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NOTES

FLORIDA'S UNIQUE DISMISSAL – THE NON-SUIT

Judging from the conflicting case opinions portraying the various uses and constructions of Florida's non-suit, a survey and analysis of this concept, designed to reduce in so far as possible some of the unfamiliarity with this area, is in order.

The Florida Rules of Civil Procedure are to a great extent a duplication of the Federal Rules of Civil Procedure, and are very similar in their effect and objectives. There are, however, express variations between the two, which obtain vastly different results in the same field of law. One such change in the Florida rules is in the area of dismissal and non-suit. The federal rules do not contain provisions for non-suit but rather provide for an end to litigation by motion for dismissal.[1] By this rule the plaintiff is allowed to dismiss his case once if his petition is filed before the defendant answers or moves for summary judgment, without the dismissal being a bar to a subsequent suit on the same cause of action. This rule is appropriately referred to as the "two-dismissal" rule, since without an order by the court to the contrary or a stipulation between the parties a prior voluntary dismissal will make a subsequent one an adjudication upon the merits.[2] Federal Rule 41 (b) further provides that a defendant may move to dismiss the plaintiff's case upon facts and law and that the dismissal, except in the case of lack of jurisdiction or improper venue or upon court order, shall operate as an adjudication upon the merits.

Florida Rule 1.35 is very similar in effect to Federal Rule 41. The main variation between the two is the addition to Rule 1.35 (b) of the clause, "except, however, that nothing stated herein shall preclude a non-suit from being taken pursuant to any applicable statute." Section 54.09 of Florida Statutes 1959 provides that "no plaintiff shall take a non-suit on trial unless he do so before the jury retire from the bar." This statute as construed by the courts provides a plaintiff with an absolute right to a non-suit, abridged only by the limitation that the non-suit must be taken before the jury retires from the bar.[3]

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[1]FED. R. CIV. P. 41 (a).

[2]Crump v. Gold House Restaurants, Inc., 96 So.2d 215 (Fla. 1957); 65 A.L.R.2d 637.

[3]*E.g.*, Hartquist v. Tamiami Trail Tours, Inc., *infra* note 5; Pitt v. Abrams, 103 Fla. 1022, 139 So. 152 (1931).

Perhaps one of the most unsettled and controversial questions in Florida law today is just how "absolute" this right of non-suit really is. Since the rules and statutes are silent as to the extent and breadth of this concept, a thorough search into Florida common law is necessary in order to understand its full consequences.

At early common law, non-suit was classified as a dismissal of the plaintiff's cause, looking to an arrest of the trial but leaving the merits undetermined.[4] It was said that a non-suit must always be voluntary, and in no case could it be adverse to the plaintiff or without his implied consent. Thus the only non-suit known at common law was classified as voluntary. A leading Florida case[5] recognized a part of this common law approach by stating that to set aside a voluntary non-suit would require the plaintiff to prosecute without his consent, which could not be done. However, the Court also recognized a Florida expansion of the common law doctrine to include the involuntary non-suit. Thus Florida law seemingly recognizes the privilege of the plaintiff to a voluntary non-suit, interlocutory in character, leaving the merits undetermined; but it goes a step further than the common law and recognizes the creation of an involuntary non-suit classified as such solely in relation to the circumstances under which it is ordered. Thus a non-suit requested by the plaintiff under such circumstances that he would otherwise be precluded from recovery would be an involuntary non-suit,[6] although it would not actually be forced upon him. An excellent example is furnished by *J. Schnarr & Co. v. Virginia-Carolina Chemical Corp.*,[7] in which the plaintiff asked for and received a non-suit after the announcement by the Court that it would direct a verdict for the defendant. The non-suit thus entered was characterized as involuntary, since the plaintiff was prompted to file his motion for non-suit by an impending adverse ruling of the Court, which would have precluded him from recovery. The Court distinguished this type of non-suit from the voluntary one, which is usually granted in such situations as when the plaintiff enters court unprepared, or is taken by surprise by the defendant, or is not prompted to request a non-suit by a proposed adverse ruling of the court.

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[4]See Slocum v. New York Life Ins. Co., 228 U.S. 364, 394 (1913).

[5]Hartquist v. Tamiami Trail Tours, Inc., 139 Fla. 328, 190 So. 533 (1939).

[6]*E.g.*, Crews v. Woods, 59 So.2d 526 (Fla. 1952); Hartquist v. Tamiami Trail Tours, Inc., *supra* note 5; J. Schnarr & Co. v. Virginia-Carolina Chem. Corp., *infra* note 7.

[7]118 Fla. 258, 159 So. 39 (1934).

Although section 54.09 of Florida Statutes 1959 does not expressly state which type of non-suit it creates, it has generally been held that the statute authorizes both the voluntary and the involuntary non-suit.[8]

LIMITATIONS AND RESTRICTIONS UPON THE USE OF NON-SUIT

The absolute right to a non-suit as reflected by an early Florida case[9] has been subject to increasing qualifications and limitations. A definite trend has been established by the courts to develop means of restricting the use of the non-suit. These devices bear careful analysis in order to formulate some rules as to when and under what circumstances a non-suit, either voluntary or involuntary, will be available to the plaintiff.

Language is found in *Hartquist v. Tamiami Trail Tours, Inc.*[10] that lays a basis for the first real rule seeking to restrict the use of the non-suit. The defendant demurred to the complaint and made a motion for final judgment. The plaintiff moved for and received a dismissal that the court said was similar to the motion to take a non-suit. At a later date, however, the court, upon motion by the defendant, reinstated the original suit. The question on appeal arose from the plaintiff's objection to reinstatement of the suit, on the ground of his absolute right to a non-suit. The Supreme Court, in affirming the lower court's holding, laid the basis for the development and refinement of an express rule upon which the right to a non-suit is conditioned: "We are of the opinion that such a ruling was 'preclusive of a recovery by the plaintiff,' the judge thereby having held that the facts alleged, even if proven, were insufficient in law to justify a recovery by the plaintiff."[11] In this case the plaintiff had no cause of action, since the facts, even if proved, were insufficient at law; he was therefore precluded from recovery and had no absolute right to a non-suit.

Crews v. Woods[12] presents a more refined analysis of the rule applied in *Hartquist*. A definite limitation on the use of the non-suit was the result of this analysis. The trial court denied the plaintiff's

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[8]*E.g.*, Crews v. Woods, *supra* note 6; Hartquist v. Tamiami Trail Tours, Inc., *infra* note 10; Pitt v. Abrams, *infra* note 9.

[9]Pitt v. Abrams, 103 Fla. 1022, 139 So. 152 (1931).

[10]139 Fla. 328, 190 So. 533 (1939).

[11]*Id.* at 346, 190 So. at 540.

[12]59 So.2d 526 (Fla. 1952).

motion for non-suit pursuant to the judge's announced intention to render summary judgment based on a statute of limitations defense. In reaching its decision the Supreme Court said:[13]

> "Hartquist . . . distinguished between compulsory non-suits necessitated by an adverse ruling which was preclusive of recovery only because the plaintiff failed in that particular suit to prove his cause of action, and those in which the adverse ruling was preclusive of recovery under any circumstances on the cause of action stated."

The Court held that the facts of this case fell within the distinction made in *Hartquist* because the plaintiff's cause was barred by the statute of limitations, and the plaintiff was therefore precluded from recovery under any circumstances on the cause of action stated.

Whether a strictly voluntary non-suit is bound by the above rule is not entirely clear from the *Hartquist* and *Crews* cases. Each dealt with a non-suit that had been taken pursuant to an adverse ruling of the court, thus placing the non-suit in the involuntary category; this category itself played an integral part in the formulation of the restriction. By supposition, then, this rule seemingly would not apply to the strictly voluntary non-suit, since it is not taken pursuant to an adverse ruling of the court. *Hartquist* confirms this supposition in its discussion of the absolute right of a plaintiff to a voluntary non-suit but a somewhat less complete right in regard to an involuntary one.[14] This interpretation seems to adopt the common law view of an absolute right to a voluntary non-suit but then to restrict the use of Florida's creation of the involuntary non-suit to any situation in which the plaintiff would be "precluded under any circumstances" from recovery on the cause of action stated.

Welgoss v. End,[15] a recent district court of appeal case, suggests a somewhat different test directed at limiting the "absolute" right to a non-suit. This test necessarily includes the two examples set out above and appears to engulf the rule itself, except that here the test is developed in relation to the voluntary non-suit and is apparently extended to include it. The plaintiff, before trial, requested a voluntary non-suit. The defendant petitioned for and received a

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[13] *Id.* at 527.

[14] 139 Fla. at 345, 190 So. at 540.

[15] 112 So.2d 390 (3d D.C.A. Fla. 1959).

dismissal of the plaintiff's case with prejudice. The Court reasoned that the cause upon which the non-suit was requested was not "on trial" as prescribed by a literal reading of section 54.09 of the Florida Statutes, and therefore at the pre-trial stage there was no right to a non-suit.

More basic questions than that of the validity of the test submitted by *Welgoss* arise when the context of the decision is analyzed. Since this case was a proceeding in equity, two questions are apparent: (1) Is non-suit even applicable, so that the "on trial" test could be said to be a real limitation; and (2) can the non-suit be employed in equity actions? The Court said that "the provisions of §54.09 . . . have been applied generally in law actions," and continued that, assuming that the statute could apply to equity, the cause was still not "on trial."[16] Thus *Welgoss* is neither authority for the "on trial" restriction on non-suit nor is it authority for Florida's position on the application of non-suit in equity proceedings. It does, however, indicate judicial opinion in the area, since it was the first Florida case to make a literal interpretation of section 54.09 in extending non-suit only to those causes that are "on trial." The Supreme Court could have, based upon the facts, made such a distinction in *Hartquist* and *Crews,* but it failed to do so.

Welgoss was also the first case to indicate, even though negatively, that a non-suit could possibly be extended to equity, although from the words of the opinion it cannot be determined upon which theory the holding was based. An explanation generally offered, which has favored restriction of non-suit to law cases only, is that throughout the years non-suit has been applicable only in law and that by this common law restriction it has no application to equity.[17] Another basis upon which the restriction of non-suit to law actions might lie, even though the rules that create non-suit lie within the section of the Florida Rules of Civil Procedure applicable to both law and equity, is that section 54.09 refers to non-suit being taken before the jury leaves the bar; and this presupposes an action in law, not equity, which, except in cases of advisory juries, has no jury trial.

Lynch v. Linden,[18] another recent district court of appeals case, sheds considerable doubt upon the application of non-suit to equity,

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[16]*Id.* at 390-91.

[17]See, *e.g.,* City of Jacksonville v. Shaffer, 107 Fla. 367, 144 So. 888, 891 (1932) (dictum, by implication); Welgoss v. End, *supra* note 15 (*semble*); 30 FLA. STAT. ANN. 712 (1956), citing Arnow and Brown, 7 U. FLA. L. REV. 125, 137 (1954).

[18]115 So.2d 91 (2d D.C.A. Fla. 1959).

while at the same time it suggests further judicial thinking on the restriction of the non-suit. In denying a motion for non-suit, dismissal, and discontinuance in this equity action, the court ruled that "non-suit . . . without prejudice [would not lie], since defendants had acquired substantial rights to be heard on bill and answer."[19] It is interesting to note that the court did not base its holding upon the fact that a non-suit did not lie from an action in equity, nor did it even consider non-suit beyond the above quoted passage; it based its decision upon the "substantial rights" acquired by the defendant to have his cause determined. The court then cited *Welgoss v. End*, *Nystrom v. Nystrom*,[20] and *Muller v. Maxcy*,[21] all equity cases, without further explanation. Since *Welgoss* was cited, the natural question arises as to which basis of that opinion the court sought to adopt. Since the *Lynch* case was a proceeding in equity, perhaps the court adopted the theory of *Welgoss* that non-suits have generally applied only to law actions, suggesting that this would thereby preclude the non-suit in this instance. This would strongly imply that as a rule non-suits are inapplicable to equity. On the other hand, from the facts of the case[22] the right to non-suit could have been denied, since the cause was not yet "on trial"; the court would thereby have strongly implied that non-suit, upon meeting the proper requirements, could apply to equity actions. If this latter suggestion is correct, a further limitation may have been developed upon a plaintiff's right to a non-suit. This limitation could be applied under any circumstances wherein the defendant had gained a substantial right to have his cause determined. Thus the plaintiff's "absolute" right to a non-suit would ultimately be placed solely within the discretion of the trial court judge in his interpretation of "substantial rights."

In the opinion rendered on rehearing the court dropped all reference to the Welgoss case and seemingly based it per curiam holding on the "substantial rights" idea, which was lifted exclusively from the *Muller* and *Nystrom* cases and which, if this per curiam opinion supersedes the original holding, in part helps to explain an otherwise confusing result.[23] From the fact that the court based the major

[19]*Ibid.*

[20]105 So.2d 605 (3d D.C.A. Fla. 1958).

[21]74 So.2d 879 (Fla. 1954).

[22]Here the defendant filed a motion for final decree on bill and answer, from which the plaintiff requested and received a non-suit.

[23]Fla. Rule 1.11 (c), applying both to law and equity to give any party a right

part of its opinion upon *Muller* and *Nystrom,* neither of which discussed the principles of non-suit or its application in equity, it might be suggested that the denial of non-suit in *Lynch v. Lynch* turned upon purely equitable principles and that the citation of *Welgoss* was a mistake, later rectified by the per curiam opinion rendered on rehearing.

As revealed by the Florida cases concerning the restrictions upon the "absolute" right to take a non-suit, it appears that involuntary non-suits will not be allowed in situations in which the plaintiff is "precluded under any circumstances" from recovery on the cause of action stated. It is doubtful that this will apply to the voluntary non-suit, to which the plaintiff may have an absolute right. If, however, litigation is in pretrial stages when the voluntary non-suit is filed, the somewhat dubious "on trial" literal interpretation of section 54.09 may preclude it from being granted. The "substantial rights of the defendant" test flies in the face of the absolute right of the plaintiff to a non-suit; and this language will probably be restricted to its function in equity, where, by the general weight of authority, the concept of non-suit is not applicable. If the trend to restrict and qualify non-suit continues, there is no real limit, short of abrogating the concept, to a court's ability to formulate doctrinal restrictions based upon the policy of the substantial right of the defendant to have his cause adjudicated with the least possible hindrance.

THE EFFECT OF NON-SUIT

Reinstating the Cause of Action

Not only do the restrictions and limitations upon the right of non-suit fall into an unsettled area of Florida law but within this area falls also the question of the plaintiff's alternatives after he has taken a non-suit. On this point the Supreme Court in *Whitaker v. Wright* stated: "The trial court has jurisdiction within proper time (certainly during the same term) to set aside and vacate an order of nonsuit, and especially where no final judgment has been entered thereon."[24] The Court also quoted from *Corpus Juris* to the effect

to move for judgment on the pleadings, was construed in these two equity cases in conjunction with Fla. Equity Rule 3.13, providing for an express amount of time within which to take testimony, to create a "substantial right of which the defendants could not be deprived except upon clear grounds of equity and right." Muller v. Maxcy, 74 So.2d 879, 881 (Fla. 1954).

[24]100 Fla. 282, 287, 129 So. 889, 891 (1930).

that the general rule is that a motion to set aside a non-suit or judgment of dismissal and reinstate the case rests in the sound discretion of the court. The Court reasoned that since the record failed to show that a final judgment was ever entered on the non-suit, there was never a final disposition of the case and that it was still pending at the time of the motion for reinstatement. As indicated by the above language, the Court did not wish to rule expressly that if final judgment had been entered the cause could not have been reinstated; nor was the Court required to make a ruling on the importance of the same term of the court as a prerequisite to reinstatement, since the motion was within the same term as the original action.

In 1933 the Supreme Court in *Seaboard Oil Co. v. Chalk*[25] further considered the problems presented by *Whitaker v. Wright*. The plaintiff asked for and received a non-suit and ninety days within which to prepare a bill of exceptions for review. Later his motion to set aside the order of non-suit and reinstate the cause of action was granted by the trial judge, and the defendant made this ruling a point of objection on appeal, arguing that the court, by entry of final judgment on the non-suit, had lost jurisdiction of the matter. The Supreme Court held that although the order of non-suit was final in its nature so as to support a writ of error,[26] the trial court had the power to vacate the order and judgment. Thus this case seems to clarify the doubt raised by the *Whitaker* case in allowing a non-suit to be vacated regardless of its entry as a final judgment.

State ex rel. Croker v. Chillingworth further clarified the questions left in doubt in both of the prior cases and formulated the existing Florida law in this area:[27]

> "After a plaintiff has suffered the dismissal of his cause of action, the court is without further jurisdiction and has no right to render any judgment in his favor nor any judgment against him. The parties are out of court for every purpose other than to carry the order into effect, or to vacate or modify the same; and after the expiration of the term . . . the court has no power to reinstate the cause."

[25]112 Fla. 387, 150 So. 605 (1933).

[26]This necessity of a final judgment as a basis for an appeal is no longer required. FLA. STAT. §59.02 (1) (1959).

[27]106 Fla. 323, 327, 143 So. 346, 347 (1932).

Thus the Florida law on reinstating a cause of action pursuant to a non-suit seems to be that it is within the power of a court to vacate its own judgment of non-suit, whether entered in the form of a final judgment or not, by virtue of the court's inherent power to modify or vacate its own judgments at its discretion. Once the term of the court expires, however, apparently it loses jurisdiction of the matter and is without discretion to vacate or modify even interlocutory orders of non-suit and reinstate the cause. The result, then, of taking a non-suit in this area is fictional, since the power to vacate an order comes not from the rules governing non-suit but from the inherent powers of the court itself.

Bar to Subsequent Suits on the Same Cause of Action

The Court in the *Chillingworth* case went further in the area of non-suit than just to grant a motion for writ of prohibition to prevent the trial judge from reinstating a cause dismissed in the term prior; it also laid the basis for still another unsettled question involving non-suit in Florida. The Court stated:[28]

> "While a judgment dismissing an action at law not involving the merits [as was the case here] is not a bar to a subsequent action and the same rule applies also to a judgment [of non-suit] . . . , such judgment is nevertheless a sufficient disposition of the cause then pending to deprive the court of jurisdiction to reinstate it after the expiration of the term . . . ."

The Court held that although the lower court was without jurisdiction to reinstate the cause of action, its holding was without prejudice to any right the plaintiff may have had under the law to proceed with the suit as an original new action. Thus the Court suggested that even if the term of a court has expired and a motion to vacate is not proper, a plaintiff, if the order of non-suit is not an adjudication upon the merits of the case, is not barred from a subsequent suit on the same cause of action.

A complex problem is thus presented. When a plaintiff who receives a non-suit brings a new suit on his original cause of action, will the trial court or the appellate court look to the technical form in which the non-suit is entered in order to distinguish between a

[28]*Id.* at 327, 143 So. at 347.

mere arrest of the trial and a bar to a subsequent suit? Or will it look to the basic classification of the non-suit as voluntary or involuntary? Or are these two questions but labels used by the judge in applying what may be the real test — the legal effect of the judgment in settling the rights and duties of the parties? Before these questions are considered, perhaps the section of the *Chillingworth* case that indicates that only a non-suit that is not an adjudication upon the merits of the case may be brought again as an original new action should be reappraised. This reappraisal is especially necessary in view of the fact that some Florida cases suggest that a judgment of non-suit is not a bar to a subsequent suit on the same cause of action.[29] One commentator, in challenging the validity of non-suit in Florida, especially the involuntary non-suit, rests his conclusion solely upon the fact that the plaintiff can sue again and again on the same cause of action, using this privilege vexatiously,[30] without mentioning a possible qualification that the non-suit, if an adjudication upon the merits of the case, may be res judicata.

Broad statements to the effect that non-suits are not a bar to a new action on the same set of facts may be the result of a confusion in terms between the purely common law usage and Florida case decisions. A non-suit at common law was voluntary only and was a dismissal of a cause without an adjudication upon the merits; consequently there was no bar to a subsequent suit on the same cause of action.[31] Florida case law, although recognizing the voluntary character of the non-suit, further subdivided it in accordance with the circumstances under which it was taken. Thus courts and writers, while correctly speaking of the non-suit as voluntary in its inception, may fail to make the further necessary distinction between the voluntary and the involuntary non-suit adhered to by the majority of the Florida cases. The common law rule applicable to voluntary non-suits is recognized by the Florida Supreme Court as applicable to any dismissal of a cause of action: "[A] dismissal . . . not involving the merits of a pending case, is not *res adjudicata* of the controversy, nor can it be pleaded in bar of a subsequent suit on the same subject-matter."[32] Although this general holding may be applicable to the

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[29]*E.g.*, J. Schnarr & Co. v. Virginia-Carolina Chem. Corp., 118 Fla. 259, 159 So. 39 (1934); National Broadway Bank v. Lesley, 31 Fla. 56, 12 So. 525 (1893).

[30]Wigginton, *New Florida Common Law Rules*, 3 U. FLA. L. REV. 1, 9-10 (1950); see 30 FLA. STAT. ANN. 713 (1956).

[31]Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913).

[32]Hassenteufel v. Howard Johnson, Inc., 52 So.2d 810, 812 (Fla. 1951).

effect of the voluntary non-suit in Florida, the legal effect of Florida's involuntary non-suit must be considered as a possible adjudication of the merits of the case and thus a bar to further action on the same cause.

The Court in *J. Schnarr & Co. v. Virginia-Carolina Chemical Corp.* held that the doctrine that non-suit is not a judgment on the merits and does not therefore act as res judicata applies only to the voluntary non-suit that is not a final judgment. As to involuntary non-suit, the Court said that "a judgment is upon the merits when it amounts to a declaration of the law as to the respective rights and duties of the parties based upon the ultimate facts disclosed by the pleadings . . . ."[33] Thus, although the *Schnarr* case did not base its holding upon a distinction as to the technical form in which the non-suit was entered, in holding that the non-suit in litigation was of the involuntary type and therefore a judgment on the merits it did extensively consider the legal effect of the order in settlement of the issues of the controversy.

Another avenue of approach to the question of when an involuntary non-suit will amount to a judgment on the merits has been indicated by the Florida cases that suggest a close analogy between the technical entry of a final judgment and an adjudication on the merits of the case. One Supreme Court decision held that "a judgment is final when it adjudicates the merits of the cause and disposes of the pending action, leaving nothing further to be done but the execution of the judgment."[34] A line of Florida cases, in considering the question of appeal from a non-suit when appeal could be had only from judgments final in nature, discuss in great detail the technical form required of the entry of non-suit before the order can constitute a final judgment. The Supreme Court, in holding the non-suit not to be a final judgment, has said, "It does not purport to declare the sentence of the law upon the entry of the nonsuit, which is an essential element of a final judgment."[35] Another decision stated that an entry of non-suit is not final without something more than the mere entry of non-suit.[36] *Spiker v. Hester*, a 1931 decision, provided

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[33]118 Fla. 259, 267, 159 So. 39, 42 (1934).

[34]Howard v. Ziegler, 40 So.2d 776, 777 (Fla. 1949).

[35]Mizell Live Stock Co. v. J. J. McCaskill Co., 57 Fla. 118, 119, 49 So. 501 (1909).

[36]State *ex rel.* L. & L. Freight Lines, Inc. v. Barrs, 129 Fla. 668, 176 So. 756 (1937).

the classic form for the entry of non-suit that is considered a final judgment:[37]

> " ' "[P]laintiff being solemnly called came not, neither was his suit further prosecuted, whereupon plaintiff suffered a non-suit, and it is therefore considered by the Court that the plaintiff take nothing by his writ and that the defendant go hence without day and recover of the plaintiff his costs . . . ." ' "

Citing *Spiker v. Hester* as the classic form for entry of final judgment, the Supreme Court in *Strong v. City of Winter Park*[38] refused an appeal from a judgment of non-suit, stating that no final judgment appeared in the record. The non-suit requested was taken pursuant to the announced intention of the trial judge to direct a verdict for the defendant and was therefore involuntary, although the court failed to make the distinction. Thus, if the analogy between final judgments and adjudication on the merits be drawn, this case is a possible example, *Schnarr* to the contrary, of an involuntary non-suit that may not be a bar to a subsequent suit on the same cause of action, since it lacked finality of judgment in the entry of the non-suit and thereby reflected the trial judge's intention not to finally adjudicate the cause.

Goldring v. Reid,[39] a very early Florida non-suit case, reached a similar conclusion by way of dictum in drawing an analogy between the technical entry of an order of non-suit and an order as res judicata. Although the non-suit in question was involuntary, the entry was merely that the "plaintiff be and is nonsuited"; and the Court did not grant an appeal, saying, "The ordering of the nonsuit . . . would indicate that by such a judgment the cause is not disposed of on its merits, so as to preclude another proper action on the merits of the cause."[40] Although the formal, technical entry of the non-suit may at one time have played a major role in the analysis by the courts of the question of when a non-suit will adjudicate the merits of the case, the most logical approach seems to be that of the *Schnarr* case. In other words, an involuntary non-suit taken pursuant to a ruling adverse to the plaintiff precluding him from recovery is, in effect,

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[37]101 Fla. 286, 289, 135 So. 502 (1931).
[38]115 Fla. 228, 155 So. 652 (1934).
[39]60 Fla. 78, 81, 53 So. 503, 504 (1910).
[40]*Ibid.*

an adjudication of the cause, notwithstanding the form of entry of the non-suit.

A 1957 Supreme Court decision seems to support the *Schnarr* case, explaining more fully a possible reason behind the holding:[41]

> " 'A judgment on the merits does not require a determination . . . on [the] controverted facts. It is sufficient if the record shows that the parties might have had their controversies determined according to their respective rights if they had presented all their evidence and the court had applied the law.' "

The Court in speaking of the policy factors behind Florida Rule of Civil Procedure 1.35 (b), which provides that dismissals shall act as adjudications upon the merits, named the policy of final determination of litigation as the most prevalent force behind such rules. The Court, however, emphasized the fact that adequate safeguards, such as the liberal amendment, transfers of action, timely appeals, and voluntary non-suits, are needed and are provided to protect the less sure-footed litigant. By all indications, then, this case substantiates the rule set forth by the *Schnarr* case — that a voluntary non-suit is not a bar to a new suit on the same cause of action but that an involuntary non-suit that is an adjudication upon the merits, or by which the parties might have had their controversies adjudicated, is a bar to subsequent suits on the same cause of action.

The Right of Appeal

As provided by section 59.05 of Florida Statutes 1959, "When because of any decision or ruling of the court on the trial of a cause it becomes necessary for the plaintiff to suffer a non-suit, he may appeal therefrom . . . ." Through the annals of Florida law this statute, in conjunction with the non-suit statute,[42] has permitted the non-suiting plaintiff a right of appeal under certain none-too-settled conditions. A survey of Florida cases in this area, together with a certain amount of speculation and legal hypothesis, is required in order to determine under what circumstances the right of appeal exists.

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[41]Hinchee v. Fisher, 93 So.2d 351, 353 (Fla. 1957).
[42]FLA. STAT. §54.09 (1959).

A line of Florida cases seeks to limit the appeal provided by section 59.05 to those entries of non-suit that import or constitute a final judgment.[43] The theory is advanced in *Mizell Live Stock Co. v. J. J. McCaskill Co.*[44] that common law required, as a prerequisite to review, both finality of cause and the element of involuntariness. Section 1697 of the Florida General Statutes of 1906,[45] according to this decision, did away with the element of involuntariness, but the finality of action requirement was expressly retained by section 1691,[46] which the non-suit appeal statute did not supersede. The non-suit from which appeal was sought in the *Mizell* case was involuntary, "suffered" pursuant to an adverse ruling of the Court; however, the plaintiff was denied appeal because the order in its technical form failed to denote finality of action. *Goldring v. Reid,* in relying upon *Mizell,* held that an order that "the plaintiff be and is hereby non-suited . . . is not such a final disposition of the action as that it will support a writ of error."[47] The case indicates that, in addition to the order of non-suit, other expressions should be entered adjudicating that the action at bar is at an end. This non-suit was also involuntary; the plaintiff was required to suffer a non-suit by reason of certain rulings of the trial court.

The section of the Florida General Statutes referred to in the *Mizell* case and upon which *Goldring v. Reid* was decided, which allowed appeal only from final judgments, was amended in 1941 to read: "Appeals in cases at law lie only from final judgments, except as specified in §§59.03, 59.04, and 59.05."[48] Thus it would seem that since 1941 the question of the finality of judgment should play no part in appeal from a non-suit, since this appeal, pursuant to section 59.05, is now an express exception to the required final judgment.[49] An analysis of the case law since 1941 has, however, failed to reveal any degree of unanimity in the recognition of this statutory change, and appeals are still denied upon the basis that the order of non-suit lacks language to indicate that a final judgment has been entered.

[43]*E.g.,* Goldring v. Reid, 60 Fla. 78, 53 So. 503 (1910); Mizell Live Stock Co. v. J. J. McCaskill Co., *infra* note 44; Ropes v. Eldridge, 39 Fla. 47, 21 So. 570 (1897).

[44]57 Fla. 118, 49 So. 501 (1909).

[45]Now FLA. STAT. §59.05 (1959).

[46]Now FLA. STAT. §59.02 (1959).

[47]60 Fla. 78, 79, 53 So. 503, 504 (1910).

[48]FLA. STAT. §59.02 (1) (1959).

[49]See Douglas-Guardian Warehouse Corp. v. Insurance Agents Finance Corp., 46 So.2d 169 (Fla. 1950).

A 1948 Florida case,[50] although granting appeal from a final judgment, indicated that a non-suit without an order of dismissal was not sufficient to support a writ of error, quoting *Goldring v. Reid,* which was decided prior to the 1941 statutory change.

In *Mullis v. City of Miami*[51] the Court took a peculiar approach to the question in granting an appeal from what it labeled a voluntary non-suit, without question of final judgment. On its face this case, in allowing an appeal from a non-suit pursuant to section 59.05 even though it did not constitute a final judgment, might seem to have accepted the 1941 statutory change. However, upon close analysis the circumstances indicate that the non-suit was entered after the judge expressed his intention to direct a verdict for the defendant and was therefore involuntary. Thus, while the case does not stand for an appeal from a purely voluntary non-suit, it does not expressly require any technical form in which the judgment of non-suit must be entered in order to form a basis for appeal.

In *City of Jacksonville v. Shaffer,*[52] another peculiar non-suit appeals case, the Court allowed an appeal from what it labeled a voluntary non-suit but which was taken pursuant to an adverse ruling of the trial court and was therefore involuntary. To confuse matters further, this case, which was decided before the 1941 statutory change and in the face of much precedent to the contrary, made no mention of the final judgment requirement for appeal, as prescribed by the *Mizell* case, but based its decision purely upon policy factors:[53]

> "The purpose of permitting appeals like this from voluntary nonsuits is to permit the plaintiff in a case at law to have important legal questions, arising *during the trial* of his case, presented to and decided by the appellate court, without his being required to suffer the conclusiveness of a final judgment against him on the merits."

By the language of both this case and *Mullis* the Court, in labeling the non-suit as voluntary, seemed to be speaking of non-suit as construed at common law, voluntarily taken at the insistence of the plaintiff; but it failed to distinguish between this concept and the

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[50]Schwenk v. Jacob, 160 Fla. 33, 33 So.2d 592 (1948).
[51]60 So.2d 174 (Fla. 1952).
[52]107 Fla. 367, 144 So. 888 (1932).
[53]*Id.* at 375, 144 So. at 891.

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further distinction between the voluntary and involuntary non-suits drawn by prior cases in Florida. This omission often makes analysis and attempted formulation of rules difficult.

As a result of the change effected by the Florida Statutes of 1941, expressly eliminating the requirement of a final judgment for appeal if taken pursuant to section 59.05, the question, ignored in the *Mullis* and *Jacksonville* cases, of the right to appeal from a purely voluntary non-suit interlocutory in character arises. The Florida courts have refused to entertain appeal from a purely voluntary non-suit as classified from the facts of the cases, and not from a possibly incorrect label applied by the court. Since a final judgment seemingly is no longer required to constitute a basis for such an appeal, apparently this would imply right of appeal from voluntary non-suit also. A 1952 Supreme Court decision, *Crews v. Woods*,[54] offered by way of dictum a possible solution of this question, although a full explanation is yet to be found in Florida case law. This case indicates that since the words of the non-suit appeal statute provide for appeal only when the plaintiff has been caused to "suffer" a non-suit and not when he voluntarily dismisses his cause, appeal will necessarily lie only from involuntary non-suit. If this construction of section 59.05 is accepted, a possible explanation of why the requirement of a final judgment is still demanded by some courts in the denial of appeal from a voluntary non-suit may be suggested. The voluntary non-suit, since it does not comply with the wording of section 59.05, would not fall under the express exceptions to section 59.02 (1), which requires a final judgment as a basis for appeal. If this literal construction of section 59.05 is not adhered to and the statute is construed as granting the right to appeal from any non-suit, there is no logical reason why, since the statutory change of 1941, a voluntary non-suit cannot provide the basis for an appeal.

The *Jacksonville* case advanced a theory that has been subsequently extended to limit further the right of appeal from a non-suit.[55] The Court indicated that a non-suit appeal could be had only from a decision of the court "on the trial" of the cause, which is a literal reading of section 59.05. This seems to be the general trend today. The cases indicate that rulings on pleadings, even when granted as non-suits, do not fit the express terms for appeal as set out by section

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[54]59 So.2d 526, 527 (Fla. 1952).

[55]*E.g.*, Lee v. Sovereign Camp, W.O.W., 113 Fla. 472, 152 So. 17 (1934); Ramsey v. Aronson, *infra* note 56 (*semble*).

59.05 and are therefore not appealable until final judgment is entered. In so holding, *Ramsey v. Aronson,*[56] a district court of appeal case, denied appeal from a non-suit granted after an order by the trial judge granting summary judgment, ruling that appeal from a non-suit pursuant to section 59.05 requires the decision of the court to be "on the trial." In referring to the *Jacksonville* case, which was said to grant appeal from a voluntary non-suit, the court further explained that the non-suit was taken during the trial of the case, whereas the present case was not yet on trial. In denying petition for rehearing, however, the holding was completely distorted when the court said: "The court adheres to its original opinion that the judgment of voluntary non-suit sought to be reviewed in this cause is not a final judgment from which an appeal would lie."[57] Unless the opinion on the petition for rehearing is to be completely disregarded and the extent of the holding is to be that the non-suit was not taken while "on the trial" of the cause and is therefore not subject to review, the *Ramsey* case makes little sense. Logically, the opinion on the petition for rehearing would be the basis of the holding, and calling this non-suit "not a final judgment from which an appeal would lie," in view of the exceptions to the requirements for appeal by section 59.02 (1) and the involuntary character of this non-suit, seems erroneous and unjustifiable.

The Florida case law provides no unanimity of opinion on the question of when an appeal based on section 59.05 will be allowed. As gathered from the early cases decided in accordance with a Florida statute permitting appeals only from final judgments, the non-suit appeal statute was held subordinate, and only those non-suits entered in the technical form of a final judgment were appealable. By the 1941 statutory change, however, the non-suit appeals statute was expressly made an exception. This change provided two avenues of approach to the question of which non-suits can form the basis for appeal. One theory is that the statutory change allows appeal from both voluntary and involuntary non-suits, construing section 59.05 as not distinguishing between the two and an express exception to the statute requiring that appeals lie only from final judgments. The other approach is that only those non-suits that literally conform to the wording of section 59.05 are exceptions to the general rule requiring finality of judgment for appeal, and this expressly eliminates

[56]99 So.2d 643 (3d D.C.A. Fla. 1957).
[57]*Id.* at 645.

voluntary non-suits not "suffered" pursuant to an adverse ruling of the court. Later cases have taken the latter position but have substantiated it only by inference in their general refusal to allow appeal from voluntary non-suits and have relied almost exclusively on the erroneous conclusion that appeals from non-suits lie only from final judgments, without further explanation as to the literal construction of section 59.05 as offered by the *Crews* case.

CONCLUSION

Since the federal rules expressly allow the plaintiff a dismissal when in the course of the suit it is felt that the dismissal will not unduly hinder the defendant, and since the Florida rules have adopted a similar provision, not only in form but also in practice, the validity of further aid to the plaintiff through the confusing concept of non-suit is open to serious criticism. The additional clause of Florida Rule 1.35 (b) creates the non-suit, a device that is both contradictory to and inconsistent with Florida Rule 1.35 (a), which provides for a voluntary dismissal if it is filed before the defendant's answer or motion for summary judgment is served. This non-suit device may allow a dismissal without prejudice to the plaintiff, even if taken after the defendant's answer or motion for summary judgment, as long as the motion is requested as a non-suit and not filed as a voluntary dismissal.

The courts have recognized the tremendous advantage allowed the plaintiff by his right to non-suit and have constantly been in the process of qualifying and restricting the use of this concept until the circumstances under which non-suit will be allowed and its effects are not at all certain. Thus, although the theory of non-suit is very much in existence today, a reasonable prediction as to when it may be finally rendered judicially ineffective cannot be made.

The contest now seems to be between the courts and the legislature to see which will be the first to abolish non-suit completely. A Senate bill[58] was introduced in April, 1959, to repeal sections 54.09 and 59.05, which would have brought about its complete abolition. This bill was sponsored by the Circuit Judges' Association, which felt that the trial judge could handle the situation more equitably under the

[58]"Senate Bill 118, By Senator Cross- (by request): A bill to be 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-suit."