University of Miami Law Review

Volume 17 | Number 3 Article 2

5-1-1963

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Paul D. Barns

Taylor Mattis

1962 AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE

PAUL D. BARNS* AND TAYLOR MATTIS**

INTRODUCTION

The amendments and revisions to the Florida Rules of Civil Procedure, which were effective July 1, 1962,[1] represent an effort to keep court procedure in step with the times. This article is a discussion of some of the technical hobbles which necessitated the amendments. More important, it is an attempt to inform the practicing attorney of the import of the amendments and how the courts may be expected to rule under them. The sweeping suggestion in the last civil procedure article published in the *University of Miami Law Review*[2] was to READ THE RULES; the reader of this article is admonished to read and compare the Florida Rules of Civil Procedure and the Federal Rules of Civil Procedure.[3] It will be readily noted that the Florida rules are patterned after the federal rules. Therefore, "decisions of the federal courts construing their rule are pertinent,"[4] as are commentaries relating to federal rules which have a Florida counterpart.

The Supreme Court of Florida adopted the revisions and compilation of the Rules of Civil Procedure pursuant to the power vested in it by article V of the state constitution.[5] The "new rules" supersede all conflicting rules and statutes.[6]

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* Justice of Florida Supreme Court (retired).

** Editorial Board Member, *University of Miami Law Review.*

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

2. Massey, *Civil Procedure, Fifth Survey of Florida Law, Part Two*, 16 U. MIAMI L. REV. 591 (1962).

3. These rules will often be referred to hereinafter as the "Florida rules" or as the "federal rules" respectively.

4. Savage v. Rowell Distrib. Corp., 95 So.2d 415, 417 (Fla. 1957); Brown v. Ripley, 119 So.2d 712, 714 (Fla. 1st Dist. 1960). In Cassel v. Gulf Life Ins. Co., 143 So.2d 510, 514 (Fla. 2d Dist. 1962), the court pointed out: "Rule 13(g) of the Federal Rules of Civil Procedure . . . is substantially the same as the present Florida Rule 1.13(7) . . . and the same amendment as discussed above in regard to the Florida Rule was added to the Federal Rule in 1946. . . . It, therefore, seems logical and reasonable to assume that the Florida Supreme Court amended Florida Rule 1.13(7) for the same reasons as those stated in Moore. . . ." The "Committee Note of 1946 to amend subdivision (g) of Federal Rule 13" also influenced the Florida court's interpretation of the Florida rule. *Ibid.*

5. "The practice and procedure in all courts shall be governed by rules adopted by the supreme court." FLA. CONST. art. V, § 3. As a general proposition there are three power sources enabling the judiciary to regulate practice and procedure: inherent power, statutory enabling acts and constitutional authority. Mr. Justice Terrell, speaking for the Florida Supreme Court in *Petition of Florida Bar Ass'n for the Adoption of Rules for Practice & Procedure*, 155 Fla. 710, 713, 21 So.2d 605, 607 (1945), said that "this Court has approached the rule making power in a pragmatic way and has not become involved in the niceties of such concepts as inherent power to make rules or the delegation of the rule making power."

For a scholarly discussion of the power of the judiciary to regulate practice and procedure, see Nash, *Florida Appeal Times*, 16 U. MIAMI L. REV. 24, 39 (1961).

6. *In re* Florida Rules of Civil Procedure, 139 So.2d 129 (Fla. 1962). FLA. STAT. § 25.371

The outline of the amendments and discussion is as follows:

I. RULE 1.7. PLEADINGS: MOTIONS

(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim. No other pleadings shall be allowed, except that the court may order a reply to an answer.

The major import of the new rule 1.7(a) is contained in the phrase "denominated as such."[7] In setting forth what pleadings are allowed, the former rule stated that: "there shall be a reply if the answer *contains* a counterclaim"; the words "denominated as such"

(1961) provides: "When a rule is adopted by the supreme court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision."

Granting that a rule takes precedence over a statute when they conflict regarding a certain practice or procedure, the determination of when there is a conflict is sometimes difficult. A Florida statutory provision requiring that all statutes repealed or superseded by court rules be expressly designated would seem to ameliorate the difficulty. Fla. Laws 1943, ch. 21995, § 4, at 689, contained that provision, but the statute was repealed.

7. The amended rule closely followed the words of federal rule 7(a) as it read before the recent amendments to the Federal Rules of Civil Procedure. The amendment of federal 7(a) does not affect the substance of the rule Florida has adopted.

were omitted. The new rule makes a reply mandatory without court order only if the counterclaim is denominated as such. If no reply is entered in response to a counterclaim denominated as such, or in response to a court order[8] to reply, a default or decree pro confesso is in order. The difficulty of drawing a clear-cut distinction between a counterclaim and certain affirmative defenses makes the provision as to denomination helpful. A plaintiff should not be subjected to the perilous task of correctly analyzing the matter set forth in the answer to determine whether he must reply.[9]

Note the following situations: (1) If new matter in an answer is really a counterclaim, but is not so denominated, the plaintiff need not reply;[10] (2) If an answer contains affirmative defensive matter not entitling a defendant to relief, but denominated as a counterclaim, the plaintiff is not thereby required to reply.[11] In short, a reply is mandatory only for a *true* counterclaim, which is denominated as a counterclaim.

Rule 1.8(d) might be utilized in either of the above situations. It provides: "When a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Thus, in situation one the court might order a reply and in situation two the court would probably treat the mislabeled material as merely defensive. In either case, the plaintiff no longer faces the alternatives of replying or risking default when he is uncertain whether an answer contains a counterclaim.

When, as in situation one, a counterclaim is not "denominated as such," and no reply is required by the court, the party adverse to the counterclaim may offer evidence at trial in denial or avoidance of the counterclaim.[12]

The last sentence of rule 1.7(a) provides "that the court may order a reply to an answer." In some situations a motion by the defendant to require a reply to the answer might be advisable. In actions at law, when

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8. In Dickerson v. Orange State Oil Co., 123 So.2d 562 (Fla. 2d Dist. 1960), the court made a distinction between a court order to reply and an "authorization" by the court to reply. See Massey, *supra* note 2, at 605.

9. 2 MOORE, FEDERAL PRACTICE ¶ 7.03, at 1534 (2d ed. 1962). For difficulties caused by the lack of distinction between counterclaims and equitable defenses, especially as to the form of trial, see Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235 (1922); Susquehanna S.S. Co. v. A.O. Anderson & Co., 239 N.Y. 285, 146 N.E. 381 (1925) (Cardozo, J.).

10. 2 MOORE, FEDERAL PRACTICE ¶ 7.03, at 1534 (2d ed. 1962).

11. Rule 1.7(a) requires a reply to a *counterclaim* denominated as such. In hypothet number two, the answer does not contain a counterclaim. A cow which is branded "horse" is still a cow!

12. Rule 1.8(e) provides that "averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." The term "averments" means affirmative matter; a denial is not an averment of anything.

the answer sets up an affirmative defense rather than a denial, a reply would more clearly ascertain the issues before trial and thereby avoid uncertainty.[13] Of course, a reply to an answer setting up an affirmative defense may either be in denial or avoidance.

The scope of the term "pleading," as used in the rules, is clarified by the new 1.7. The meaning of "pleadings" does not include motions.[14] Formerly, it was often said, "A motion is a pleading, but not a responsive pleading." Now the title of 1.7 is "Pleadings; Motions," indicating that the two are distinct.

> (e) Motion in Lieu of Scire Facias. Any relief available by scire facias is grantable on motion after notice without the issuance of a writ of scire facias.

The deletion of the former 1.7(e) was a matter of housecleaning. That rule provided for the abolition of technical defensive pleadings, such as rejoinders, rebutters and the like, which were already abolished through the phrase in 1.7(a): "No other pleading shall be allowed . . . ."

The purpose of the new rule is simplification. The drafting of a motion is better known to the practice than the drafting of a writ of scire facias.[15] Of course, a writ of scire facias is still obtainable.[16]

II. Rule 1.20. Consolidation: Separate Trials

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
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> (b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or issues.

The former Florida rule 1.20 dealt with consolidation of causes. It was taken from the 1931 Chancery Act § 20. Its language was not readily applicable to situations arising under a rule encompassing both

13. See Gulf Life Ins. Co. v. Ferguson, 59 So.2d 371 (Fla. 1952).

14. A motion is simply an application to the court for an order. Ordinarily, a motion is not regarded as a responsive pleading. However, when the motion is viewed in terms of its effect, rather than its form, it is apparent that sometimes a motion may perform the same function as a responsive pleading.

15. The writ of scire facias has a history dating from the Act of Westminister, 1285, 13 Edw. 1, c. 18. Judge Hollands gave that history and its application in Florida special attention in Spurway v. Dyer, 48 F. Supp. 255 (S.D. Fla. 1942).

The primary use of scire facias is to revive a judgment so that execution might issue. 29 Fla. Jur. *Scire Facias* §§ 4, 5 (1960).

16. Fla. R. Civ. P. 2.15, relating to scire facias, is still in effect.

law and equity, especially when counterclaims and cross-claims were involved.

The new 1.20(a) is identical to federal rule 42(a). The power given the court is purely discretionary and may be exercised sua sponte. The test for determining if consolidation is proper is whether the actions involve a common question of law or fact. Another requirement is that the actions to be consolidated must be pending before the same court. Generally, consolidation will be reasonable where the actions are of a like nature, as when several negligence actions are brought arising out of the same collision.[17]

Subsection (b) of Florida rule 1.20, relating to separate trials, is newly added by the amendments. The court may order separate trials of claims, cross-claims, or of any separate issues in furtherance of convenience or avoidance of prejudice. The trial court had this power before it was placed in the rules. The only difference in Florida rule 1.20(b) and federal rule 42(b) is the reference in the latter to third party claims.[17a]

III. RULE 1.32.[18] WITNESSES, EXPERT, DEPOSITIONS

> (1) The term "expert witness" as used herein applies exclusively to a person duly and regularly engaged in the practice of his profession, who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill in respect of the subject upon which he is called to testify.
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> (2) The testimony of any expert or skilled witness may be taken at any time before the trial of any civil cause in any of the courts of this state, in equity or at common law, upon reasonable notice, in the manner now provided for taking depositions under Rule 1.21 or Rule 1.22, notwithstanding the residence of the witness. Provided, however, that the court may, upon proper objection by opposing counsel pursuant to due notice, disallow the taking of such deposition, and require the attendance of such witness in person at the trial of the cause, if the court finds that the personal appearance of such witness at the trial shall be necessary to insure a fair and impartial trial. Such objection shall be made to the court prior to the taking of the deposition, otherwise the same may be used in evidence, if otherwise admissible.

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17. MOORE, MANUAL § 20.01[1], at 1443 (1962). The cited portion of Moore also discusses other uses of consolidation.

17a. The Florida Rules of Civil Procedure contain no provision equivalent to federal rule 14 for third-party practice. Pan American Surety Co. v. Jefferson Constr. Co., 99 So.2d 726 (Fla. 3d Dist. 1958).

18. The provisions for depositions de bene esse, formally under rule 1.32, were abolished since other rules are sufficient to enable depositions to be taken under the same circumstances.

(3) An expert or skilled witness, whose deposition is taken, shall be allowed a witness fee, in such reasonable amount as the trial judge may determine, and the same shall be taxed as costs.

(4) Nothing herein contained shall prevent the taking of any deposition as otherwise provided by law.

The new rule 1.32 is a transposition of section 90.23 of the Florida Statutes, with no change in substance. It provides for taking testimony of expert witnesses, notwithstanding their residences.

Rule 1.21 provides for the *taking* of depositions and regulates their *use*. By implication rule 1.32 carves out some exceptions to rule 1.21. The former relates to the taking of depositions of an "expert," which must be done pursuant to rule 1.21. But under 1.32 a party may object to the mere *taking* of the deposition of an "expert" on the ground that his personal appearance at trial is required to insure a fair and impartial trial. The objection must be made before the deposition is taken. It appears that if no objection is made to the taking, or if the objection is overruled, the deposition may be *used* "if otherwise admissible," even though the witness is available to testify in person. Since the adoption of this rule, it is not a condition precedent to using the deposition for the court to find "that the witness is at a greater distance than one hundred miles from the place of trial or hearing or is out of the United States . . ." as is necessary under rule 1.21(d)(3).

Section 90.23 of the Florida Statutes, from which the new rule 1.32 is taken, was probably in conflict with rule 1.21 regulating the taking and also the use of depositions. However, by virtue of the fact that the statute was placed in the rules, it is now presumed to be an exception to, or limitation upon, the general provisions of rule 1.21. It will likely be so construed.

IV. Rule 1.35. Dismissal of Actions

1. *Introduction to the Problem of Termination of Actions in Florida*

Before the recent amendments, rule 1.35 was substantially the same as federal rule 41. However, the Florida rule contained the extra words "however . . . nothing stated herein shall preclude a nonsuit from being taken pursuant to any applicable statute." This phrase has caused some confusion to bench and bar. It has been deleted from the new rule 1.35. The effect of the deletion is not clear. Practitioners, students and even judges[19] now wonder whether the right of non-suit still exists, and if so, what its effects are.

19. "The Judges are hearing much argument as to whether the non-suit statute has been repealed by negative implication . . . . there seems to be some argument about this." Letter from Robert J. O'Toole, Chairman of the Civil Section of the Court of Record

Discussion shall first be made of the new rule 1.35 as it compares with its federal counterpart, rule 41, forgetting for the moment the non-suit complication in Florida. Thereafter, views will be offered on the existence and possible application of non-suit in Florida, in light of the omission of any reference to non-suit in the amended rule 1.35.

2. *Analysis of Rule 1.35*

(a) Voluntary Dismissal; Effect Thereof.

(1) By Plaintiff; By Stipulation. Subject to provisions hereof, except in actions in replevin or proceedings wherein property has been seized or is in the custody of the court, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment or decree, whichever first occurs, or (ii) by filing stipulation of dismissal signed by all parties who have appeared in the action.

Without Prejudice, When. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state an action based on or including the same claim.

The first paragraph of rule 1.35(a)(1) is the same as the language in federal rule 41(a)(1), except that the words "except in actions in replevin or proceedings wherein property has been seized or is in the custody of the court" have been substituted for the words "Rule 23(c), of Rule 66, and of any statute of the United States" in the federal rule. The second paragraph of the above quoted rule is the same as the second or last sentence of federal rule 41(a)(1), except the words "any court of this state" have been substituted for the words "any court of the United States or of any state" in the federal rule.

It will be noted that two types of voluntary dismissal are mentioned in the first paragraph: (i) notice dismissal and (ii) dismissal by stipulation. The second paragraph contains the so-called two-dismissal rule: The second notice of dismissal of the same claim operates as an adjudication upon the merits.[20]

Judges' Association of Florida, to E. Snow Martin, Chairman of the Civil Procedure Section of the Florida Bar Association, January 16, 1963, published in a Memorandum From Marshall R. Cassedy, Executive Director of the Florida Bar Association, to The Florida Bar's Committee on Civil Procedure.

20. Unless otherwise stated in a *stipulation* of dismissal, the dismissal is without prejudice. Successive dismissals by stipulation of the parties, expressly stated to be without prejudice, have been held not to bar a further action. Cornell v. Chase Brass & Copper Co., 48 F. Supp. 979 (S.D.N.Y. 1943). There is a question whether a notice dismissal following a dismissal by stipulation would bar another action. It would seem that the rule should

(2) By Order of Court; If Counterclaim. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been served by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court.[21]

Without Prejudice. Unless otherwise specified in the order, a dismissal under the foregoing paragraph is without prejudice.

The first paragraph of rule 1.35(a)(2) is the same as the language in federal rule 41(a)(2),[21a] except that the word "served" has been substituted for the word "pleaded" in the federal rule. The second paragraph of the above quoted rule is the same as the third or last sentence of federal rule 41(a)(2), except that the words "the foregoing paragraph" have been substituted for the words "this paragraph" in the federal rule. All of federal rule 41(a)(2) is in one paragraph, whereas the Florida rule 1.35(a)(2) is divided into two paragraphs.

Where dismissal may not be effected under rule 1.35(a)(1), a plaintiff may voluntarily dismiss only upon order of the court pursuant to rule 1.35(a)(2). It is now well settled under the federal rule that the granting of this motion is within the court's discretion, and not a matter of right.[22]

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apply only where the dismissal is by notice in both actions. However the language of the rule is susceptible to varying constructions, since it states that "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, *except* that a *notice of dimissal* operates as an adjudication on the merits when filed by *a plaintiff who has once dismissed* . . . an action." MOORE, MANUAL § 19.07[2] (1962).

21. Problems arise in cases wherein multidefendants are being sued and the plaintiff wishes to dismiss the action as to some but not all of the defendants, or wherein one or more of the defendants has answered and the plaintiff is now precluded from using notice dismissal under the rule. For a discussion in this area see Massey, *Civil Procedure, Fifth Survey of Florida Law, Part Two*, 16 U. MIAMI L. REV. 591, 619 (1962).

21a. FED. R. CIV. P. 41(a)(2) is as follows:

By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

22. 5 MOORE, FEDERAL PRACTICE ¶ 41.05, at 1019 (2d ed. 1951). One case, Bolton v. General Motors Corp., 180 F.2d 379 (7th Cir. 1950), held that a plaintiff has an absolute right to dismissal, restricted only by the requirement that it be upon order of the court and upon such terms and conditions as the court deems proper. Moore commented that the holding misconstrued the rule. 5 MOORE, *op. cit. supra* at 1019. The case was overruled by Grivas v. Parmalee Transp. Co., 207 F.2d 334 (7th Cir. 1953), *cert. denied*, 347 U.S. 913 (1954).

> (b) Involuntary Dismissal. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.
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> After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.
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> With Prejudice. Unless the court in its order for dismissal otherwise specifies, a dismissal under the foregoing paragraph, other than a dismissal for lack of jurisdiction, for improper venue or for the lack of an indispensable party, operates as an adjudication upon the merits.

The major distinction between Florida rule 1.35(b) and federal rule 41(b)[22a] concerns the res judicata or "upon the merits" effect of dismissals under the respective rules.[23] The entire subsection (b) of federal rule 41 is in one paragraph, whereas the Florida counterpart is in three paragraphs. Two differences between the last sentence of the federal fule and the last paragraph of the Florida rule are significant. (1) In the latter, the words "under the foregoing paragraph" have been substituted for the words "under this subdivision" of the federal rule. (2) The words of the federal rule "and any dismissal not provided for in this rule" have been deleted in the Florida rule. These changes in the Florida rule make a great difference in the operation of the rules.

The last paragraph of 1.35(b) limits the res judicata effect of

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22a. FED. R. CIV. P. 41(b) is as follows:

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

23. Another distinction between Florida rule 1.35(b) and federal rule 41(b) lies in the fact that the latter was recently amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to non-jury cases. See *Report of Proposed Amendments to Certain Rules of Civil Procedure for the United States District Courts*, Submitted by the Judicial Conference of the United States, Sept. 1962, Advisory Committee's Note following Rule 41.

involuntary dismissals to those which arise under the *second* (or "foregoing") *paragraph*, unless otherwise specified in the order of dismissal. Thus, any involuntary dismissal for failure to prosecute, or to comply with the rules or a court order, is not automatically with prejudice. The amended last paragraph of 1.35(b) removes the rules as a basis for the res judicata effect of dismissals in these areas, and substantive law may now be freely applied. Decisional law will govern whether dismissals referred to in the first paragraph of rule 1.35(b), and involuntary dismissals not provided for in this rule, are with prejudice. A review of decisions made before the rule was amended will be helpful at this point.

The case of *Yinger v. Kasow*[24] held that a dismissal for failure to prosecute did not constitute an adjudication on the merits. Rule 1.35(b) before the amendment stated that "any dismissal not provided for in this rule," (dismissal for failure to prosecute was not so provided) operated as an adjudication on the merits, unless otherwise specified in the order. The amendment has removed any question of conflict between the *Yinger* decision and the language of the rule. The paragraphing and wording of the new rule conforms to the *Yinger* decision, and henceforth, *Yinger* will govern. A dismissal for failure to prosecute will not be upon the merits, unless otherwise ordered. This result is opposed to the federal view. The federal courts bar the bringing of a subsequent action when the initial action was dismissed for failure to prosecute and the order of dismissal did not specify that it was without prejudice.[25] However, the difference results from the fact that all the types of involuntary dismissals, including dismissal for failure to prosecute, are incorporated in the phrase in the federal rule that "a dismissal under this subdivision" shall be without prejudice. The Florida rule is more restrictive in scope than the federal rule. Only those dismissals under the second *paragraph* of the Florida rule are with prejudice.

The res judicata effect of involuntary dismissal for failure to comply with a court order has been decided in *Hinchee v. Fisher*.[26] That type of dismissal was held to be upon the merits. The court's authority was the pre-amendment clause in rule 1.35(b) that "unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . shall operate as an adjudication upon the merits." Failure to comply with a court order was at that time "under this subdivision." The authority of the rule as a basis for *Hinchee* has been removed by the amendment of rule 1.35(b), which leaves the Florida

24. 123 So.2d 758 (Fla. 3d Dist. 1960).

25. 5 MOORE, FEDERAL PRACTICE ¶ 41.11[2], at 1039 (2d ed. 1951).

26. 93 So.2d 351 (Fla. 1957). The assignor of a lease filed the first action against the assignees. The action was dismissed for failure of the assignors to pay into registry of court a sum of money which the court had required in an order. The second action, an identical claim between the same parties, was barred.

courts free to apply the substantive or decisional law. Where a reasonable excuse is offered for failure to comply with an order, the court should, in the exercise of its discretion, either refuse to dismiss or provide in its order of dismissal that it does not constitute an adjudication upon the merits.[27]

The involuntary dismissal of a complaint for failure to state a cause of action[28] is not provided for in rule 1.35. Whether that type of dismissal is upon the merits has caused problems in Florida. The position of the *Restatement of Judgments* is:

> Even though the judgment for the defendant is based upon the failure of the plaintiff to state in his complaint facts sufficient to constitute a cause of action, the plaintiff is not necessarily precluded thereby from maintaining an action on his original cause of action. If his complaint in the later action contains further allegations, the omission of which made the complaint in the first action demurrable, the judgment in the first action is not a bar to the second action.[29]

The rationale of *Kautzmann v. James*,[30] a 1953 Florida Supreme Court case, harmonizes with the *Restatement*. However, in *Hammac v. Windham*[31] the district court rejected the reasoning of the *Kautzmann* case on the ground that the supreme court did not consider rule 1.35(b) in reaching its conclusion. In *Hammac* the plaintiff failed in the first action to allege facts sufficient to establish liability for gross negligence under the guest statute. The complaint was dismissed for failure to state a cause of action. In the second action, even though the complaint alleged additional facts sufficient to state a cause of action for gross negligence, the defendant was granted summary judgment on his plea of res judicata. The rationale was that rule 1.35(b) provided that unless the court in its order of dismissal otherwise specifies, "any dismissal not provided in this rule" shall operate as an adjudication upon the merits.[32]

Since the quoted words have been deleted in the amended rule 1.35(b), the rule as a basis for the holding in situations similar to *Hammac* has been removed. Florida courts are now free to return to the substantive decisional law, as expressed in the *Restatement*.[33]

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27. 5 MOORE, FEDERAL PRACTICE ¶ 41.12, at 1040 (2d ed. 1951).

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

29. RESTATEMENT, JUDGMENTS § 50, comment *c* (1942).

30. 66 So.2d 36 (Fla. 1953).

31. 119 So.2d 822 (Fla. 1st Dist.), *cert. denied*, 122 So.2d 408 (Fla. 1960), 16 U. MIAMI L. REV. 621, 622 (1962).

32. *Id.* at 825.

33. RESTATEMENT, JUDGMENTS § 50, comment *c* (1942). For other Florida cases on this point see Bricklayers, Masons, Plasterers Union v. Acme Tile & Terrazzo Co., 112 So.2d 43 (Fla. 2d Dist. 1959); *In re* Pellicer's Estate, 118 So.2d 59 (Fla. 1st Dist. 1960); Capers v. Lee, 91 So.2d 337 (Fla. 1956). A recent clear statement of this point of law in

In determining whether dismissal for failure to state a cause of action is res judicata or not, it is helpful to realize that an adjudication upon the *merits* of a *complaint* is not necessarily an adjudication upon the merits of a *cause of action.* In federal practice, the cardinal principle is that if the complaint in the second action contains allegations which rectify a material deficiency of the complaint in the first action, the second action is not precluded.[34]

3. *Status of Non-Suit*

Having noted the present differences in the federal and Florida rules for dismissal of actions, we shall direct our attention to the problem of non-suit as it relates to the amended Florida rule 1.35.

At common law a plaintiff could abandon his case at any time before the jury returned a verdict. The non-suit statute in Florida[35] limited the time at which the plaintiff could elect a non-suit to the time before the jury retired from the bar. A dismissal by reason of non-suit is always voluntary, even though by inadvertence the judiciary may have referred to non-suits as compulsory or involuntary. Under Florida practice, there is no *compulsory* non-suit; however, there may be coercive circumstances inducing the non-suit dismissal. With the exception of the statutory limitation upon the time of electing a non-suit dismissal, the right was at one time construed by the courts as absolute.[36] However, later decisions qualified and restricted the right.[37] Whether the right

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Florida was made by Mr. Chief Judge Carroll in Rice v. White, 147 So.2d 204, 207 (Fla. 1st Dist. 1962):

> Under our practice a motion to dismiss a complaint on the ground of failure to state a cause of action is addressed exclusively to the *allegations* of the complaint, the well-pleaded allegations being assumed to be true for the sole purpose of determining the validity of the motion. In other words, the court determines whether the plaintiff, if he later proves the allegations of his complaint, would thereby establish a cause of action against the defendant. The dismissal of a complaint on such a motion merely means that the plaintiff has failed to include in the allegations of his complaint all of the elements essential to his recovery in a cognizable cause of action. Such a dismissal cannot be adjudication on the merits because no evidence on the merits has been produced and, even if it were, the evidence could not properly be considered in ruling on the motion to dismiss. See Rules 1.8(b) and 1.11(b) of the Florida Rules of Civil Procedure, 30 F.S.A.

34. For federal cases on point under the federal rules see Brazier v. Great Atl. & Pac. Tea Co., 256 F.2d 96 (5th Cir. 1958); Estevez v. Nabers, 219 F.2d 321 (5th Cir. 1955); Curacao Trading Co. v. William Stake & Co., 61 F. Supp. 181 (S.D.N.Y. 1945); Russo v. Sofia Bros., 5 Fed. Rules Serv. 12b.35, Case 2 (S.D.N.Y. 1941).

35. FLA. STAT. § 54.09 (1961): "No plaintiff shall take a non-suit on trial unless he do so before the jury retire from the bar." Another Florida Statute, § 59.05, provides for appeal from an order granting a non-suit.

36. "In this state it is held that the right to take a nonsuit is only abridged by the statute which limits the taking of a nonsuit to any time before the jury retires from the bar." Pitt v. Abrams, 103 Fla. 1022, 1024, 139 So. 152, 153 (1931).

37. "The history of recent years has been that of a continuing limitation upon the non-suit as known to the Common Law." Johns v. Puca, 143 So.2d 568, 570 (Fla. 2d Dist. 1962), *cert. denied*, 147 So.2d 531 (Fla. 1963). See, *e.g.*, Hartquist v. Tamiami Trail Tours, Inc., 139 Fla. 328, 190 So. 533 (1939) (lower court did not err in denying plaintiff's motion for non-suit dismissal after the court had announced, but not entered, a ruling adverse to

was categorized as absolute or not, it is subject to amendment and modification by the judicial process and by new rules of procedure.[38] If the non-suit statute and the procedural right to which it refers are in conflict with the rule, the former must yield to the rule, at least to the extent that the statute conflicts with the rule.[39]

Rule 1.35(a)(1) provides for a voluntary dismissal as of right (other than by stipulation) only if notice is filed before the defendant's answer or motion for summary judgment. Thereafter the granting of a plaintiff's motion for dismissal requires an order of the court under 1.35(a)(2), and as stated in Moore's *Federal Practice* in reference to rule 41(a)(2): "The granting of the motion is within the court's discretion, and not a matter of right."[40] An unrestricted right of non-suit would allow a plaintiff to terminate the action without prejudice after the defendant had served an answer or motion for summary judgment, i.e., at trial. The conclusion follows that, as provided in 1.35(a)(2), the plaintiff's control over the termination of the action ends after his adversary has served an answer or motion for summary judgment.

Rule 1.35, as related to voluntary dismissals, should be construed in pari materia with the rationale behind the common law right of non-suit dismissal. This simply means that in each case where a plaintiff seeks termination of the action at trial, the court should balance the equities of the plaintiff's not being forced to prosecute against his wishes and a defendant's right to have the case decided, once it has reached the trial phase. Thus, the resolution lies, as solutions to difficult legal problems often do, within the sound discretion of the trial court,[41] as provided for under rule 1.35(a)(2).

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plaintiff on demurrer); Crews v. Woods, 59 So.2d 526 (Fla. 1952) (lower court did not err in denying plaintiff's motion for a non-suit dismissal made after the court had announced its decision to grant defendant's motion for a summary judgment on the defense of statute of limitations). The supreme court in *Crews* stated at 538: "There was, then, no absolute right to a non-suit, and the lower court did not err in so holding." The holding in Johns v. Puca, 143 So.2d 568 (Fla. 2d Dist. 1962), was that a plaintiff in a legal action may not exercise the right to non-suit so as to effect the substantive right of a counterclaimant to a trial of his cause.

38. See National Broadway Bank v. Lesley, 31 Fla. 56, 12 So. 525 (1893); West Coast Fruit Co. v. Hackney, 98 Fla. 382, 123 So. 758 (1929).

39. "When a rule is adopted by the supreme court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision." FLA. STAT. § 25.371 (1961).

"All rules, parts of rules, statutes or parts of statutes inconsistent with the amendments hereby approved and adopted are hereby repealed." *In re* Florida Rules of Civil Procedure, 139 So.2d 129 (Fla. 1962).

"The rule was adopted by this court pursuant to Article V, Section 3, Florida Constitution, F.S.A. It, therefore, superseded any legislative enactment governing practice and procedure to the extent that the statute and the rule may be inconsistent." Jaworski v. City of Opa-Locka, 149 So.2d 33, 34 (Fla. 1963).

40. 5 MOORE, FEDERAL PRACTICE ¶ 41.05, at 1019 (2d ed. 1951).

41. Senate Bill 118 was sponsored by the Circuit Judges' Association to repeal the sections of the Florida Statutes relating to non-suits. The opinion of the Association was

The federal pratice allows the plaintiff a dismissal when, in the course of the suit, the court feels that the dismissal will not unduly prejudice the defendant; Florida has adopted a similar provision, and Florida courts seem disposed to take a similar attitude.[42]

V. RULE 1.38. RELIEF FROM JUDGMENT DECREES OR ORDERS

(a) Clerical Mistakes. Clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the record on appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

The first part of rule 1.38, subsection (a), empowers the trial court to correct *clerical* errors. The amended 1.38(a), for all practical purposes, is the same as federal rule 60(a).

"Clerical mistakes" include only those errors or misprisions arising from an accidental slip or omission, and not errors or mistakes in the substance of what is decided by the judgment or order.[43] In the interest of justice, and to the end that the record reflect the actual intention of the court and the parties, relief from these technical errors should be freely granted. It matters not whether the mistake was made by the court, clerk, or a party.[44]

Although clerical errors may be corrected "at any time," the pendency of an appeal affects the procedure for correction. Absent an appeal, the trial court at any time may sua sponte, or on motion by a

that the trial judge could handle the situation more equitably under the voluntary dismissal rule, rule 1.35(a). The bill, which was defeated, was entitled "An Act relating to non-suits; repealing Section 54.09, Florida Statutes, relating to time for non-suits; and repealing Section 59.05, Florida Statutes, providing for appeal from order of non-suits." It was introduced in April 1959. See Note, 13 U. FLA. L. REV. 105, 122 (1960).

42. The case of Hartquist v. Tamiami Trail Tours, Inc., 139 Fla. 328, 190 So. 533 (1939) (see note 37 *supra*), was decided before the adoption of rule 1.35(a), but Crews v. Woods, 59 So.2d 526 (Fla. 1952), was decided after the adoption of the rule known as rule 35, and now known as rule 1.35. In Johns v. Puca, 143 So.2d 568 (Fla. 2d Dist. 1962) it was held error to dismiss a compulsory counterclaim on plaintiff's motion at trial after plaintiff had elected to take a non-suit dismissal of his claim. The authority for that holding was the provision in 1.35(a)(2) that if a counterclaim has been served by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action may not be dismissed against defendant's objection unless the counterclaim can remain pending for independent adjudication.

43. 30 F.S.A., Rule 1.38, Authors' Comment at 934 (1956).

44. This is true under the federal rules. 6 MOORE, FEDERAL PRACTICE ¶ 60.06, at 4042 (2d ed. 1953). However, a recent Florida case indicates that the mistake involved must be the court's mistake, not an omission of a party. See State v. Gooding, 149 So.2d 55 (Fla. 1st Dist. 1963).

party after such notice as the court may require,[45] correct the mistake. Regarding the effect of appeal, the Florida rule before amendment provided that errors could be corrected *before the appeal is entered.* The rule now provides for correction *before the record on appeal is docketed* in the appellate court. Therefore, in Florida, as in the federal courts, the *taking* of an appeal does not divest the trial court of the power to make corrections of a clerical nature. Before the record on appeal is *docketed*, the procedure for correction is the same as if no appeal were pending. After the record is docketed in the appellate court, and while the appeal is pending, leave of the appellate court should be obtained before correction by the trial court.[46]

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment or decree is void; (5) the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decreee upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding, or to set aside a judgment or decree for fraud upon the court.
>
> Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.[47]

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45. Where the error is not apparent on the face of the record, and evidence must be heard to ascertain whether there is in fact a clerical error, then the parties should be given notice and an opportunity to be heard. 6 MOORE, FEDERAL PRACTICE ¶ 60.07, at 4052 (2d ed. 1953).

46. 6 *id.* ¶ 60.08[2]. For an opinion as to whether errors can be corrected by the trial court *after* an appeal is considered, see 6 *id.* ¶ 60.08[3].

47. This subsection is in two paragraphs, whereas its federal counterpart, rule 60(b), is in one. The substance is the same as the federal rule, except for the insertion in the Florida rule of the words "decree" and "or decree" following the word "judgment," the

This is a rule of procedure or practice[48] properly within the scope of the supreme court's rule-making power. It abolished the use of the ancillary writs of coram nobis and audita querela as legal remedies and bills of review and bills in the nature of bills of review in equity. The rule is intended to provide that the jurisdiction of the court under the former procedure may now be invoked by a timely motion. The rule was not intended to diminish the substantive remedial law but only to provide that certain remedies may be applied for by motion.[49] Of course the court may not, by rule, abridge or abolish substantive remedial rights, but it may regulate the manner, mode, means and methods of invoking the court's jurisdiction in seeking remedies.[50] A rule does not lack validity because it deals with substantive matters. All rules of civil procedure, except the most formal, deal with substantial matters of procedure to the end that substantive rights may be speedily and justly adjudicated. Giving relief from a judgment because it is a product of the reasons listed in 1.38(b) is part and parcel of the procedural means of procuring adjudication of substantive rights.[51]

The purpose of rule 1.38(b) was to incorporate the substance of common law and equitable ancillary remedies for the purpose of relief from judgments.

1. *Analysis of Rule 1.38(b)*

(1) The first reasons listed for applying for relief from a final judgment, order, decree or proceeding are mistake, inadvertence, surprise, or excusable neglect. Since the historical basis and foundation of clause (1) of the Florida rule are the same as clause (1) of federal rule 60(b), their scope will likely coincide.

Our rule 2.8 permits the correction of judicial errors on motions for rehearing or new trial in actions at law, and rule 3.16 permits the correction of judicial errors on rehearing in suits in equity when a timely motion or petition is made. After relief under these rules is exhausted

insertion of the words "or rehearing" in clause (2), the deletion of clause (6) reading "any other reason justifying relief from the operation of the judgment" and the deletion of the clause "or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655."

48. As to what is procedure or practice, see State v. Furen, 118 So.2d 6 (Fla. 1960), 15 U. MIAMI L. REV. 105 (1960).

49. For the scope of the substantive remedial law under coram nobis, audita querela, and bills of review and bills in the nature of bills of review, see 7 MOORE, FEDERAL PRACTICE ¶ 60.13-.15, at 33-72 (2d ed. 1955).

50. See State v. Furen, 118 So.2d 6 (Fla. 1960).

51. 6 MOORE, FEDERAL PRACTICE ¶ 60.04[3], at 4037-39 (2d ed. 1953). However, as Moore points out: "It is true that the principles of the ancillary remedies that were available only for relief from judgments at law, and the principles of the ancillary remedies that were available only for relief from decrees in equity, have now been made available by amended rule 60(b) [like Florida rule 1.38(b)] . . . irrespective of whether the judgment was rendered in an action which was formerly one at 'law' or 'equity'." 6 MOORE, *op. cit. supra* at 4039.

and the time for appeal has commenced to run, may the trial court correct its judicial errors on the basis of a different rule of law or change in a rule of law by a later decision? Or may the error of law be corrected only on appeal? Moore is of the opinion that relief from judicial error by the trial court ought to be permitted at any time before the time for appeal has expired, but he has doubts that his position will be sustained in the construction of 60(b)(1). Moore's position is as follows:

> Does this extension of 60(b)(1) [like Florida Rule 1.38(b)(1)] authorize relief from a substantive error of law by the court? If the Rule can be taken at its face value, then the answer is probably in the affirmative, although the matter is certainly not free from doubt.[52]

Federal rule 60(b) provides that the trial court may not extend the time for taking an appeal under rule 73(a) and (g). Moore reasons that to allow such corrections of substantive errors of law under 60 (b)(1) would indirectly extend the appeal time.[53] However, he then states:

> On the other hand, why should not the trial court have the power to correct its own judicial error under 60(b)(1) [like Fla. Rule 1.38(b)(1)] within a reasonable time—which as we subsequently pointed out, should not exceed the time for appeal—and thus avoid the inconvenience and expense of an appeal by the party which the trial court is now convinced should prevail?[54]

To satisfy the principle of finality and yet obtain the same flexibility Moore suggests that:

> A possible course of action that would seem, however, to satisfy the conflicting principles of finality and flexibility discussed above, and also to be safe is this. Take an appeal within proper time and also, within appeal time, move the district court for relief; and then ask the appellate court to authorize the district court to proceed and determine the motion.[55]

(2) The second reason for applying for relief from a final judgment, order, decree or proceeding is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing." Newly discovered evidence is also a ground for a motion for new trial under rule 2.8, but to be timely, that motion must

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52. 7 MOORE, FEDERAL PRACTICE ¶ 60.22[3], at 236 (2d ed. 1955).

53. Florida rule 1.6(b), similar to federal rule 6(b), provides that the court may not "extend the time for making a motion for new trial, for taking an appeal, or for making a motion for directed verdict."

54. 7 MOORE, *op. cit. supra* note 52, at 237.

55. *Id.* at 238.

be served not later than ten days after the rendition of verdict or the entry of summary judgment. If the evidence is not, or by due diligence could not have been, discovered within time to move for a new trial under 2.8(b), then relief may be sought under rule 1.38(b). Rule 2.8(g) specifically provides that "this rule does not affect the remedies defined in Rule 1.38(b)."

If any real distinction can be drawn between the principles governing the *type* of evidence warranting relief under 2.8 and that warranting relief under 1.38(b)(2), the difference is one of degree; under 1.38 (b)(2) a somewhat stronger showing may be required since it permits a more belated attack upon the finality of the judgment. The evidence "must be of such a material and controlling nature as would probably induce a different conclusion, and not be merely cumulative."[56]

(3) The third reason for motioning under 1.38(b) is "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." This clause is a recognition of the inherent power of the court to protect itself against fraud. The last sentence of the rule provides: "This rule does not limit the power of the court . . . to set aside a judgment or decree for fraud upon the court."

"Fraud upon the court" may be established by an independent action, by motion or otherwise. The exercise of the power is not dependent on any particular procedural steps being taken to establish it. The court may act sua sponte. It is only necessary that fraud, misrepresentation or misconduct be established; however, the lapse of time may dictate that the matter be left at rest.

(4) The fourth reason for applying for relief under 1.38(b) is that the judgment or decree is void. It is important to understand the ramifications of a void judgment. It creates no binding duty upon the the parties; it is legally ineffective.[57] A party who attacks a judgment or decree as void need show no meritorious claim or other equities on his behalf; he need only establish that the judgment is void. He is entitled to have it treated for what it is; a legal nullity. Clause (4) of rule 1.38 (b) is a recognition that a trial court has the power to grant relief, on motion, from a void judgment or decree which it rendered. Relief from a void judgment or decree may also be obtained in the following ways: under rule 2.8, providing for amendments of judgments, if the motion is made within ten days after rendition; by an independent action in equity to enjoin its enforcement; or by collateral attack in any pro-

56. 7 MOORE, FEDERAL PRACTICE ¶ 60.23[4], at 242, 243 (2d ed. 1955).

57. Williams v. North Carolina, 325 U.S. 226 (1945); MacDonald v. Mabee, 243 U.S. 90 (1917).

ceeding in any court where the validity of the judgment or decree is in issue.[58]

(5) This clause constitutes a statement of three situations wherein relief from a final judgment, decree or order is justifiable: first, where the judgment or decree has been satisfied, released or discharged; second, where a prior judgment or decree upon which it is based has been reversed or otherwise vacated; and third, where it is no longer equitable that the judgment or decree should have prospective application.

Under the first ground recognized in clause (5) a motion is authorized to secure an adjudication of the fact of compliance with a judgment or decree of the court. A motion may also secure adjudication of the fact that certain circumstances have occurred which make compliance unnecessary, such as the judgment being discharged in bankruptcy.

Under the second ground in clause (5) relief from a final judgment, decree or order may be obtained from the trial court because a prior judgment upon which it is based has been reversed or otherwise vacated. A change in the judicial view of applicable law after a final judgment is not a sufficient basis for vacating that judgment if it was entered before announcement of the change.[59]

Where a decision on which a final judgment, order or decree is based on appeal, 1.38(b)(5) is pertinent even though no appeal was taken from the judgment from which relief is sought.[60]

The third ground under clause (5) applies chiefly to continuing injunctions, but it encompasses any final judgment which has prospective application. The critical issues determining relief are whether the judgment has prospective application and whether it is no longer equitable that the judgment have prospective application. With respect to this motion, appropriate relief is within the sound discretion of the trial court, whose action will not be disturbed on appeal if consistent with accepted legal principles.[61]

58. Although there is no express recognition in federal rule 60(b) [which is similar to Florida rule 1.38(b)] that collateral attack remains as a means for relief from a void judgment, there is no merit to a conclusion that the rule affects that right under generally accepted principles. Since the void judgment establishes no binding legal obligations, it should have no res judicata effect when its validity is called into question by collateral attack at any time. Laches of a party will not infuse life into a void judgment. 7 MOORE, FEDERAL PRACTICE ¶ 60.41[2] (2d ed. 1955).

59. Title v. United States, 263 F.2d 28 (9th Cir. 1959); Collins v. City of Wichita, 254 F.2d 837 (10th Cir. 1958). *But see* Polites v. United States, 364 U.S. 426 (1960), wherein the Court said: "[W]e need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law."

60. 7 MOORE, FEDERAL PRACTICE ¶ 60.26[3], at 282 (2d ed. 1955).

61. MOORE, MANUAL § 26.08, at 1920 (1962).

Florida rule 1.38(b) omits clause (6) of the federal rule 60(b). That clause reads: "any other reason justifying relief from the operation of the judgment." Under the federal rule, the residual clause opens the reservoir of the court's power to grant relief on a timely motion which fulfills the following qualifications: first, the reason is one not stated in clauses (1)-(5), and second, the reason urged justifies relief. It is not an unbridled discretionary power to grant relief for any reason. Relief under clause (6) of the federal rule must be for reasons justifying relief under the substantive law, the reasons must be other than those within clauses (1)-(5) and the motion must be timely.

Clauses (1) through (5) state the traditional or common grounds for relief from final judgments or decrees. Clause (6) was only added in the federal rule to provide for relief by motion in the event some recognized ground for relief had been overlooked. As to its omission in the Florida rule, it is suggested that the clause is not actually needed; yet some situation may arise in which it could be used. If clause (6) of the federal rule is amended by inserting the words "under the substantive law," to make it read: "any other reason *under the substantive law* justifying relief from the operation of the judgment or decree," the clause may be more acceptable, and less misleading.

As the rules in Florida now stand, relief which might fall under clause (6) of the federal rule[62] would be cause for an independent action. The Florida rule abolishes the use of ancillary writs, but a substantive remedial right can be claimed through an independent action, begun by filing a compliant sounding in coram nobis or similarly.

2. *Timeliness of Motion Under 1.38(b)*

The rule provides that: "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, decree, order, or proceeding was entered or taken." This sentence requires all motions for relief under 1.38(b) to be made within a "reasonable time." The "not more than one year" clause, which is applicable only to clauses (1), (2) and (3),[63] is not a grant of one

62. As to what constitutes grounds for relief under clause (6) of the federal rule, Moore states: "[T]o the extent that precedent dealing with these old remedies [coram nobis, etc.] would warrant relief in a situation not covered by clauses (1)–(5), then that precedent is persuasive for the *grant* of relief under residual clause (6). If, however, the precedent is *against* relief or no precedent under the old rmedies can be found, then that is not conclusive that relief should not be granted under clause (6)." 7 MOORE, FEDERAL PRACTICE ¶ 60.27[1], at 294 (2d ed. 1955).

63. Where a motion is timely, under the principles mentioned, it will usually suffice to determine whether the reason urged is such as to justify relief, without determining which specific clause of 1.38(b) covers the reason. But if the motion is made more than one year after the judgment was entered, then it is necessary to determine whether the reason is within clause (1), (2) or (3), for if it is, the maximum time limit of one year applicable to those clauses cannot be circumvented. See 7 MOORE, *op. cit. supra* note 62, at 309.

year, but is rather a limitation when relief is sought by motion. Circumstances may require action earlier than the expiration of the "one year," when relief is sought under those clauses. What is a "reasonable time" must be determined according to the facts and circumstances of each case.

With respect to clause (4), the reasonable time limtitation may generally mean no time limit at all,[64] because the theory underlying the concept of a void judgment is that it is a legal nullity and may be vacated by the court at any time.[65]

What constitutes a timely motion under clause (5) should be determined in light of all the circumstances of the case. Due to the nature of the rationale underlying that clause, the "reasonable time" limitation should be applied to the end that substantial justice be done. This means that the movant should be given ample time under all the circumstances to make his motion; but if he has not acted with reasonable diligence, his motion may properly be denied.[66]

3. *Independent Actions*

Rule 1.38(b), like federal rule 60(b), provides that "this rule does not limit the power of the court to entertain an independent action to relieve a party from any judgment, decree, order or proceedings." The purpose of the rule was to provide a motion procedure for the *ancillary* common law and equitable remedies. The purpose of the saving clause was to make it clear that the rule does not limit the power of the courts in a proper case to grant relief against a judgment in an *independent* action.

The independent action to obtain relief from a judgment or decree is in personam against the party holding it, never against the court rendering the judgment or decree. The usual ground is fraud, but accident and mistake are also grounds for relief in an independent action. Even though relief might have been obtained by a timely motion under clauses (1), (2) or (3) of rule 1.38(b), the time of one year may have elapsed and resort to an independent action may, under some circumstances, be appropriate.

4. *Essentials and Effect of Motion*

Rule 1.7(b), concerning motions, requires that an application to the court for an order shall be by motion which "shall state with particularity the grounds therefor." The movant, under 1.38(b), should set

64. However, there may be exceptional situations where diligence would be required on the part of the movant. See Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949).

65. See United States v. Sotis, 131 F.2d 783 (7th Cir. 1942).

66. 7 MOORE, FEDERAL PRACTICE ¶ 60.26[1], at 275 (2d ed. 1955).

forth matters with such particularity as to show he is entitled to the relief sought. He should also show that the motion is timely.

Unlike a motion for new trial in actions at law, or a petition for rehearing in equity, a motion under 1.38(b) does not affect the finality of the judgment. Neither does that motion toll the time for appeal. The motion is ancillary to the action wherein the final judgment or decree was rendered, similar to the remedies of coram nobis and audita querela in law actions and bills of review and bills in the nature of bills of review in equitable actions.

5. *Appeals under Rule 1.38(b)*

An order *denying* a motion for relief from a final judgment or decree under 1.38(b) is final and appealable. However, such an appeal does not bring up for review the final judgment or decree from which relief was sought.

The general tests of finality apply to an order *granting* relief from a final judgment or decree under 1.38(b). If the trial court fully adjudicates the motion, it is appealable as a final judgment or decree. But if the trial court sets aside the judgment and orders a new trial, the order is interlocutory and not appealable as a final judgment, although probably appealable by statute as an order granting a new trial.

An appeal from a final judgment or decree does not extend the time for seeking relief under 1.38(b); the trial court cannot *grant* a motion made after an appeal, whether or not the motion is *made* before the appeal is taken. The appeal deprives the lower court of jurisdiction to do anything that would affect the appellate court's jurisdiction. Leave of the appellate court must be obtained if the trial court is to grant such a motion.[67]

VI. Rule 2.8. Motions for New Trials; Rehearing; Amendments of Judgments

> (a) Jury and Non-Jury Cases. A new trial may be granted to all or any of the parties and on all or a part of the issues. On a motion for a rehearing of a summary judgment or of matters heard without a jury, the court may open the judgment if one has been entered, take additional testimony and enter a new judgment.

The first sentence of this Florida rule is applicable to jury and non-jury trials. A new trial may be granted upon grounds that would support that order in the absence of the rule. Some of the language is

67. Procedures enabling the trial court to act on a 1.38(b) motion after an appeal is taken are found in 7 Moore, Federal Practice ¶ 60.30[2], at 335 (2d ed. 1955).

taken from federal rule 59(a), which was designed to apply to actions at law and suits in equity.

The second sentence of the Florida rule operates to give judicial sanction to motions for rehearing[68] where judgments have been entered on motions to dismiss addressed to the complaint, motions for judgment on the pleadings, motions for summary judgment, motions for judgment notwithstanding the verdict or motions to dismiss made at trial, as provided for by various rules. All these, including summary judgments, are "matters heard without a jury." It is suggested that the second sentence might well be amended by deleting the words "of a summary judgment or" as surplusage. The second sentence would then read:

> On a motion for a rehearing of matters heard without a jury, the court may open the judgment if one has been entered, take additional testimony and enter a new judgment.

This change would still provide for rehearing of summary judgments, a need which resulted from judicial pronouncements in *Weisberg v. Perl*[69] and *Marans v. Stang*.[70] These decisions indicated that a trial judge lacked jurisdiction over a case after the entry of summary final judgment. "The only method for review after a summary final judgment has been entered is by direct appeal to this Court as provided for by the laws and rules governing appeals from a final judgment in common law actions."[71] However, after the supreme court promulgated the amendment to rule 2.8(a), but before the amendment took effect, the supreme court reconsidered the question of a trial court's power to order rehearing of a summary judgment. Its decision was that a "judge could disturb his own judgment inasmuch as he had discovered that he had erred" and that he was not "stripped of his power over the judgment because it was a summary one."[72] The rationale was based upon "the inherent power of a court to repair the injury it has occasioned."[73]

An important result of the provision in the rules for rehearing of matters heard without a jury (including rehearing of a summary judg-

68. "[T]he proper function of a petition for rehearing is to present to the court some point which it overlooked or failed to consider by reason whereof its judgment is erroneous." Mann v. Etchells, 132 Fla. 409, 417, 182 So. 198, 201 (1938). See also Batteiger v. Batteiger, 109 So.2d 602, 603 (Fla. 3d Dist. 1959).

69. 73 So.2d 56 (Fla. 1954). "This is a common law action and a petition for a rehearing after summary final judgment is unknown and unheard of in such a proceeding." *Id.* at 57.

70. 124 So.2d 891 (Fla. 3d Dist. 1960).

71. Weisberg v. Perl, 73 So.2d 56, 58 (Fla. 1954), citing Kent v. Marvin, 59 So.2d 791 (Fla. 1952).

72. Floyd v. State, 139 So.2d 873, 875 (Fla. 1962).

73. *Ibid.* However, Mr. Justice Drew dissented in *Floyd*, stating: "I find no Florida decision sustaining a judicial revisory power over final judgments broader than that required to declare void that which is by its nature a nullity, or to correct errors to make the record speak the truth." *Id.* at 877.

ment) is its effect upon appeal times. Florida Appellate Rule 1.3 provides: "Where there has been a timely and proper motion or petition for a new trial, rehearing or reconsideration by the lower court, the decision, judgment, order or decree [from which appeal is taken] shall not be deemed rendered until such motion or petition is disposed of." In *Counne v. Saffan*[74] the supreme court held that inasmuch as there was no rule providing for an attack by petition for rehearing on a summary judgment, the filing of one would not extend the time for taking an appeal and the period would, therefore, be computed from the date of the final judgment. Since there is now a rule providing for rehearing of a summary judgment, and other matters heard without a jury, the basis for the *Saffan* decision has been removed. The appeal time will now begin with the disposition of a timely petition for rehearing of matters heard without a jury,[75] or of a motion for a new trial.

> (b) Time for Motion. A motion for a new trial, or a motion for rehearing in matters heard without a jury or rehearing of any motion for judgment provided for by these rules, shall be served not later than 10 days after the rendition of verdict or the entry of a summary judgment.

The main difference between Florida rule 2.8(b) and its federal counterpart is that federal rule 59(b)[75a] requires that the motion be served ten days after entry of the *judgment*, whereas the Florida rule specifies ten days after rendition of *verdict* or the *entry of a summary judgment*.

The reasons supporting a motion for relief from judgments, decrees or orders under rule 1.38(b), if discovered within ten days after rendition of a verdict or entry of a summary judgment, should be used as grounds for a motion for a new trial, rehearing or amendment of judgment under rule 2.8. Relief may be more readily granted under 2.8, since the attack occurs sooner after the judicial action subject to complaint.

The motion for rehearing may be addressed to any judgment rendered in "matters heard without a jury," which may be a judgment not provided for by these rules.

Rule 2.8(b) limits the time for serving motions for rehearing "on matters heard without a jury or rehearing of any motion for judgment

74. 87 So.2d 586 (Fla. 1956), 16 U. MIAMI L. REV. 30 (1961).

75. *Cf.* Ramagli Realty Co. v. Craver, 121 So.2d 648 (Fla. 1960). Rehearings after final judgments are not looked upon with favor under the federal rules. *But see* Gainey v. Brotherhood of Ry. & S.S. Clerks, 303 F.2d 716 (3d Cir. 1962). That opinion, rendered by Judge Hastie, is more liberal than usual.

75a. FED. R. CIV. P. 59(b) is as follows:

Time for Motion: A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

provided for by these rules," to "not later than 10 days after . . . the entry of a summary judgment." The application of the ten day limitation is clear if the court has entered a final judgment on motion for a summary judgment. But what is the time limitation for serving a motion for rehearing in the following situations: when judgment of dismissal is entered on motion to dismiss a complaint for failure to state a cause of action; when cases are tried without a jury; when judgment is entered on motion for judgment on the pleadings; when judgment is entered on motion for judgment notwithstanding the verdict? In these instances there has been neither "rendition of verdict" nor "entry of a summary judgment" from which to limit the time for a motion for rehearing. Yet it is clear that the intent of the rule is to permit a rehearing relating to such judgments. The object of the rule is to permit self-correction of any error and not to require an appeal when the error might be corrected in the court where it was made. The rule is ambiguous and should be construed in light of its intent and purpose, not literally. The ten day limitation must be interpreted as commencing after the entry of *any* judgment in matters heard without a jury, or any judgment on a motion provided for by "these rules." Under this liberal construction those motions when "timely served" within ten days after judgment, will suspend the finality of judgments and toll the running of appeal times. "[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief."[76]

However, the ambiguity in 2.8(b) would be removed by deleting the words "a summary" and substituting the word "such." The rule would then clearly provide:

> A motion for a new trial, or a motion for rehearing in matters heard without a jury or rehearing of any motion for judgment provided for by these rules, shall be served not later than 10 days after the rendition of verdict or the entry of *such* judgment.

What if a plaintiff, being satisfied with the verdict in a jury trial, does not file a motion for a new trial, but his adversary files a motion for judgment notwithstanding the verdict? If the judgment notwithstanding the verdict is rendered more than ten days after the verdict, does the rule authorize the plaintiff to serve a motion for a new trial not later than ten days after judgment notwithstanding the verdict? The rule is subject to the affirmative construction that he may, and such construction would make the rule, in that respect, conform to federal rule 59(b), which permits serving of motions for new trial "not later than 10 days after the entry of the judgment." If a favorable

76. Heydon's Case, 76 Eng. Rep. 637 (1584) (Coke).

verdict is superseded by an adverse judgment notwithstanding the verdict, then a motion for new trial should be in order on any ground that would have been available had the verdict been adverse. The rule is ambiguous on this point unless amended as suggested.

> (c) Time for Serving Affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

This subsection is new in the Florida Rules of Civil Procedure and is the same as rule 59(c) of the federal rules. It will likely be construed similarly.[77]

> (d) On Initiative of Court. Not later than 10 days after entry of judgment, or within the time of ruling on a timely motion for a rehearing of non-jury matters or 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.

This subsection is an expansion of federal rule 59(d), which provides: "Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party."

The purpose of the ten-day limitation on the court's granting a new trial on its own initiative was to give finality to the judgment which had been entered, in the absence of a motion for new trial by a party. If a party has served a timely motion for a new trial, the finality of the judgment has been suspended and the court is free, up to the time of ruling on the motion, to do what it might have done on its own initiative within ten days after judgment.[78]

> (e) When Motion for Unnecessary; Non-Jury Case. Where an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal by an assignment of error whether or not the party raising the question has made any objection thereto in the trial court, or made a motion for rehearing, new trial or to alter or amend the judgment.

This rule is merely declaratory of what would be the law of judicial review.

77. See 6 MOORE, FEDERAL PRACTICE ¶ 59.10 (2d ed. 1953).

78. For a discussion of this second phrase in rule 2.8(d) see Kaufman v. Sweet Et Al Corp., 144 So.2d 515 (Fla. 3d Dist. 1962).

> (f) Order Granting to Specify Grounds. In actions tried by a jury every order granting a new trial shall specify the particular and specific grounds therefor.

This rule is in substance the same as rule 2.6(d), which has been transposed merely to place it in the proper category. It requires the court to give reasons for granting a new trial in jury cases, whether on motion of a party or on the court's own initiative. When a case is tried without a jury and the judgment is set aside on rehearing, the case is merely reopened for further testimony. This is not a new trial, plenary in nature, but only a continuation of the same trial; no reasons for the rehearing are required to be stated. For purposes of appeal, an order granting a new trial without stating the grounds therefor has been treated as a nullity.[79]

> (g) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment, except that this rule does not affect the remedies defined in Rule 1.38(b).

This rule is the same as federal rule 59(e)[80] except for the added clause: "except that this rule does not affect the remedies defined in Rule 1.38(b)." This clause is not in the federal rule.

VII. RULE 3.13. INTERPLEADER

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claim of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties otherwise permitted.[81]

The rule as to interpleader removes a number of technical limitations which grew up under classical chancery practice. During its evolution the following restrictions were placed upon the use of equitable interpleader: (1) The same thing, debt or duty must have been

79. Morton v. Staples, 141 So.2d 806 (Fla. 1st Dist. 1962).

80. See Gainey v. Brotherhood of Ry. & S.S. Clerks, 303 F.2d 716 (3d Cir. 1962), construing FED. R. CIV. P. 59(e).

81. The language of this Florida rule is now substantially the same as that in federal rule 22(1).

claimed by both or all the parties against whom the relief was demanded. (2) All their adverse titles or claims must have been dependent upon or derived from a common source. (3) The person seeking relief must not have had nor claimed any interest in the subject matter. (4) The plaintiff must have incurred no independent liability to either of the claimants; he must be a mere stakeholder.[82] This was the strict bill of interpleader. These restrictions were restated by the Florida Supreme Court as "indispensable to successful maintenance or interpleader."[83]

The second sentence of the new rule 3.13 removes the rigidity of the previous exactions. This rule is intended to prevent multiplicity of actions and circuity of litigation, thus protecting the stakeholder.

CONCLUSION

It is evident from a study of these latest amendments to the Florida Rules of Civil Procedure that the trend is to conform more and more closely to the federal rules. In 1945 a petition of the Florida Bar Association requested that the Florida Supreme Court substitute the Federal Rules of Civil Procedure for our system of common law and equity practice.[84] In denying this application, the supreme court explained that the federal rules were "still in the experimental stage and must be amended and adjusted to a system materially different from our State system where nine tenths of the practice must be done."[85] As the federal rules have begun to grow out of the experimental stage, Florida has profited by adopting various rules from federal practice and procedure. That the job of prescribing rules of procedure is a continuing one is illustrated by the fact that the Federal Rules of Civil Procedure have just undergone changes as extensive as the Florida amendments we have been discussing.

On the whole, the Florida Supreme Court is succeeding admirably in the never-ending responsibility of prescribing "procedure that will make the administration of justice everything that the man of the street has been taught to expect of it."[86] But the responsibility does not lie with the supreme court alone. The bar should, and quite often does, respond with constructive criticisms of existing rules and proposals for amendments and revisions. The process may be slow and tedious, but progress is constantly being made.

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82. 3 MOORE, FEDERAL PRACTICE ¶ 22.03, at 3005, 3006 (2d ed. 1948).

83. Paul v. Harold Davis, Inc., 155 Fla. 538, 541, 20 So.2d 795, 796 (1945). See also Pan American Surety Co. v. Cooke, 130 So.2d 290 (Fla. 3d Dist. 1961), which cites the *Paul* case with approval.

84. Petition of Fla. Bar Ass'n for the Adoption of Rules for Practice & Procedure, 155 Fla. 710, 21 So.2d 605 (1945).

85. *Id.* at 719, 21 So.2d at 609.

86. *Id.* at 716, 21 So.2d at 608.

This article has concerned itself with rules by civil procedure; however, a recent amendment to the appellate rules[87] is worthy of discussion.

APPELLATE RULE 3.5(c)

> (c) Essentials. The assignments or cross assignments of error shall designate identified judicial acts which should be stated as they occurred; grounds for error need not be stated in the assignment.

The first clause, "the assignments or cross assignments of error *shall* designate identified judicial acts . . . ," is mandatory and means that each assignment of error shall be addressed to a designated act of the judge. The designation should be sufficient to identify the act. However, since the policy of the law of procedure is to advance the remedy in order to secure a determination of the controversy, and not to avoid the determination of the controversy without just cause, this provision will likely receive a liberal construction. Nevertheless, the judicial act complained of should be ascertainable from the assignment as it is worded. The notice of appeal and other circumstances may aid in this determination.

It is only *judicial* acts that may be the basis of assignments of error. Jury verdicts and irregular conduct of the jury or attorneys are not acts of the court or judge; however, they may be the grounds of invoking judicial acts. Judicial acts may be acts of omission or commission. It is essential that the judicial act complained of by the assignment be established as true in fact by the record. Assignments of error are not self-proving. They must be established by the record on appeal and not by the brief or oral argument.

If a party is not aggrieved by an act of the court, there is no basis for an assignment of error and likewise there is no basis for an appeal. The want of an assignment of error is not jurisdictional, but it is ground for the dismissal of an appeal because there is nothing for the appellate court to decide, except possibly in trials *de novo* on appeal. Of course, assignments of error are amendable.

The clause that assignments of error "should be stated as they occurred" is directory. "Errors" should be stated as they occurred so that the statement will impart some information concerning the surrounding facts and circumstances to the appellate court. When the error is designated as a certain order, judgment or decree of a given date recorded at a page in a book, it is not stated as it occurred. If the error was a judgment sustaining a motion to dismiss for insufficiency of the complaint, the assignment should so recite. If it was a judgment

87. *In re* Florida Appellate Rules, 142 So.2d 725 (Fla. 1962).

of dismissal after final hearing on the pleadings and the evidence, these circumstances should be stated in the assignment, *i.e.*, according to the facts and circumstances "as they occurred." Of course, the facts and circumstances as they occurred may be generally stated in the assignments and then amplified for clarity in the brief.

The clause providing that "grounds for error need not be stated in the assignment," dispenses with the necessity of making any contention in the assignment as to *why* the judicial act complained of was error. It reserves the statement and argument of the grounds of error for presentation in the brief.