Florida Law Review

Volume 9 | Issue 1 Article 4

March 1956

# Proceedings in Forma Pauperis

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# NOTES

## PROCEEDINGS IN FORMA PAUPERIS

Equality before the law should be a primary goal of every democracy. Instances of discrimination between rich and poor in the substantive laws of the United States are rare indeed. If accessibility to the courts depends upon financial ability, however, the pauper has no way to avail himself of the substantive law. Statutes exempting the pauper from court costs and fees is one means by which the financial burden has been partially lifted. The purpose of this note is to discuss the nature and effectiveness of in forma pauperis legislation, with particular emphasis on the Florida law.

### ORIGIN AND DEVELOPMENT

The first comprehensive in forma pauperis legislation was an English statute[1] providing that one who proved his poverty to the satisfaction of the chancellor could have an original writ and writs of subpoena without cost. The statute also provided for the appointment of "learned Counsel and Attornies," who were to serve without reward. There is evidence that aid was rendered to poor persons in bringing their actions even prior to 1494.[2] This fact led the California Supreme Court to declare that the power of the common law courts to remit fees in forma pauperis was inherent.[3] At least two states recognize the English statute as part of their law by virtue of the adoption of the English common law.[4] The question of the applicability of this statute to Florida law is moot, because Florida has passed a statute on the subject in derogation of the common law.[5]

The liberality expressed in this early statute was restricted in practice. To qualify for relief one had to prove that he was not worth the sum of five pounds, exclusive of his wearing apparel and the matters in the cause.[6] Some authorities assert that a plaintiff who proceeded

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[1]Statute of Westminster, 1494, 2 HEN. 7, c. 12.

[2]See Brunt v. Wardle, 3 Man. & G. 534, 133 Eng. Rep. 1254 (1841).

[3]Martin v. Superior Ct., 176 Cal. 289, 168 Pac. 135 (1917).

[4]McClenahan v. Thomas, 6 N.C. (2 Murph.) 247 (1813); Cowan v. City of Chester, 2 Del. Co. 234 (C.P. Pa. 1884).

[5]FLA. STAT. §58.09 (1953).

[6]See Perry v. Walker, 1 Colly. 229, 63 Eng. Rep. 396 (1844).

in forma pauperis was publicly whipped if he lost the case.[7]

American jurisdictions were slow in enacting in forma pauperis statutes. In early American history there was no critical need for such relief. Suits were comparatively few in a basically agrarian economy,[8] and court costs were not prohibitive. But, with the increase in litigation following urbanization, a majority of American states adopted in forma pauperis statutes in some form,[9] varying in degrees of liberality from the English statute. A federal in forma pauperis statute,[10] in addition to incorporating the provisions of the English statute, grants relief to indigent defendants.

In 1937 the Florida Legislature enacted the statute presently in effect, which provides in part:[11]

> "In counties of a population of one hundred and eighty thousand inhabitants or more, insolvent and poverty stricken persons having actionable claims or demands existing in their favor, shall be entitled to receive the services of the several courts, sheriffs, clerks and constables of said county, without charge or cost to themselves . . . ."

This statute has never been construed by the Florida Supreme Court. The following discussion concerns its constitutionality, administration, and effectiveness in the light of the existing problem of providing relief for indigent litigants.

## CONSTITUTIONAL ASPECTS

### *Validity of Existing Florida Law*

Because of the population restriction in the Florida in forma pauperis statute, it is applicable only in Dade, Duval, and Hillsborough counties.[12] This restrictive clause presents a problem because of the constitutional prohibition against regulating by special and local laws the practice of courts of justice other than municipal courts.[13] In

[7]See Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 374-75 (1923).

[8]See SMITH, JUSTICE AND THE POOR 6-7 (1919).

[9]See, *e.g.*, ARIZ. CODE ANN. §21-602 (1939); ARK. STAT. ANN. §27-401 (1947); D. C. CODE, §11-1508 (1951); GA. CODE ANN. §6-203 (1935).

[10]28 U.S.C. §1915 (1952).

[11]FLA. STAT. §58.09 (1953).

[12]See MORRIS, THE FLORIDA HANDBOOK 338 (3d ed. 1952).

[13]FLA. CONST. art. 3, §§20-21.

determining the constitutionality of legislative enactments that are effective only in certain counties because of population restrictions, the Florida Court has held that such laws are general and of uniform operation, and therefore valid, if the population restriction bears a reasonable relationship to the purposes for which the particular statute was enacted.[14]

In a recent case[15] the Florida Supreme Court held that a population act effective only in Dade county that increased the number of grand jurors to twenty-three did not violate the Constitution. The Court took judicial notice of the fact that there was a greater volume of crime in heavily populated metropolitan areas and used that fact as a basis for finding the classification reasonable. Similarly, if the Court is willing to take judicial notice of the fact that there is a greater volume of poverty in the heavily populated areas, it will have a basis for holding the in forma pauperis statute constitutional.

*Constitutional Mandates for Relief*

*Federal Constitution.* The United States Supreme Court has held that the Fourteenth Amendment to the Constitution does not guarantee a nonresident defendant in an attachment action the right to proceed without providing required security, even though the defendant's inability to provide security foreclosed a defense on the merits.[16] The accused in a criminal proceeding, however, at least in a capital case, is guaranteed the right to counsel.[17] Although it is not likely that the Fourteenth Amendment will be construed as a positive demand on the states to provide legal aid to the impoverished in civil cases in the near future, if social policy, prompted by a decline in national prosperity, should demand such action, the Fourteenth Amendment would be a possible means for accomplishing the result.

*Florida Constitution.* The Florida Constitution provides:[18]

"All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation

[14]Waybright v. Duval County, 142 Fla. 875, 880, 196 So. 430, 431 (1940) (dictum); State *ex rel.* Baker v. Gray, 133 Fla. 23, 36, 182 So. 620, 624 (1938) (dictum).

[15]Lightfoot v. State, 64 So.2d 261 (Fla. 1952).

[16]Ownbey v. Morgan, 256 U.S. 94 (1921).

[17]Powell v. Alabama, 287 U.S. 45 (1932).

[18]FLA. CONST. Decl. of Rights §4.

> shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

The Florida Court has refused to construe this provision as guaranteeing an impoverished plaintiff the right after a nonsuit to proceed in a second action without paying the cost of the first proceeding.[19] The Supreme Court of Rhode Island has interpreted a similar provision of its constitution[20] as guaranteeing an impoverished plaintiff the right to proceed in forma pauperis upon proof that he is unable to pay the required security for costs.[21] Although the language of the Florida Constitution is sufficiently broad to admit an interpretation similar to that of the Rhode Island court, it is doubtful that the framers contemplated such a result.

### ADMINISTRATION

In the majority of those states with in forma pauperis provisions, the applicant is required to file an affidavit setting forth the facts on which he bases his claim and reasons for his inability to pay the costs. The judge then considers the merits of the pauperis claim and determines whether he is in fact unable to pay.[22]

In some states the applicant does not have to show that he is a pauper;[23] and the benefits of the statute are available even if the applicant is able-bodied and could earn the necessary money for the costs.[24] The right to proceed requires only that the litigant show that he has a good cause of action and from extreme poverty is unable to meet the expenses of the suit. In Florida, however, a determination of whether the litigant is poverty-stricken necessarily precedes any benefits under the in forma pauperis statute. The litigant must first file an affidavit with the appropriate court, sheriff, clerk, or constable stating that he is insolvent and unable to pay charges, costs, or fees. The affidavit must be supported by a certificate of an attorney stating that he has investigated the statements set forth in the affidavit and

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[19]State *ex rel.* Larkin v. Bird, 145 Fla. 477, 199 So. 758 (1941).

[20]R.I. CONST. art. 1, §5.

[21]Lewis v. Smith, 21 R.I. 324, 43 Atl. 542 (1899).

[22]See, *e.g.*, Severa v. Severa, 22 N.J. Super. 267, 91 A.2d 895 (1952); Whedbee v. Ruffin, 191 N.C. 257, 131 S.E. 653 (1926).

[23]*E.g.*, People *ex rel.* Barnes v. Chytraus, 228 Ill. 194, 81 N.E. 844 (1907); McNamara v. Nolan, 13 Misc. 76, 34 N.Y. Supp. 178 (N.Y.C.P. 1895).

[24]Kerr v. State *ex rel.* Wray, 35 Ind. 288 (1871).

that in his opinion the litigant is entitled to relief under the statute. The attorney's certificate must further state that he believes that the litigant has a meritorious claim and that he intends to act as attorney for the litigant without charge.

*Determination of Poverty*

Florida, like the majority of states, makes no provision as to the method to be used in determining poverty. The Florida statute requires the litigant to be insolvent and poverty-stricken to enjoy its benefits.[25] The phrase "insolvent and poverty stricken" may be difficult to define, although it may contemplate that the litigant be "utterly unable to pay the costs of the cause," as required in criminal procedure.[26]

Most states use the "discretion test"[27] to determine poverty, while a few states have adopted a "fixed means test."[28] The fixed means test places a limit on the income or worth of the applicant; if he exceeds the stated maximum amount he is excluded from the benefits of the statute. The American Bar Association in its Model Poor Litigants Statute[29] determines that a poor litigant is one who is not worth over $500 and who does not receive an income of more than $25.00 a week.

Specific standards appear to leave much to be desired in solving the problem of poverty determination. If the applicant earns a small amount per week in excess of the fixed means amount, he is excluded even though a rise in the cost of living might well bring his buying power to an amount actually under a static fixed means amount. A person with ten dependents who earns slightly more than the fixed amount is excluded, while his less productive brother with one dependent who earns a few dollars less per week is considered worthy of the statutory benefits. Fraudulent income reporting would also destroy much of the effect of the fixed means test.

The discretion test contemplates broad discretionary power, in that poverty is not defined specifically. The true test involved in this flexible method of poverty determination is whether the applicant can

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[25]FLA. STAT. §58.09 (1953).

[26]FLA. STAT. §924.17 (1953).

[27]See, *e.g.*, ARK. STAT. ANN. §27-403 (1947); COLO. STAT. ANN. c. 43, §22 (Supp. 1953); ILL. ANN. STAT. c. 33, §5 (Smith-Hurd Supp. 1955); KY. REV. STAT. §453.190 (1953); W. VA. CODE §5853 (1955).

[28]*E.g.*, ARK. STAT. ANN. §27-402 (1947); N.Y. CIV. PRAC. ACT §199.

[29]REP. AM. BAR ASS'N 456 (1925).

afford to bring the necessary legal proceedings.

Most states provide that the final determination of poverty lies with the judge.[30] Proponents of judicial discretion in the determination of poverty theorize that the judge has knowledge of local conditions and is best qualified, since he has at his disposal the means to conduct the necessary inquiries.[31]

The discretion test apparently is favored by the Florida statute, because the initial investigation of poverty by the attorney is in no way restricted by fixed means requirements. Since the attorney is probably as familiar with local conditions as the judge, there seems to be no objection to having him make the investigation, guided by his own discretion.

The discretion test appears to be the more logical method, since it gives the investigator the right of discretion in excluding unworthy persons who are neither indigent nor possessed of meritorious claims.[32]

*Persons Eligible*

A broad administrative problem arises in the designation of those persons or classes of persons to whom the benefits of an in forma pauperis statute are to be extended. The Florida statute specificially limits its benefits to plaintiffs in the large counties. Beyond these specific limitations this general statute is silent; it makes no provision for specific groups of persons.

Most other states similarly include only limited classifications of persons within the meaning of the statute. Several states, like Florida, limit the applicability of the statutes to plaintiffs,[33] but some include defendants as well.[34] Florida makes no provision as to residency requirements. In other jurisdictions, in the absence of an express requirement of residency, a nonresident is allowed to sue.[35]

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[30]See, *e.g.*, ARIZ. CODE ANN. §21-602 (1939); COLO. STAT. ANN. c. 43, §22 (Supp. 1953); ILL. ANN. STAT. c. 33, §5 (Smith-Hurd Supp. 1955); KY. REV. STAT. §453.190 (1953).

[31]See EGERTON, LEGAL AID 71 (1945).

[32]Majors v. Superior Ct., 181 Cal. 270, 184 Pac. 18 (1919).

[33]*E.g.*, ARIZ. CODE ANN. §21-602 (1939); ARK. STAT. ANN. §27-403 (1947); KAN. GEN. STAT. ANN. §60-2401 (Corrick 1949).

[34]*E.g.*, COLO. STAT. ANN. c. 43, §22 (Supp. 1953); IND. STAT. ANN. §2-211 (Burns 1933); W. VA. CODE §5853 (1955).

[35]*E.g.*, Pittsburgh, C.C. & St. L. Ry. v. Jacobs, 8 Ind. App. 556, 36 N.E. 301 (1894); Willis v. Willis, 20 Pa. Dist. 720 (1911); Vezolles v. Tennessee Cent. Ry., 175 Tenn. 554, 136 S.W.2d 502 (1940).

The Florida statute is silent as to its applicability to a personal representative of a deceased pauper and as to guardians. Similar silence in other states has been construed to allow an executor or administrator to sue.[36] Some states permit suit by the next friend[37] or guardian ad litem.[38]

*Relief Given*

There is great diversity among the states as to the extent of the relief given. In some states it is limited to exempting the poor litigant from putting up the required security for payment of the costs in the event he loses,[39] though most states provide in general terms that the poor need pay no costs at all.[40] Florida explicitly exempts the poor plaintiff from paying for the services performed by the clerks, judges, sheriffs, or constables,[41] but does not specifically provide for the item of jury compensation and expense. The Florida Court, however, used the following language in ruling that an impoverished defendant in an eviction action was not to be denied trial by jury even though he could not deposit a sum sufficient to cover jury expenses:[42]

> "[A] defendant brought into court in such cases and required to submit to the jurisdiction of the forum for the adjudication of his rights of property or of liberty may look with confidence to the guarantee in the organic law and demand a trial by jury although he be penniless and without friends. If the State has been derelict in not providing a source from which jurors may be paid, such failure cannot be charged to defendant required to answer the process of the State."

This language is sufficiently broad to allow a plaintiff to proceed in

[36]*E.g.*, Wever v. Wever, 191 Ga. 241, 12 S.E.2d 636 (1940); Causey v. Opelousas-St. Landry Securities Co., 187 La. 659, 175 So. 448 (1937).

[37]*E.g.*, Powell v. Fidelity and Deposit Co., 48 Ga. App. 529, 173 S.E. 196 (1934); Vezolles v. Tennessee Cent. Ry., *supra* note 35.

[38]Griffin v. Griffin, 153 Ga. 547, 113 S.E. 161 (1922); Vezolles v. Tennessee Cent. Ry., 175 Tenn. 554, 556, 136 S.W.2d 502, 503 (1940) (dictum).

[39]*E.g.*, KAN. GEN. STAT. ANN. §60-2401 (Corrick 1949); MICH. STAT. ANN. §27.738 (1938); OKLA. STAT. ANN. tit. 12, §921 (1937).

[40]*E.g.*, COLO. STAT. ANN. c. 43, §22 (Supp. 1953); ILL. ANN. STAT. c. 33, §5 (Smith-Hurd Supp. 1955); W. VA. CODE §5853 (1955).

[41]FLA. STAT. §58.09 (1953).

[42]State *ex rel.* Jennings v. Peacock, 126 Fla. 743, 745, 171 So. 821, 822 (1937).

forma pauperis without putting up a deposit to cover the compensation and expenses of the jury. In Florida, witnesses' expenses are paid by the party calling them.[43] No provision is made for the payment of witnesses' fees for an indigent plaintiff.

Generally a litigant's largest item of expense is the attorney's fee. Some states provide that the court may appoint counsel to serve the poor litigant without reward.[44] Under the Florida statute the pauper, before he can proceed, must obtain counsel who will take his case without promise of reward. To give effect to in forma pauperis legislation some provision for competent counsel without cost to the poor litigant should be made.

## The Right to Appeal

Ordinarily, no appeal may be taken by the original plaintiff in a suit until he has paid all costs that have accrued up to the time of the appeal.[45] This provision cannot be ignored by the courts, even though it is considered oppressive and lacking in justice.[46]

A large number of states that allow proceedings in forma pauperis do not allow costs on appeal;[47] one general in forma pauperis statute has been held not to relieve the party from giving an appeal bond.[48] There are, however, a growing number of states that make some provision for in forma pauperis appeals.[49] In 1955 the Florida Legislature added the following amendment to the in forma pauperis statute: "The provisions of this section shall also be applicable to any appeal or other proceeding in the supreme court that originated in said county."[50] All services afforded the litigant by the original statute are now available when he appeals, although the amendment is silent as to the exact costs to be allowed. The attorney must continue in the

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[43]Fla. Stat. §90.15 (1953).

[44]*E.g.*, Ark. Stat. Ann. §27-403 (1947); Ill. Ann. Stat. c. 33, §5 (Smith-Hurd Supp. 1955); Ind. Stat. Ann. §2-211 (Burns 1933); Ky. Rev. Stat. §453.190 (1953); Mo. Rev. Stat. Ann. §1404 (1939).

[45]Fla. Sup. Ct. R. Prac. 29.

[46]Walker v. Jacksonville, 154 Fla. 893, 19 So.2d 372 (1944); *accord*, Hale v. Martin, 76 So.2d 279 (Fla. 1954).

[47]*E.g.*, Ark. Stat. Ann. §§27-401-06 (1947); Ill. Ann. Stat. c. 33, §5 (Smith-Hurd Supp. 1955); Ky. Rev. Stat. §453.190 (1953).

[48]Noyes v. Brooks, 174 Pa. 632, 34 Atl. 285 (1896).

[49]*E.g.*, La. Rev. Stat. Ann. §13:4525 (West 1950); Mich. Stat. Ann. §27.2613 (1943).

[50]Fla. Stat. §58.09 (1953), as amended, Fla. Laws 1955, c. 29615.

case with no remuneration. No provision is made for forgiveness of the appeal bond requirement. A provision to remedy this defect is desirable. Prior to the amendment the litigant who was unable to pay his costs was afforded no opportunity to appeal, and it is not clear that the amendment corrected this defect.

The Federal statute,[51] which also provides for an appeal, affords the appellant a privilege and not a right, in that no requirement of due process is violated by refusal to allow an in forma pauperis appeal.[52]

In sister states there is almost as much variance in the appeal provision as there is in those provisions allowing the indigent person to proceed initially.[53] The conflicting appeal provisions present problems of operation and administration similar to those encountered in the discussion of the application of the statute in the lower courts.

## The Ultimate Burden of Cost

England has provided for extensive relief to poor litigants by the enactment of the Legal Aid and Advice Bill of 1949.[54] The pauper selects counsel from a list of attorneys who have volunteered their names, and the attorney is paid eighty-five per cent of the recommended fee out of a legal aid fund supported by Parliamentary appropriation. The present Florida provisions for the relief of indigent litigants impose no appreciable burden on the taxpayer. The Florida statute provides that the services of the applicable county officials shall be performed without charge, and only in the event that a sheriff or constable incurs personal expense is reimbursement allowed from county funds.[55] No tax funds in Florida are used to provide the poor litigant with money to pay attorney's fees.

The charity of the individual attorney to indigent clients undoubtedly is a partial answer to the problem; but the extent of this form of relief is uncertain, and the burden is large to be the sole responsibility of individual benevolent attorneys. Privately supported legal aid programs afford another alternative solution to the problem.[56]

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[51]28 U.S.C. §1915 (1952).

[52]Williams v. McCulley, 131 F. Supp. 162 (W.D. La. 1955).

[53]See note 49 *supra*.

[54]12 & 13 Geo. 6, c. 51. For a discussion of the bill see Comment, 59 Yale L.J. 320 (1950).

[55]Fla. Stat. §58.09 (1953).

[56]The Legal Aid Committee of the Florida Bar Association was first organized in September 1948. During the year ending May 1951 over 5,000 legal aid cases

## CONCLUSION

Conceding that aid to poor litigants under existing Florida law is a matter of privilege and not a matter of right, and even though the population restriction contained in the statute may not render it unconstitutional, an extension of the privilege to indigent persons throughout the entire state would be in the interest of justice.

The Florida in forma pauperis statute is sufficiently general in its terms to permit a wide latitude of judicial discretion in solving the varied problems of administration. The recent amendment providing for appeal was a needed reform. An extension of the provisions of the statute to include all costs that may be reasonably incurred by a poor litigant in the prosecution of his suit would be desirable, because nothing short of complete relief will open the door of justice to indigent litigants. It also seems desirable to extend the application of the statute to include the indigent defendant.

Unless an indigent plaintiff is able to procure the services of an attorney without cost, the in forma pauperis statute is without practical effect. Probably the most desirable solution, in lieu of providing tax funds, is the extension throughout the entire state of the legal aid program sponsored by The Florida Bar. The combination of a more detailed in forma pauperis statute, liberal interpretation by the courts, and full assumption by the bar of its responsibility to indigent litigants would lead toward the goal of equality before the law for all.

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were satisfactorily handled by the various local bar committees. 25 FLA. L. J. 181 (1951). The annual report of the Legal Aid Committee for 1954 states that legal aid is functioning efficiently in eleven counties of the state. 29 FLA. L. J. 193 (1955). Integration of the local committees into a state-wide organization has been discussed but has not been attempted.