unless there is some "... invasion of the plaintiff's constitutional rights or an attempt to seize property is alleged."

This decision is substantially the same as that in Henderson v. Gay,3 an earlier case construing the statute, wherein the court pointed out that to allow suit in any circuit court of the state where there was no "... allegation of an invasion of the plaintiff's constitutional rights or of an attempt to seize property" would be unduly burdendsome because of the numerous suits the comptroller is called upon to defend.

Jurisdiction

Law or equity.—Two decisions involving construction of the rule governing the transferral of actions commenced in equity to the law docket4 are of interest. The first, Manning v. Clark,5 held that the trial court, in the order of transferral, should establish the procedure to be followed with reference to the time in which the parties could make the necessary alterations in their pleadings. The second, Brass v. Reed,6 provided that the plaintiff would be given an opportunity to move that the cause be transferred to the law side of the docket within thirty days of the decision of the chancellor that the action was not cognizable in equity.

1. Fla. Stat. § 212.15 (1951) (which provides that a taxpayer "shall have the right" to have an adverse decision by the comptroller reviewed "in any of the circuit courts of Florida").
2. 53 So.2d 110 (Fla. 1951).
3. 49 So.2d 325 (Fla. 1950).
4. Fla. Stat., Equity Rules, rule 75 (1951) (which provides that when it appears that a suit commenced in equity should have been brought as an action at law, it should forthwith be transferred with only such alterations in the pleadings as are essential).
5. 62 So.2d 352 (Fla. 1952).
6. 64 So.2d 646 (Fla. 1953).
These cases seem to afford a definite construction of a rule which states the court’s policy in general terms.

In another case, the Supreme Court affirmed that the trial court could not transfer from the law docket to equity, saying: “Since the new rules are silent on this point and courts of law are limited in procedural matters by rule or statute, we are driven to the conclusion that there was no authority to transfer this cause to the Equity docket.”

**Process**

*Form.*—The court discussed the requirement of the clerk’s signature on a summons, before the summons could be properly “issued” in a civil action, in a sound decision. An order was entered in the Circuit Court for Palm Beach County quashing service of process on the ground that the original summons served was not signed by the clerk as required by law, but giving leave for the amendment of the original summons by placing thereon the clerk’s signature, service to be effective from the latter date. The Supreme Court held that the original unsigned paper, called a “summons,” was void, and not susceptible of amendment by direction to the clerk to addend his signature after service.

This decision clearly follows the court’s policy as enunciated in the rule that a summons shall be “issued” by the clerk; such a printed form with only the names of plaintiff and defendant inserted thereon, without authority to authenticate it, is not a “process.”

**Pre-Trial Conference**

*Failure to attend.*—In Beasley v. Gisten, the circuit court entered an order dismissing the cause with prejudice with costs to the plaintiff in an action in which plaintiff’s counsel failed to appear for a pre-trial conference. The Supreme Court held that the rule that counsel is the litigant’s agent and that his acts are those of his principal, does not justify dismissal of the cause with prejudice upon failure of counsel to attend, since such a dismissal would punish the litigant instead of counsel. The court has power to discipline counsel for refusal or failure to attend such a conference, and a refusal may warrant a citation for contempt or a lesser degree of punishment.

---

7. Wood v. Wagner, 55 So.2d 537 (Fla. 1951).
11. 61 So.2d 179 (Fla. 1952).
Affidavits.—In Hahn v. Frederick, petitioner appealed the refusal of the judge below to disqualify himself for prejudice in pending litigation. The Supreme Court held that the terms of the disqualification statute, that petitioner's affidavit be supported “in substance” by those of two other persons, were not met by the two supporting affidavits which said they believed petitioner's affidavit to be true. The reason advanced for the holding by the Supreme Court was that affidavits alleged on information and belief are insufficient in any instance where it is required that the affidavit attest to the substantive truth of matters alleged and not merely to good faith.

Justice Terrell pointed out in his dissent that this interpretation does not further the primary object of the statute—the protection of litigants where there is a “fear” of prejudice.

Discovery

Refusal to give deposition.—In a separate maintenance proceeding instituted by a wife after her husband abandoned her and returned to New Jersey, the Supreme Court affirmed a decree entered in favor of the wife from which the husband had appealed. Upon the failure of the husband to comply with an alternative order requiring him to appear in Florida to give a deposition or to pay the expenses necessary for plaintiff or her attorney to take his deposition in New Jersey, the trial judge struck the husband's answer and entered a final decree in favor of the wife in an ex parte proceeding.

In affirming the decree, the Supreme Court seemed impressed by the substantial wealth and the bad faith of the husband. Were it not for these facts, the rule that a defendant should not be required to travel any great distance in order to be examined by plaintiff for discovery purposes where no counterclaims or affirmative defenses are involved might well apply.

Motion to inspect: Discretionary power of the court.—Where defendants appealed from a denial of a motion in the trial court for the inspection of an object, the Supreme Court held that the granting or denial of such a motion for inspection is a matter of discretion and not of right. In affirming the denial, the Supreme Court said that the burden is on the movants to show that the court clearly abused its discretion in denying the motion, and that movants suffered thereby.

13. 66 So.2d 823 (Fla. 1953).
Here the object sought to be inspected was the engine of an insured aircraft allegedly destroyed. Movant-insurers sought to determine the percentage of structural damage by an expensive and time-consuming internal inspection of the engine, while the court felt that an external examination was far more practical.

**COMPLAINT**

*Motion to amend.*—In *Twyman v. Livingston*, an action for damages based on an oral agreement for the purchase and resale of realty, the Supreme Court reversed a judgment for the defendant. It was held, on appeal, that where an order was entered by the trial court overruling defendant’s demurrers directed to two counts of the plaintiff’s declaration, it was error for the trial court to refuse plaintiff’s application to amend these counts when the court subsequently determined they were fatally defective. This decision seems wholly within the spirit of the rule regarding the amendment of pleadings.

*Bill of particulars.*—Concerning itself with the rule providing for clarification of the pleadings, the court, in *Moore v. Boyd*, held that the inadequacy of a complaint following the form of the common counts as set forth in a repealed statute, justified the defendant’s request for a bill of particulars before answering to the complaint. It was error to treat his motion therefore as a nullity and to enter a default judgment on defendant’s failure to answer within the time prescribed.

**JURY TRIAL**

*Discretion of court.*—In *Wood v. Warriner*, the Supreme Court construed the rule regarding a demand for a jury trial, holding that it was within the discretion of the trial judge to allow a party to amend his pleadings and obtain a jury even as late as the day of trial. This is a most liberal interpretation of the rule and follows the answer of the court to a certified question in *Foundation of Youth Broadcasting Co. v. Church*.

Again broadly interpreting the rule and pointing out its purpose was to relieve congested court dockets, not to deprive litigants of jury trial where desired, the Supreme Court reversed a trial court ruling that

18. 58 So.2d 518 (Fla. 1952).
21. 62 So.2d 427 (Fla. 1952).
23. 62 So.2d 729 (Fla. 1952).
24. Fla. Stat. Common Law Rules, rule 31 (1951) (which provides that unless either party demands a jury trial in his pleadings, it shall be waived).
25. 51 So.2d 728 (Fla. 1951).
a demand for jury trial filed with the amended complaint, but in a separate document, did not meet the requirements of the rule. The fact that the request was in a separate document is unimportant if timely made, and timeliness is largely a matter of trial court discretion.\(^\text{27}\)

**Summary procedures.**—In the case of Dezen v. Slatco,\(^\text{28}\) the Circuit Court for Dade County entered an order of execution for sheriff’s levy on a car owned by the defendant. Answering an order to show cause why her ownership of the car should not be set aside as fraudulent,\(^\text{29}\) the defendant demanded jury trial. The circuit court did not err in refusing defendant’s demand. The rule as to demand for jury trial\(^\text{30}\) does not apply to such limited summary procedures authorized by statute. The defendant could have jury trial by complying with the rule relating to claims of third parties to property taken under levy.\(^\text{31}\)

**Taking Testimony**

**Extension of time.**—Discussing extensions of time for taking testimony, the Supreme Court in Hewett v. Hewett,\(^\text{32}\) held that the rule\(^\text{33}\) required that there be cause shown for the granting of further time, and that the cause must be expressed in the record; since there was no showing of excusable neglect in failing to take testimony within the time allowed, an extension for this purpose was error.

**Affirmative Defenses**

**Statute of limitations.**—In Tuggle v. Maddox,\(^\text{34}\) the Supreme Court held that the trial court erred in dismissing *ex nemo motu* an action by a divorced wife against her ex-husband for expenses which she had incurred in supporting a child of the parties. The ground for the decision was that the action was barred by the statute of limitations, since the ex-husband had not pleaded the statute as an affirmative defense.\(^\text{35}\)

This decision clearly follows the rule which requires that such defenses must be affirmatively pleaded.\(^\text{36}\)

**Pleading of waiver or estoppel.**—In an action on a life insurance policy by the beneficiary,\(^\text{37}\) defendant-insurer raised in its answer the

---

28. 66 So.2d 483 (Fla. 1953).
29. FLA. STAT. § 55.57 (1951) (which provides for setting aside of transfers of property where fraudulent as to a judgment creditor).
32. 65 So.2d 51 (Fla. 1953).
33. FLA. STAT. Equity Rules, rule 46 (1951) (which permits extensions of time for taking of testimony only on "good cause shown").
34. 60 So.2d 158 (Fla. 1952); accord, Proctor v. Schomberg, 63 So.2d 68 (Fla. 1953).
35. FLA. STAT. Common Law Rules, rule 8(a) (1951).
affirmative defense of fraud in the medical history of the insured. Without filing a reply, plaintiff attempted to show at trial that defendant was estopped to assert fraud, since the agent of the insurer had compiled the medical history in question. Defendant's objection to the introduction of such proof was overruled. On appeal judgment for plaintiff was reversed, and a new trial granted by a divided Supreme Court (4-3). The majority opinion held that in accord with the rule that waiver or estoppel must be affirmatively pleaded to meet an affirmative defense raised by defendant, it was error to admit such proof. The minority opinion argued that to require a formal pleading by the plaintiff to assert estoppel to offset defendant's affirmative defense of fraud was a needless technicality. There is merit in the dissent's contention, but any change in this procedure should come as an amendment to the rule.

Summary Judgment

Effect of denial of motion to dismiss.—In an action against restaurant operators for food poisoning, the Circuit Court for Dade County denied defendant's motion to dismiss the complaint, but granted defendant's motion for summary judgment, on the ground that the pleadings and depositions showed that plaintiff did not have a cause of action as a matter of law, and plaintiff appealed. The Supreme Court reversed this judgment, holding that the trial court determined the presence or absence of a cause of action in plaintiff's favor when it denied defendant's motion to dismiss, and could not thereafter grant summary judgment on the ground proposed.

This decision seems a reasonable interpretation of the rule concerning summary judgment.

Affidavits.—In MacGregor v. Hosack, an action to recover a broker's commission, defendant's motion for summary judgment was granted by the trial court, although plaintiff offered an affidavit in support of his complaint and denying defendant's affirmative defense, to which defendant presented no counter-affidavit. On appeal the Supreme Court reversed and gave judgment for the plaintiff, since defendant could not prevail on a motion for summary judgment without supporting affidavits, if plaintiff denies the defenses under oath.

Dismissal and Non-suit

Non-suit as a matter of right.—In a tort action to which defendant interposed the defense of statute of limitations, the trial court announced

41. 58 So.2d 513 (Fla. 1952).
that upon a proper motion made by defendant it would render summary judgment. Plaintiff moved for a non-suit which he claimed was due him as a "matter of right" where the court has announced its intention to render an adverse peremptory ruling. The trial court denied plaintiff's motion and was affirmed on appeal. The Supreme Court distinguished between allowing plaintiff an involuntary non-suit in the face of an adverse ruling which is preclusive of recovery because the plaintiff fails in that particular suit to prove his cause of action, and disallowing a non-suit in a case in which the adverse ruling is preclusive of recovery under any circumstances (as here where based upon the statute of limitations). In the latter instance, plaintiff has no involuntary non-suit as of right, and a summary judgment may be res judicata.

This decision apparently lends the certainty of judicial construction to a perhaps indefinite rule.

Involuntary dismissal: Want of prosecution.—The statute providing for dismissal for want of prosecution has been interpreted and discussed by the Supreme Court in a generous number of decisions. It was held that where an action was dismissed for lack of prosecution, and neither a motion for reinstatement of the cause was made nor an appeal taken from the order of dismissal, the court was without jurisdiction to order reinstatement after one month had elapsed.

In Railway Express Agency v. Hoagland, the court held the fact that the plaintiff was sojourning in Europe and had not been in contact with her counsel was insufficient to show "good cause" necessary to reinstate an action dismissed for want of prosecution. In Suddeth Realty Co. v. Wright, the chancellor dismissed the cause of action after seven years ex mero motu. Plaintiff sought reinstatement on the ground that an oral motion for transferral to law and an oral application to amend, both made some four years earlier, had never been ruled upon. An order reinstating the cause was granted below, but was reversed by the Supreme Court on review. The court felt that plaintiff's failure to secure a ruling over so long a period ought to preclude reinstatement; if formal motions had been made, they would have been ruled on forthwith.

Dismissal for want of prosecution does not, of course, bar a further

43. Fla. Stat. Common Law Rules, rule 35(b) (1951) (the rule relating to non-suits which provides "... that nothing stated herein shall preclude a non-suit from being taken pursuant to any applicable statute."). The Florida non-suit statute is Fla. Stat. § 54.09 (1951) under which it has been the long-established rule that plaintiff is entitled, as of right, to a voluntary or involuntary non-suit, the latter in case the trial court announces that it will render an adverse peremptory ruling. In such an instance, plaintiff would be able to obtain judicial review of the sufficiency of his evidence.

45. B. & L. Trucking Co. v. Loftin, 63 So.2d 276 (Fla. 1953).
46. 62 So.2d 756 (Fla. 1952).
47. 55 So.2d 189 (Fla. 1951).
CIVIL PROCEDURE

action. In Hassenteufel v. Howard Johnson, Inc. of Florida,\(^48\) the lower court specified that the dismissal was with prejudice. The Supreme Court, on appeal, held a later action on the cause was not barred. The statute does not authorize such dismissal, nor was the decision on the merits.

Reinstatement of the cause was sought in Gulf Appliance Distributors, Inc. v. Long,\(^49\) on the ground that an order allowing substitution of counsel had been entered for the plaintiff and so there was no want of prosecution for the requisite period. The Supreme Court affirmed the order denying reinstatement of the cause. The activity required to toll the running of the statute is some "... active measure taken by the plaintiff and intended and calculated to hasten suit to judgment." Reinstatement of the cause requires such grounds as would justify refusal to dismiss in the first instance.

Death of a sole plaintiff tolls the running of the statute until an administrator of the decedent's estate has been duly appointed and qualified. In Gregory v. Circuit Court,\(^50\) such order of dismissal for want of prosecution was reversed by the Supreme Court. As the court acutely observed, until appointment of the administrator there was no one in esse able to prosecute the suit and take further action in the cause.

In National Surety Corp. v. Grahn,\(^51\) plaintiff appealed from an order granting a motion of dismissal for want of prosecution. The Supreme Court held that where, by the statute,\(^52\) the circuit judge still had jurisdiction to reinstate the cause, the appeal taken by the plaintiff was premature.

INSTRUCTIONS

Assignment of error.—An interesting construction of the rule regarding errors in instructions to a jury\(^53\) was given by the Supreme Court in Bradley v. Associates Discount Corp.\(^54\) The court held therein that the term "assignment of error" is not descriptive of challenges to rulings presented by way of motion for a new trial, but applies to attacks launched in the appellate court after the trial court has disposed of the controversy.

Repetition of charge to jury.—In Warmouth v. Greenberg,\(^55\) the Supreme Court interpreted the statute authorizing the trial court to repeat its instructions to a jury returning without a decision.\(^56\) It was there held that it was not error for the trial judge to repeat only portions

\(^{48}\) 52 So.2d 810 (Fla. 1951).
\(^{49}\) 53 So.2d 706 (Fla. 1951).
\(^{50}\) 56 So.2d 529 (Fla. 1952).
\(^{51}\) 57 So.2d 457 (Fla. 1952).
\(^{52}\) Fla. Stat. § 45.19 (1951).
\(^{53}\) Fla. Stat. Common Law Rules, rule 39(b) (1951) (which provides that "... no party may assign as error the giving of any instruction unless he objects thereto.").
\(^{54}\) 58 So.2d 857 (Fla. 1952).
\(^{55}\) Fla. Stat. § 54.22 (1951).
\(^{56}\) 49 So.2d 793 (Fla. 1951).
of the charge where the jury desires only to hear that part of a charge dealing with a particular issue. To require a repetition of the entire charge under all circumstances would be impracticable.

**NEW TRIAL**

*When no verdict is returned.*—Interpreting the rule concerning the procedure to be followed when a jury fails to return a verdict, the Supreme Court in *Gore v. Hansen*, held that where the trial court denied a motion for entry of judgment in accordance with a motion for directed verdict after the cause had gone to the jury and resulted in a mistrial, but did not expressly order a new trial, the trial court's order would be considered as equivalent to an order for a new trial.

*Filing of motion.*—In a decision relating to the formal procedure involved in filing application for a new trial, the Supreme Court held, in *Hillsboro Plantation, Inc. v. Plunkett*, that a motion for a new trial is filed "to the trial judge" when presented to the clerk and entered by him on a progress docket. This ruling was reaffirmed in *Mead v. Bentley*, and apparently counsel had questioned this interpretation of the rule, and had argued that filing of such a motion must be made with the judge personally. The court lucidly pointed out that this position is ridiculous, since the volume of business handled in the courts today clearly precludes such a procedure.

Another decision relating to filing and serving motions for a new trial was *Springer v. Morris*. Here the court noted that the statutory requirement that a copy of a motion for a new trial to be presented to the judge must be served on the opposite party or his attorney with three days notice of the time and place at which the motion would be heard was abrogated by the new rule of procedure. The motion would not be dismissed for the want of service of a copy when the other requisites of the rule had been met.

*Statement of grounds.*—In *Booker v. Saunders Realty Co.*, the lower court issued an order for new trial without specifying therein the grounds on which the motion was granted. In reviewing the order, the Supreme Court held this was error. The rule requires that the court specify the grounds for new trial in the order granting it.

57. FLa. STAT. Common Law Rules, rule 40(c) (1951) (which provides that if a verdict is not returned, the trial court may direct entry of judgment as if requested verdict had been directed or may order a new trial).
58. 59 So.2d 538 (Fla. 1952).
59. 59 So.2d 872 (Fla. 1952).
60. 61 So.2d 428 (Fla. 1952).
62. 58 So.2d 859 (Fla. 1952).
63. FLa. STAT. § 54.24 (1951).
64. FLa. STAT. Common Law Rules, rule 41 (1951).
65. 53 So.2d 912 (Fla. 1951).
VACATION OF ORDER

Result thereof.—In *Florida Power and Light Co. v. Knost*, the Supreme Court held that the action of the circuit judge in subsequently vacating an order overruling an objection to certain interrogatories would have to be construed as an admission that such an order should not have been entered in the first place. This decision seems implicit in the rule governing the subject.

SETTING JUDGMENT ASIDE

Showing good cause.—The Supreme Court, in *Lewis v. Jennings*, reversed an order of the Circuit Court for Dade County which vacated a judgment for the plaintiff. The court held that since defendant had failed to appear on the day of trial for the second time, and no explanation for such absence had been given except that the notice of trial had not been seen, the lower court had abused its discretion in vacating the judgment.

CERTIFIED QUESTIONS

Determination of constitutional questions.—In *State Road Dep't v. Forehand* the circuit court certified to the Supreme Court a question of the constitutionality of a statute. The majority held the statute valid. Three members of the court dissented on the ground that the question of constitutionality was not properly presented. The rule as to certification does not, by its terms, exclude questions of constitutionality, and it appears that there is precedent for the decision of a question of constitutionality of a statute where sought by certified question in the case of *Rudisill v. Tampa*.

In a concurring opinion Justice Hobson, pointing out the danger of overcrowding the Supreme Court docket by allowing blanket certification of constitutional questions, suggests that whether such a question should be allowed certification should be discretionary with the Supreme Court and determined by “... whether the question is of great public concern and has attendant upon it exigencies which dictate a speedy decision of the controversy in the interest of the common weal.”

67. 65 So.2d 740 (Fla. 1953).
69. 64 So.2d 275 (Fla. 1953).
70. 36 So.2d 901 (Fla. 1952).
72. 9 So.2d 380 (Fla. 1942).