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Bussey v. Legislative Auditing Committee, 298 So. 2d 219 (Fla. 1st Dist. Ct. App.), cert. denied, 304 So. 2d 451 (Fla. 1974)

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certainly a factor to be considered.[42] While some Florida cases have prorated liability, it seems clear that those results were reached because of an additional proration clause in one of the policies[43] or because both insured parties were considered owners.[44]

It is not clear that the Mississippi approach is the result desired by the *Stauffer* court. Clearly that solution would not result in "full coverage" under both policies. This language would reasonably indicate some type of proration, and would be in accord with the majority view in the United States.[45] In addition, the attorneys for petitioner's insurer believe that proration is the correct interpretation of the court's opinion.[46]

The ambiguity of the decision results in confusion and uncertainty in this area of the law. To a certain extent, any precedent in this field is of limited value because of the importance of the precise language of the policies and the facts involved in each case. But the failure of the *Stauffer* court to state its position clearly cannot be excused by the lack of precedent or confusing facts. A clear guide to the road Florida will follow in resolving "other insurance" problems must await future decisions.

MARY F. CLARK

Process—PERSONAL SERVICE OF LEGISLATIVE WITNESS SUBPOENA DOES NOT CONFER IN PERSONAM JURISDICTION ON CIRCUIT COURT IN PROCEEDINGS TO ENFORCE THAT SUBPOENA.—*Bussey v. Legislative Auditing Committee,* 298 So. 2d 219 (Fla. 1st Dist. Ct. App.), *cert. denied,* 304 So. 2d 451 (Fla. 1974).

On August 27, 1973, in a sixth floor hallway of a Tampa office building, Robert N. Bussey was offered a witness subpoena by an agent of the Florida Legislative Auditing Committee. Bussey was accompanied by his attorney, who, at his request, accepted the sub-

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42. *Id.* at 777.

43. Motor Vehicle Cas. Co. v. Atlantic Nat'l Ins. Co., 374 F.2d 601 (5th Cir. 1967); Factory Mut. Liab. Ins. Co. of America v. Continental Cas. Co., 267 F.2d 818 (5th Cir. 1959); Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co., 163 F. Supp. 325 (S.D. Fla. 1958).

44. Hartford Accident & Indem. Co. v. Liberty Mut. Ins. Co., 277 So. 2d 775 (Fla. 1973).

45. *See* notes 22, 23 and accompanying text *supra.*

46. Petitioner's Brief for Certiorari at 8, World Rent-A-Car, Inc. v. Stauffer, No. 46,908 (Fla. filed Feb. 13, 1975): "The result of [the Second District's] ruling, if given effect, would mean that each insurance company would respond to the Plaintiff's damages pro tanto."

poena in his stead and signed it with the notation, "accepted under protest." The subpoena required Bussey to appear before the committee on September 18, 1973, and to bring with him specified documents. The legislature was not then in session.[1]

Bussey resided outside the United States.[2] He was in Tampa as a defendant in an unrelated civil action in federal district court. His attorney notified the committee by mail that Bussey would not appear as directed. The committee, pursuant to subsection 11.143(4)(b), Florida Statutes,[3] responded by initiating criminal contempt proceedings in circuit court. Copies of the complaint and order to show cause were mailed to Bussey's attorney in Tampa, who promptly filed a motion to dismiss. The attorney argued that service of process by mail on himself was insufficient to vest in the court jurisdiction over the defendant.[4] The circuit court denied the motion. It reasoned that the contempt cause was a continuation of proceedings initiated by the personally served legislative subpoena, and that the statute contemplated no new service of process.[5] Bussey took an interlocutory appeal. In *Bussey v. Legislative Auditing Committee,*[6] the First District Court of Appeal held that the circuit court had not acquired personal jurisdiction over the defendant and reversed. The Florida Supreme Court denied certiorari.[7]

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1. For factual and procedural background of the case, see file on *Legislative Auditing Committee v. Bussey* (Office, Legislative Auditing Committee, Capitol Building, Tallahassee, Florida) [hereinafter cited as Committee File].

2. Bussey's legal residence for jurisdictional purposes was a disputed issue. He contended that his legal residence was in Argentina. The committee listed addresses for him in Costa Rica, Argentina, Mexico and St. Petersburg, Florida; it maintained that the Florida address was his legal residence. The circuit court did not reach the question. *See* Committee File.

3. FLA. STAT. § 11.143(4)(b) (1973) provides:

> Should any witness fail to respond to the lawful subpoena of any such committee at a time when the legislature is not in session or, having responded, fail to answer all lawful inquiries or to turn over evidence that has been subpoenaed, such committee may file a complaint before any circuit court of the state setting up such failure on the part of the witness. On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of said complaint and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in his possession which is lawfully demanded. The failure of any witness to comply with such order of the court shall constitute a direct and criminal contempt of court, and the court shall punish said witness accordingly.

4. Motion to Dismiss and Quash, Legislative Auditing Comm. v. Bussey, No. 73-1455 (Fla. Cir. Ct. Leon County, Oct. 9, 1973).

5. Order, Legislative Auditing Comm. v. Bussey, No. 73-1455 (Fla. Cir. Ct. Leon County, Dec. 11, 1973).

6. 298 So. 2d 219 (Fla. 1st Dist. Ct. App. 1974).

7. 304 So. 2d 451 (Fla. 1974).

Bussey is the first case involving the application of subsection 11.143(4)(b). The Florida Constitution gives the legislature itself, *while in session,* the power to adjudge contempt and to punish noncompliance with lawful legislative subpoenas.[8] This power is not given to interim committees; they must resort to "judicial proceedings as prescribed by law."[9] No statutory provision for such proceedings existed until 1969, when the legislature enacted subsection 11.143(4)(b). That statute directs the circuit court to take personal and subject matter jurisdiction upon the mere filing with the court of the complaint in an action to enforce a lawful legislative subpoena.[10]

When contempt proceedings are initiated to enforce judicial orders, Florida courts have recognized that delivery of contempt papers to a party's attorney may satisfy due process notice requirements. Three conditions must be met in those cases: the cause from which the contempt arises must be pending or not yet concluded; the defendant must receive actual notice; and the attorney must not have disclaimed representation of the defendant.[11] In such actions, the court has obtained jurisdiction in the original cause by means of valid judicial process. *Bussey* raised the question of whether *non-judicial* service of process, *i.e.* a legislative subpoena, satisfies personal jurisdiction requirements in subsequent *judicial* proceedings.

The *Bussey* court might have extended prior case law to embrace the situation where a personally served legislative subpoena is followed by mailing of the contempt complaint to the attorney of record. Alternatively, it could have read the statute as a straightforward grant of personal jurisdiction, and proceeded to consider directly any constitutional problems raised by the statute.

The *Bussey* court did neither. It simply stated that the objective of process is to give the party notice of the proceedings; that the cir-

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8. FLA. CONST. art. III, § 5 provides:

> Each house, when in session, may compel attendance of witnesses and production of documents and other evidence upon any matter under investigation before it or any of its committees, and may punish by fine not exceeding one thousand dollars or imprisonment not exceeding ninety days, or both, any person not a member who has been guilty of disorderly or contemptuous conduct in its presence or has refused to obey its lawful summons or to answer lawful questions. Such powers, except the power to punish, may be conferred by law upon committees when the legislature is not in session. Punishment of contempt of an interim legislative committee shall be by judicial proceedings as prescribed by law.

9. *Id.* FLA. STAT. § 11.141 (1973) authorizes the creation of interim committees. FLA. STAT. § 11.143 (1973) details their investigatory powers.

10. *See* note 3 *supra.*

11. Ginsberg v. Ginsberg, 122 So. 2d 30, 32 (Fla. 3d Dist. Ct. App. 1960). *See* Reizen v. Florida Nat'l Bank, 237 So. 2d 30 (Fla. 1st Dist. Ct. App. 1970). Both cases were cited by the *Bussey* court. *See* note 17 *infra.*

cuit court action was distinct from the legislative proceedings; and that therefore the circuit court had no personal jurisdiction "until proper notice is given to that defendant of the action or proceedings against him."[12] Though the court could have reasoned that the "continuous proceedings" rule was inapplicable to the instant case because a legislative subpoena is insufficient to notify the recipient that a *court* is preparing to pass on his rights, it did not expressly apply such a rationale.

Moreover, the court's treatment of the statute was conclusory. Though the legislative intent can only be gleaned from the law itself,[13] the statute seems unambiguous. It provides: "On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of said complaint . . . ."[14] Nonetheless, the court refused to accept the plain statutory language. The opinion stated that to interpret the statute as conferring personal jurisdiction would violate due process provisions of the state and federal constitutions, since adequate notice would not be provided.[15] The statutory language was therefore read to grant only subject matter jurisdiction.[16]

The conclusion reached as to the adequacy of notice was conspicuously devoid of supporting documentation.[17] Apparently the pre-

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12. 298 So. 2d at 221.

13. There is nothing enlightening in this regard in either the 1969 Session Laws or the 1969 *House Journal*. There were no amendments to the bill, Fla. H.R. 1490 (1969). Committee records are nonexistent.

14. FLA. STAT. § 11.143(4)(b) (1973); *see* note 3 *supra*. Though the *Bussey* court made no mention of such an argument, it might be contended that the words "on the filing of such complaint" refer to the normal method of initiating judicial proceedings. This, of course, ordinarily embraces personal service of the complaint. That argument is unpersuasive, however, in view of the legislature's broad contempt powers while in session. *See* note 8 *supra*. The more reasonable construction of § 11.143(4)(b) is that the complaint need merely be filed with the court; in granting interim committees the power to enforce their subpoenas, the legislature probably intended to draw upon as much of its in-session power as possible.

15. 298 So. 2d at 221.

16. *Id.*

17. The only cases cited were Reizen v. Florida Nat'l Bank, 237 So. 2d 30 (Fla. 1st Dist. Ct. App. 1970), and Ginsberg v. Ginsberg, 122 So. 2d 30 (Fla. 3d Dist. Ct. App. 1960). Both cases were cited in support of the rule allowing service on a party's attorney *"where the cause is pending or not yet concluded."* 298 So. 2d at 221. *See* note 11 and accompanying text *supra*. The court held this rule inapplicable.

The only other citations were to *Florida Jurisprudence* and *American Jurisprudence 2d*. The court cited 25 FLA. JUR. *Process* §§ 3-4 (1959) for the proposition: "Where the defendant does not enter a voluntary general appearance or otherwise waive service of process, the issuance and service of process is *indispensable* to the jurisdiction of the Court, even though the Court may have jurisdiction of the subject matter." 298 So. 2d at 221. This statement supports neither party. No one contended that there was no service of process. The issue was rather the sufficiency of the method of service used,

cise issues raised in *Bussey* have not been litigated elsewhere. There is one case, however, that deals with closely related issues. In *State v. Uphaus*,[18] the defendant failed to comply fully with a personally served witness subpoena from the Attorney General of New Hampshire. The latter petitioned the superior court to have the defendant appear there and fully comply with the attorney general's subpoena, or to hold the defendant in contempt of that court for failure to comply. A New Hampshire statute[19] appeared to give the trial court both subject matter and personal jurisdiction. On appeal, the New Hampshire Supreme Court reversed the trial court's finding of contempt and held that the lower court had not acquired jurisdiction over the defendant. The court construed the law to grant only subject matter jurisdiction and, since the attorney general had apparently only mailed a copy of the petition to the defendant's Connecticut home,[20] found that the trial court lacked jurisdiction over the person. The supreme court so held in view of the "well established principle of law that there must be *personal service in this jurisdiction* on a nonresident defendant to give the Court jurisdiction over his person."[21]

Despite the support provided by *Uphaus*, the *Bussey* decision is unfortunate in two respects. First, the *Bussey* court's determination that notice was insufficient begs the question involved: was the defendant in this case denied either effective notice or opportunity to be heard? The argument avails that a legislative subpoena is not notice of judicial proceedings, but it is not compelling in light of the facts

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that of a personally served legislative subpoena followed by a mailing of the complaint to the attorney of record.

The opinion also cited 62 AM. JUR. 2d *Process* § 2 (1972): "To say that process confers jurisdiction means that it empowers the court to exercise authority derived from law." 298 So. 2d at 221. And finally, quoting 62 AM. JUR. 2d *Process* § 3 (1972), the *Bussey* court said, " 'A judgment against one who was not given notice in the manner required by law of the action or proceeding in which such judgment was rendered lacks all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is fairly administered.' " 298 So. 2d at 221. Again, neither of these statements directly addresses the issues involved.

18. 116 A.2d 887 (N.H. 1955).

19. N.H. REV. STAT. ANN. § 491:20 (1968) provides: "Procedure. Upon such petition the court or justice shall have authority to proceed in the matter as though the original proceeding had been in the court, and may make orders and impose penalties accordingly." Compare the above language to the seemingly explicit and mandatory conference of subject matter and personal jurisdiction in FLA. STAT. § 11.143(4)(b) (1973). *See* note 3 *supra*.

20. 116 A.2d at 890. The opinion does not specify how the petition was served, but notes that the only personal service in the case was of the subpoena. *Id.* at 889.

21. *Id.* (emphasis added). Notwithstanding the statutory language, *see* note 19 *supra*, the New Hampshire Supreme Court found that the legislative intent was "not to make the proceedings ancillary to and a mere continuation of the hearing before the Attorney General." *Id.*

of the case. Offered the legislative subpoena, Bussey had his attorney accept and sign it in his stead. A month later, the same attorney received a copy of the complaint and order to show cause by mail, and immediately proceeded to represent the defendant in the circuit court. In these circumstances it seems safe to conclude that Bussey had both actual notice and an opportunity to defend.

Secondly, the *Bussey* court failed to consider the ramifications of its decision as respects the legislative investigatory process. It clearly created a loophole by which an intractable witness may successfully avoid the command of a personally served legislative subpoena issued by an interim committee. A potential witness may fail to appear, or appear and fail to respond to lawful questions. While such action provides grounds for a judicial criminal contempt citation,[22] he need only leave the jurisdiction[23] or conceal his whereabouts to avoid such penalty, for he will then not be amenable to personal service in the contempt proceeding. After *Bussey,* an interim committee can only enforce its subpoena by twice effecting personal service.

The loophole may be closed by amending the existing statute. A provision might be added authorizing personal service of a legislative subpoena containing a specific and clearly printed notice to the witness that the subpoena was filed with a circuit court; that the recipient is thereby submitting to the personal jurisdiction of that court in the event of an action to enforce the subpoena should he not comply; and that process will thereafter be served by mail upon him, at his last known residence, or upon his attorney of record. The subpoena would be filed with a circuit court and personally served by a sheriff or other designated agent, like any civil complaint. By utilizing judicial service of process in the first instance, an interim committee should be able to meet the *Bussey* court's objections.

In addition, a provision might be added to the Florida "long arm" statute, section 48.193, making noncompliance with a personally served, lawful legislative subpoena an act upon which extra-state service might be predicated. Though legislation embodying these two approaches has been drafted,[24] it has not yet been introduced. If in-

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22. If the legislature were in session, it would be unnecessary to seek a judicial contempt citation. While in session, the legislature itself can render a contempt citation. *See* note 8 *supra.*

23. Bussey did precisely that in this case. *See* Committee File.

24. The operative language of the draft amendment to § 11.143 provides:

11.143(3)(e)(1): Any committee, whether or not the legislature is then in session, that causes a subpoena to be served by a sheriff or by a duly constituted agent of a Florida legislative committee as authorized by Section 11.143(3)(d) Florida Statutes (1973), shall have the power to have any such subpoena served as follows:

terim committees are to avoid the necessity of dual personal service and its concomitant risks, such legislation is necessary. While the vast majority of legislative subpoenas are honored, the *Bussey* decision has weakened the legislature's ability to deal effectively with recalcitrant witnesses.

STEPHEN J. WEINBAUM

The subpoena shall contain in clear, bold faced type, the following words:

"Notice: This legislative subpoena has been filed with the Circuit Court of (county and circuit), Florida, on (date), and by the authority of Section 11.143(3)(e), Florida Statutes, 1975, is therefore both the process of the above named circuit court and of the herein named legislative committee, SUCH THAT: Personal service of this subpoena upon (name) shall constitute notice to such person that he or she shall be subjected to the jurisdiction of the above named circuit court in any action by the named committee in such circuit court for a contempt citation, order to show cause, or to otherwise enforce this subpoena. The complaint in any such action therefore need not be personally served, but may be mailed to the above named person at his or her last known address in the United States or to his or her attorney of record as authorized by F.S. 48.193 (1)."

11.143(3)(e)(2): Such subpoena as authorized by subsection (1) of this section, when personally served by a sheriff or by a duly constituted agent of a Florida legislative committee, as authorized by Section 11.143(3)(d), Florida Statutes, containing the notice as provided by subsection (1) of this section, duly filed in any circuit court of the State and bearing evidence of such filing, shall obviate the need for further personal service when a committee proceeds under Section 11.143 (4)(b) Florida Statutes, 1973, to invoke the in personam jurisdiction of the circuit court. In such circumstances, the complaint specified in Section 11.143(4)(b) may be served by U.S. Mail, either upon the defendant-witness at his or her last known address in the United States, or upon his or her attorney of record as authorized by Florida Statute § 48.193(1). The circuit court thereafter shall take jurisdiction of the witness and the subject matter of said complaint as provided by Section 11.143(4)(b). This section shall not affect the power of the legislature or any committee thereof to proceed as elsewhere provided for by law.

It is the intent of this section that a subpoena served in compliance with Section 11.143(3)(e)(1) and (2) shall be deemed to begin proceedings in the circuit court such that any further action arising from the issuance of said subpoena shall be considered a continuation of such proceedings personal notice having been given the witness and judicial service of process having been utilized in the first instance.

The draft amendment to Fla. Stat. § 48.193(1) would make a person subject to the jurisdiction of Florida courts if he "(h) Fails to respond to any lawful legislative subpoena lawfully served or, respond[s] but fail[s] to answer all lawful inquiries or turn over all evidence that has been subpoenaed."