University of Miami Law Review

Volume 22 | Number 2 Article 5

1-1-1967

Appellate Procedure

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APPELLATE PROCEDURE

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INTRODUCTION

The purpose of this survey is to review some of the most important cases involving rules and procedures to be followed in courts having appellate jurisdiction.[1] No attempt has been made to cover appellate procedures in specialized fields such as criminal law[2] and workmen's compensation except as they may relate to general appellate practice. Reference will be be made to the federal court system when useful analogies can be drawn.

A review of Florida cases over the past two years shows that far too many appeals were dismissed merely because the procedures outlined in the Florida Appellate Rules[3] were not followed. These Rules are neither overly complicated nor voluminous. Therefore it is suggested that a review of the Rules would be most beneficial to anyone who is about to take an appeal.

Because Florida's procedural rules are patterned upon federal rules, *Moore's Federal Practice* is today our best text on the state practice.

I. CHANGES IN LEGISLATION AND APPELLATE RULES

The current Florida Appellate Rules were promulgated in 1962. Rules 1.3,[4] 3.2c,[5] 3.2f,[6] 3.7j,[7] 3.7k, 3.13b,[8] 3.15b,[9] 3.16e,[10] 4.5c(6) and

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1. The survey covers cases reported from 177 So.2d 1 through 200 So.2d 927.
2. Although cases involving habeas corpus and FLA. R. CRIM. P. 1 are technically classed as civil actions, they will be treated in the survey on Criminal Law.
3. Sometimes referred to in the text simply as the Rules.
4. The 1965 amendment to the definition of "rendition" clarifies the prior language and

7.2a[11] were amended by the Supreme Court of Florida in 1965.[12]

In its last regular session, the 41st Florida Legislature repealed all statutes relating to time for appeals and substituted in their place the Florida Appellate Rules.[13] This move toward uniformity in the time allowed for filing an appeal should reduce the risk of overlooking statutes which shorten the period of time for taking an appeal in certain cases.

On June 12, 1967, the Supreme Court of the United States promulgated an extensive revision of its rules to be effective as of October 2, 1967.[14] This was the first major revision of the Court's rules since 1954.

II. JURISDICTION OF APPELLATE COURTS

A. *Supreme Court*

Appeals from trial courts may be taken directly to the Supreme Court of Florida as a matter of right from final judgments or decrees passing directly upon the validity of a state statute, a federal statute or treaty, or construing a controlling provision of the Florida or Federal Constitution.[15] However, when the trial judge does initially pass on the validity of a state statute and his holding is neither assigned as error nor

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provides that the filing of a timely and proper motion or petition for a new trial, a rehearing, or other timely post trial motion or petition permitted by the rules stays the "rendition" until such motion or petition is disposed of.

5. A new paragraph was added which provides:

Deficiencies in form or substance in the notice of appeal shall not be ground for dismissal of the appeal unless it be clearly shown that the complaining party was misled or prejudiced by such deficiencies.

6. The following sentence was added:

Every motion to dismiss an appeal for failure to comply with this rule shall be filed on or before the 20th day after the filing of the notice of appeal or if costs were settled thereafter from the date of such settlement.

7. The rule was amended to make the appendix requirement to briefs permissive, rather than mandatory, "despite the mandatory language of the rules in regard thereto."

8. Amended to read that a voluntary dismissal may be by the "moving party" instead of by the "appellant."

9. The rule now reads:

If a petition for rehearing is filed in a cause, the time for the issuance of the mandate or other process shall be extended until the petition is denied, or, if granted, until the cause has been fully determined; provided, however, that the court may delay the issuance of its mandate upon terms and conditions to be imposed by it after denial of rehearing for good cause if such application be made at the time of filing the petition for rehearing.

10. The following sentence was added:

The trial court shall have full and complete power and authority upon due application to enforce the payment of fees allowed by the appellate court.

11. The form of the notice of appeal was revised.

12. These amendments are reported at 179 So.2d 341 and at 181 So.2d 2.

13. FLORIDA SESSION LAW SERVICE Ch. 67-175.

14. Thirty-six of the sixty-two rules were amended. The revised rules may be found at 388 U.S. 927, 87 S.Ct. 2147, 18 L.Ed. 2d ii and 42 F.R.D. 81. An excellent discussion of the effect of these rule changes was written by Bennett Boskey and Eugene Gressman in 42 F.R.D. 139.

15. FLA. CONST. art. V, § 4(2).

argued in an appellate brief, there is no jurisdictional vehicle by which the case can be brought before the supreme court.[16] The supreme court did take jurisdiction in a case where the trial court unnecessarily held a state statute invalid and affirmed the decision of the trial court without undertaking to determine the validity of the statute.[17]

When the language of the trial judge's decree specifically rejects attacks on the constitutionality of a statute, an appeal may be taken directly to the supreme court because "passing upon and rejecting attacks on the validity of an act necessarily involved determination of that validity."[18]

Appeals from district courts of appeal may be taken to the supreme court only from decisions *initially* passing upon the validity of a state statute, a federal statute or treaty; or *initially* construing a controlling provision of the Florida or Federal Constitution.[19] A chink was placed in the armor of this constitutional limitation on jurisdiction by *Massachusetts Bonding & Insurance Co. v. Bryant*.[20] The supreme court took jurisdiction even though the district court of appeal did not, in fact, *initially* pass on the constitutionality of a statute. It had merely discovered an earlier decision of the supreme court which determined the statute's constitutionality. In clarifying its interpretation of article V, section 4(2) of the Florida Constitution, the court stated:

> Although we have held that a decision 'initially' passing upon a constitutional question as specified in Section 4 of Article V of the Constitution, applies only to an original such determination in immediate litigation . . . we qualified the statement by restricting its application to like decisions by the same or other District Courts of Appeal. The pronouncement should not be strained to mean that a litigant could challenge the validity of an act which had already been held valid by this court and use that as a vehicle to secure another determination of the issues of his case under the familiar ruling that once this court assumes jurisdiction, it will consider the entire case, merits and all. And to preclude any false hope of litigants and attorneys that such procedure would be sanctioned, we hasten to say that because of the ramifications of the present controversy and the many facets involved we do take jurisdiction, although the ruling of the District Court is based more on 'discovery' than 'initial' determination . . . .[21]

From the quote above, it would seem that if a district court initially

16. Hillsborough County Aviation Auth. v. Walden, 196 So.2d 912 (Fla. 1967).

17. *See* Conway v. Sears, Roebuck & Co., 185 So.2d 697 (Fla. 1966). The court regarded the opinion of the trial court as obiter dictum.

18. Smith v. Martin, 186 So.2d 16,17 (Fla. 1966).

19. FLA. CONST. art. V, § 4(2).

20. 189 So.2d 614 (Fla. 1966).

21. *Id.* at 616.

passes on the validity of a statute in a particular litigation, and bases its decision on the discovery of a case decided by a district court of appeal, an appeal may be taken to the supreme court, and that such an appeal cannot be taken if the decision of the district court is based on a case decided by the supreme court.

> The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.[22]

The above-quoted section of the Florida Constitution has been interpreted to give the supreme court the jurisdiction to review by certiorari cases in which the district court has misapplied the rule of an earlier supreme court decision.[23] It has also been held that obiter dictum is sufficient to create a conflict in decisions necessary to give the supreme court jurisdiction to review a case by certiorari.[24]

The supreme court has reviewed by certiorari cases in which the district court of appeal affirmed the decision of the trial court without opinion where the legal result of the decision was such that it created an apparent conflict with an opinion of the supreme court or with a decision of a different district court of appeal.[25] These last-mentioned cases were not reviewed until after the supreme court requested the district courts to adopt an opinion setting forth the theory and reasoning upon which the decisions were based (which requests were refused).[26] The fear has been expressed that, as a result of the decisions to take jurisdiction in such cases, the lawyers of Florida might never again accept with finality a decision of a district court of appeal.[27]

When an appeal is erroneously taken from a district court of appeal, the supreme court may treat the appeal as a petition for certiorari if there

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22. FLA. CONST. art. V, § 4(2).

23. *See* Orange City Water Co. v. Town of Orange City, 188 So.2d 306 (Fla. 1966).

24. *See* Hawkins v. Williams, 200 So.2d 800 (Fla. 1967) and Saf-T-Clean, Inc. v. Martin-Marietta Corp., 197 So.2d 8 (Fla. 1967).

25. *See, e.g.*, Home Dev. Co. v. Bursani, 178 So.2d 113 (Fla. 1965) and Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965).

26 In Hoisington v. Kulchin, 178 So.2d 349 (Fla. 3d Dist. 1965), the Third District Court of Appeals refused to set forth an opinion giving the reasoning for it decision.

> [T]o comply with the request would be to make an advocate of this court if it should attempt to set forth the basis of its reasoning after its jurisdiction has expired. *Id.* at 352.

It should be pointed out that the supreme court specifically granted jurisdiction to the appellate court to set forth its reasoning in an opinion. It is difficult to see why a court should not advocate a reason for its own decision.

27. See Justice Thornal's dissent in Foley v. Weaver Drugs, Inc., 177 So.2d 221, 234 (Fla. 1965).

is jurisdiction for granting the petition had it been requested initially. In *Ainsley Realty Co. v. Kramer*,[28] the district court of appeal dismissed the appeal of a corporation against which a final judgment had been recovered after the corporation had been voluntarily dissolved. The ground for dismissal was that a dissolved corporation had no standing to prosecute an appeal. The supreme court pointed out that the appellant had mistakenly asserted that the district court passed on the validity of a state statute. However, because the district court overlooked the fact that the case cited in its order did not support the proposition that an appeal of a dissolved corporation must be dismissed,[29] the supreme court held that justice required that the appeal be treated as a petition for certiorari. The court further held that, under section 608.30(3) of the Florida Statutes, the board of directors of a corporation is allowed to prosecute an appeal from a final judgment entered against the corporation after its dissolution when the suit was in progress prior to the dissolution.

The authors would suggest that the holding of *Ainsley Realty Co. v. Kramer* be incorporated into the Florida Appellate Rules to read as follows:

> *Misconception of Remedy*. If an appeal be improvidently taken where the remedy might have been more properly sought by certiorari, this alone shall not be a ground for dismissal; but the notice of appeal and the record thereon shall be regarded and acted on as a petition for certiorari duly presented.

B. *District Courts of Appeal*

> Article V, section 5(3) of the Florida Constitution states that: Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.
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> . . . .
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> . . . A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.

During the period surveyed by this article disagreement arose among the distirct courts of appeal as to when they have jurisdiction to issue the writs mentioned in article V. In turning down a request for a writ of prohibition or writ of mandamus the District Court of Appeal, Fourth Dis-

28. 189 So.2d 609 (Fla. 1966).

29. The case cited was City of Hollywood v. Bair, 127 Fla. 93, 178 So. 850 (1937).

trict, interpreted article V to mean that writs of mandamus, prohibition, certiorari, and quo warranto could be issued by the district courts of appeal only in cases in which a direct appeal to the district court would be allowed as a matter of right.[30]

The District Court of Appeal, Third District, has refused to review by certiorari cases in which the Florida Constitution[31] confers final appellate jurisdiction upon the circuit courts.[32] However, the other district courts of appeal have reviewed, by writ of certiorari, cases where direct appeals were properly taken to circuit courts.[33] In one of those cases the court recognized that a party is not entitled to two appeals from the same judgment, and treated an appeal as a petition for certiorari.[34] If confusion does exist as to whether the district courts of appeal have jurisdiction to review by writ of certiorari a judgment of a circuit court, affirming, modifying or reversing the judgment of a lower court, any doubts should have been allayed by the decision of the Supreme Court of Florida in *Dresner v. City of Tallahassee*[35] in which the court stated:

> The type of certiorari which we here discuss is in the nature of the common law writ which issues in the sound discretion of a superior court directed to an inferior court in order to determine from the face of the record whether the lower court has exceeded its jurisdiction or has otherwise deviated from the essential requirements of the law. It is appropriate in situations where no other provision is made for the review of a judgment of a lower court.[36]

The extent of this jurisdiction is governed generally by the precedents previously applicable to the Supreme Court of Florida prior to the establishment of the district courts of appeal.[37]

The constitutional right to appeal the decision of a trial court in a district "to the court of appeal of such district"[38] was held to give the District Court of Appeal, Third District, jurisdiction to review the denial of a petition for certiorari by a circuit court in spite of the fact that a statute[39] "purports to place jurisdiction . . . in the first district court of

30. State *ex rel.* Sentinel Star Co. v. Lambeth, 192 So.2d 518, 523 (Fla. 4th Dist. 1966).
31. FLA. CONST. art. V, § 6(3).
32. *See* Berger v. State, 174 So.2d 456 (Fla. 3d Dist. 1965) and State v. Katz, 108 So.2d 60 (Fla. 3d Dist. 1959).
The court did recognize that it could issue a common law writ of certiorari when that writ is confined to its legitimate scope, but pointed out that the writ could not be used as a second appeal.
33. *See, e.g.*, Awtrey v. City of St. Petersburg, 193 So.2d 469 (Fla. 2d Dist. 1967) and Frazee v. Frazee, 185 So.2d 484 (Fla. 1st Dist. 1966).
34. Frazee v. Frazee, 185 So.2d 484 (Fla. 1st Dist. 1966).
35. 164 So.2d 208 (Fla. 1964).
36. *Id.* at 210.
37. *Id. See also*, Robinson v. State, 132 So.2d 3 (Fla. 1961).
38. FLA. CONST. art. V, § 5(3).
39. FLA. STAT. § 458.123(4) (1965).

appeal."[40] The court reasoned that the certiorari proceeding in the circuit court, reviewing a decision of the State Board of Medical Examiners, was an original proceeding or case, and that the jurisdiction thus exercised was that of a trial court.

C. *When Jurisdiction Passes from the Trial Court*

It has been a principle of long standing that after an appeal has been perfected the appellate court has *complete* and *exclusive* jurisdiction over the whole case.[41] An appellant who files a notice of appeal before the entry of an order denying his motion for a new trial is deemed to have abandoned his motion and thereby vested jurisdiction in the appellate court.[42] If a notice of appeal and a motion for a new trial are filed on the same day, the appellate court is vested with complete and exclusive jurisdiction over the subject matter and the parties to the appeal.[43] Any subsequent ruling by the trial court on the motion for a new trial is a nullity.[44]

The supreme court departed from the above-mentioned principles of jurisdiction in *State* ex rel. *Owens v. Pearson*[45] and held that:

> The proper and timely filing of a petition for rehearing after the filing of a notice of appeal is a subsequent event which destroys the efficacy of the notice of appeal. Jurisdiction can thereafter be vested in the appellate court only by the filing of another notice of appeal following the disposition of the petition for rehearing or the abandonment of such motion by the party making it . . . .[46]

The opinion in the above-quoted case gave only a slight hint that the party seeking a rehearing and the party filing the notice of appeal were not one and the same.

State ex rel. *Owens v. Pearson* was later clarified by the supreme court in *Harrell v. State*[47] in which it was held that, by filing the notice of appeal the appellant *waives* his other post trial remedies.

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40. Brunson v. State Bd. of Medical Examiners, 186 So.2d 276, 277 (Fla. 3d Dist. 1966).

41. Holland v. State, 15 Fla. 549 (1876).

FLA. APP. R. 3.2(d) provides:

The filing of the notice of appeal and deposit of the filing fee with the clerk of the lower court shall give the [appellate] Court jurisdiction of the subject matter and of the parties to the appeal. . . .

42. Perez v. City of Tampa, 181 So.2d 571 (Fla. 2d Dist. 1966).

43. State *ex rel.* Faircloth v. District Court of Appeal, Third District, 187 So.2d 890 (Fla. 1966).

> There can be no doubt that the filing of a notice of appeal . . . vests in the appellate court *complete and exclusive* jurisdiction of the subject matter and of the parties to the appeal. This court in a number of cases has held that a notice of appeal filed after a motion for a new trial . . . amounted to an abandonment of the latter. We can draw no distinction because in this case the motion for new trial and the notice of appeal were filed on the same date. *Id.* at 891-92 (emphasis supplied).

44. Sanders v. McCaughey, 192 So.2d 774 (Fla. 2d Dist. 1966).

45. 156 So.2d 4 (Fla. 1963).

46. *Id.* at 8.

47. 197 So.2d 505 (Fla. 1967).

> The decision in *State* ex rel. *Owens v. Pearson* is based upon the qualification . . . that the timely post trial motion of another litigant may operate to render appellant's notice premature, the doctrine of waiver being clearly inapplicable against the other party.[48]

The doctrine of waiver of post trial remedies should not be confused with the question of the jurisdiction of the appellate court. Once the notice of appeal and filing fee are deposited with the clerk of the lower court, the district court of appeal has "jurisdiction of the subject matter and of the parties to the appeal."[49]

The following proposed appellate rules would help to clarify this point:

> An appeal or a petition for writ of certiorari to a lower court filed within the time fixed by these rules or any applicable statute is a continuation of the original action which gives the appellate court jurisdiction of the subject matter and of the parties.[50]
>
> A timely appeal after the appellant has served a timely motion tolling the appeal time, deprives the lower court of jurisdiction to determine the merits of the motion.
>
> After a timely appeal a later timely motion by another which tolls the running of the time for taking an appeal under these rules does not vitiate the prior appeal, but the lower court may grant a hearing on the motion and by order tentatively indicate the tenor of a ruling thereon in event the appellate court releases jurisdiction for its determination; otherwise, the appellate court on motion shall release jurisdiction to the lower court for a hearing and order on the merits of the timely motion.[51]

The proper method for a party to obtain a post trial remedy after another party has properly filed an appeal would be to file a timely motion with the appellate court requesting that court to grant jurisdiction to the trial court to rule on the motion for a post trial remedy. Such motions should be freely granted by the appellate courts.

However, under the present Florida precedents, if one party has

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48. *Id.* at 506.

49. FLA. APP. R. 3.2(d). This rule may be the cause of some confusion because it refers to "jurisdiction . . . of the parties to the appeal." This language could lead one to believe that the trial court retains jurisdiction over parties who do not file an appeal, but who file a motion for a post trial remedy subsequent to the filing of an appeal by another party to the original action.

50. P. BARNS, APPELLATE RULES—PROPOSED IMPROVEMENTS, Rule 2.2 (Univ. of Miami Law Center 1967).

51. Id., Rules 5.13(a), (b). *Cf.* Keohane v. Swarco, Inc., 320 F.2d 429 (6th Cir. 1963); Gainey v. Brotherhood of Ry. & S.S. Clerks, 303 F.2d 716 (3d Cir. 1962).

filed a timely appeal, the cautious practitioner would be wise to file his motion for post trial remedy in the trial court, and at the same time move the appellate court to release jurisdiction to the trial court to rule on the motion; at least until the present confusion is clarified by a decision of the supreme court or by an amendment to the rules.

III. TIME FOR FILING APPEALS

A. *Premature Filing*

> Appeals from final decisions, orders, judgments or decrees shall be commenced within 60 days from the *rendition* of the final decision, order, judgment or decree appealed from . . . .[52]
>
> 'Rendition' of a judgment, decision, order or decree means that it has been reduced to writing, *signed* and made a matter of record, or if recording is not required then filed.[53]

In *Egantoff v. Herring*,[54] the district court properly held that an entry of judgment in the circuit court minute book did not commence the running of the time for taking an appeal because such an entry was not a rendition of judgment in accordance with Appellate Rules 3.2(b) and 1.3. A directed verdict for the defendant had been entered in the circuit court minute book with the following entry: "It is therefore, considered, ordered, adjudged and decreed, that plaintiff . . . do by this suit take nothing." Sixty-three days later the trial judge signed a formal judgment. The notice of appeal was filed within sixty days of the signed judgment of the court but more than sixty days after the minute book entry. The denial of a motion to dismiss the appeal was upheld by the Supreme Court of Florida in *State* ex rel. *Herring v. Allen*.[55]

The District Court of Appeal, Second District, has used the decisions in *Egantoff v. Herring* and *State* ex rel. *Herring v. Allen* as authority in dismissing a great number of cases where appeals were filed after entry of judgment in the circuit court minute book but before a judgment had been signed by the trial court.[56] In two cases where it was shown on rehearing that the trial judge had actually signed the minute book entry, the appeals were determined on their merits.[57]

However, in *Mertz & White Inc. v. Mason*[58] the judge signed the minute book in order to adjourn the term before the appeal was filed.

52. FLA. APP. R. 3.2b (emphasis supplied).
53. FLA. APP. R. 1.3 (emphasis supplied).
54. 177 So.2d 260 (Fla. 2d Dist. 1965).
55. 189 So.2d 363 (Fla. 1966).
56. *See, e.g.*, Hall v. Masucci, 195 So.2d 612 (Fla. 2d Dist. 1967); Prevatt v. McClennan, 194 So.2d 656 (Fla. 2d Dist. 1967); City of St. Petersburg v. Ferguson, 193 So.2d 648 (Fla. 2d Dist. 1966); Allen v. Guagliardo, 189 So.2d 842 (Fla. 2d Dist. 1966).
57. Bull v. Roy, 191 So.2d 285 (Fla. 2d Dist. 1966) and Trombley v. Jennings, 189 So.2d 517 (Fla. 2d Dist. 1966).
58. 193 So.2d 654 (Fla. 2d Dist. 1967).

The Second District Court of Appeal held that: "This signature was not a signature which would make the minute book entry a final judgment."[59] The same court held that the subsequent entry of a cost judgment cannot make an unsigned entry in a circuit court minute book a final judgment.[60]

In *Locke v. Brown*,[61] the appeal was dismissed *ex mero motu* as an appeal from an unsigned minute book entry. Thereafter, the parties perfected a formal final judgment and an appeal was brought from that judgment and heard on the merits.[62]

A minute book entry was held appealable in a criminal case even though not signed by the judge.[63] The court distinguished *Egantoff v. Herring*[64] by pointing out that in criminal cases Florida Appellate Rule 6.2 requires that appeals be taken within ninety days after judgment is *entered;* whereas Florida Appellate Rule 3.2(b) requires civil appeals to be taken within sixty days from *rendition* of judgment. Noting a distinction made between entry of judgment and rendition of judgment in a law dictionary,[65] the court concluded that a criminal case is appealable from an unsigned minute book entry.

The Third District Court of Appeal refused to make such a distinction between entry of judgment and rendition of judgment.[66] The court concluded that "entered" as used in Florida Appellate Rule 6.3 must be considered the same as "rendition" in Florida Appellate Rule 3.2(b). If this were not done the abatement periods provided for in Rule 1.3 (with regard to motions for a new trial) would not be effective for tolling of the time for taking an appeal in criminal matters.

Obviously an unsigned entry in the circuit court minute book should not commence the running of time for taking an appeal. The appeal time should not commence until a formal, final judgment has been "rendered" or "entered."

To determine when the time for appeal has expired, a definite time must be established for the commencement of the time. However, this does not mean that an appeal filed prematurely should be subject to dismissal *merely* because it was filed before judgment was rendered.

In *Markham v. Holt*,[67] the United States Court of Appeals for the Fifth Circuit stated:

The basic policy considerations underlying the limitation that a

59. *Id.* at 655. *See also*, Scaglione v. Best, 196 So.2d 22 (Fla. 2d Dist. 1967).
60. Barfield v. Atlantic Coast Line R.R., 189 So.2d 825 (Fla. 2d Dist. 1966).
61. 189 So.2d 833 (Fla. 2d Dist. 1966).
62. Locke v. Brown, 194 So.2d 45 (Fla. 2d Dist. 1967).
63. Gossett v. State, 188 So.2d 836 (Fla. 2d Dist. 1966).
64. 177 So.2d 260 (Fla. 2d Dist. 1965).
65. BLACK'S LAW DICTIONARY 625 (4th ed. 1951).
66. State v. Shedaker, 190 So.2d 429 (Fla. 3d Dist. 1966).
67. 369 F.2d 940 (5th Cir. 1966).

> final judgment is a prerequisite to appealability are the excessive inconvenience and costs occasioned by piecemeal review on the one hand, and the danger of denying justice by needless delay on the other.[68]

However, the court went on to hear the case on its merits even though the appeal was filed before the entry of a judgment. In doing so the court was following the example of the Supreme Court of the United States which pointed out in *Lemke v. United States*[69] that, although the notice of appeal was filed before judgment was entered, it "gave full notice . . . of the sentence and judgment which petitioner challenged." Since the irregularity did not involve any substantial rights of the parties, it was disregarded.[70]

The dismissal of appeals from unsigned circuit court minute book entries can create substantial miscarriages of justice, especially in cases where such a dismissal occurs more than sixty days after a formal judgment is signed. The right to appeal is then lost.

A remedy for this problem is found in the following proposed amendment to the Florida Appellate Rules:

> When an appeal from a judgment is prematurely taken because the judge has not signed the clerk's minutes, the clerk's minutes not signed by the judge containing a judgment is sufficient evidence of the rendition and entry of the judgment appealed from.[71]

B. *Mistaking Interlocutory Orders as Final*

Florida Appellate Rule 4.2(a) provides in part:

> Appeals to district courts from interlocutory orders at law relating to venue or jurisdiction over the person, appeals to the appropriate court from interlocutory orders or decrees in equity and orders, judgments or decrees entered in law or equity after final judgment or decree, except those relating to motions for new trial or reconsideration, may be prosecuted in accordance with this rule . . . .

At times it is difficult to determine whether an order is interlocutory or final in nature. In *Arnold v. Brady*,[72] the plaintiff took a full appeal from the following order:

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68. *Id.* at 942.

69. 346 U.S. 325 (1953).

70. *See also*, United States v. Kokin, 365 F.2d 595 (3d Cir. 1966). For a more complete discussion see 8 J. MOORE, FEDERAL PRACTICE ¶ 37.05[2] (2d ed. 1965).

71. P. BARNE, APPELLATE RULES—PROPOSED IMPROVEMENTS, Rule 5.14 (Univ. of Miami Law Center 1967).

72. 178 So.2d 732 (Fla. 2d Dist. 1965).

> Considered, Ordered and Adjudged that Defendant's Motion for summary judgment be and the same is hereby granted.[73]

The appeal was dismissed because it was not from a "final decision, order or judgment."[74] An order granting a motion for summary judgment is not a summary judgment. Likewise, an order which merely grants a motion to dismiss a complaint is interlocutory. Adding the words "with prejudice" does not make it a final order. To constitute a final judgment the order must go further and dismiss the complaint.[75]

C. *Multi-Claim and Multi-Party Litigation*

At common law a writ of error would not lie to bring up a judgment that had not completely disposed of the action. The reason for that rule (at least in the year 1615) was that, "the whole record ought to be in the Common Pleas or in the King's Bench . . . ."[76] This rule presented few problems at a time when there were only a few instances where joinder of claims or parties was permitted. However, under our present procedure which permits multiple claims, counterclaims, cross claims, interpleader, joinder of parties and intervention, judgments may often be entered which dispose of less than the entire litigation.[77] It is necessary to have some means of determining when such judgments are final and therefore appealable. Otherwise there may arise considerable doubt as to when the time for taking an appeal begins to run; on the other hand, there may be unnecessary delay in taking an appeal from the portion of the litigation which has been disposed of.

Several cases reported during the period surveyed point out the need for having a more definite rule for determining the finality of judgments in actions involving multiple claims or parties when less than the entire litigation has been disposed of.

The simplest type of multiple claim litigation is an action based on a complaint with more than one count. The Supreme Court of the United States has held that when the claims arise out of wholly separate and distinct transactions or engagements, the dismissal of one count is a final judgment.[78] In *Jacobs v. Gould*,[79] the Second District Court of Appeal held that an order dismissing with prejudice two counts of a three-count complaint in an action at law was an interlocutory order. The court failed to note whether or not the three counts arose out of separate and distinct transactions.

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73. *Id.*

74. This is but one of many examples in the reported cases where an order granting a motion was mistaken for a final judgment.

75. Raphael v. Carner, 194 So.2d 298 (Fla. 4th Dist. 1967).

76. Metcalfe's Case, 11 Coke 38, 77 Eng. Rep. 1193, 1196 (1615).

77. FLA. R. CIV. P. 1.110(g), 1.170(a)(b), 1.170(g), 1.240, 1.170(h) and 1.230.

78. Reaves v. Beardall, 316 U.S. 283 (1942).

79. 197 So.2d 307 (Fla. 2d Dist. 1967).

Suits involving counterclaims and cross claims may also raise doubts as to finality when only a portion of the litigation is disposed of. In *Bumby & Stimpson, Inc. v. Peninsula Utilities Corp.*,[80] the trial court had entered summary judgment in favor of the defendant on March 12, 1965, leaving a compulsory counterclaim still pending. The language of the judgment was ambiguous as to its finality.[81] Notice of appeal was filed by the plaintiff on April 5. On May 12, the counterclaim was dismissed without prejudice. On November 2, the Third District Court of Appeal dismissed the appeal because it was filed prior to the rendition of a final judgment. The court stated: "An order which does not dispose of the entire claim between the parties is not final."[82] By then it was too late for the plaintiff to appeal from the final judgment.

The dismissal of a counterclaim was held appealable by the Second District Court of Appeal in *Duncan v. Pullum*,[83] where the court stated:

> The general rule is that a judgment, order or decree to be appealable as final must dispose of all the issues or causes in the case; but the rule is relaxed where the judgment, order or decree adjudicates a distinct and severable cause of action. This instant order terminated a separate cause of action, but *arising out of the same subject matter*, which defendant thought he had against plaintiff.[84]

From the italicized language in the above quote it would appear that the counterclaim in *Duncan v. Pullam would* be classified as compulsory under Florida Rule of Civil Procedure 1.170.

The Fourth District Court of Appeal refused to allow an appeal from the dismissal of a counterclaim when the original claim was still pending.[85] Citing *Bumby & Stimpson, Inc. v. Peninsula Utilities Corp.*, the court reasoned as follows:

> It has been held that the dismissal of a complaint, although final in form, which left pending a counterclaim was not appealable. The same reasoning would apply to an order dismissing a counterclaim.[86]

The court failed to state whether the counterclaim was compulsory or permissive.

Prior to the adoption of their current rules, the federal courts con-

80. 179 So.2d 414 (Fla. 3d Dist. 1965).
81. The order read:
Ordered and adjudged that the motion for summary judgment is granted. The plaintiff . . . shall take nothing by this suit and the defendant . . . shall go hence without day, costs to be hereafter taxed. *Id.* at 415
82. *Id.* at 416.
83. 198 So.2d 658 (Fla. 2d Dist. 1967).
84. *Id.* at 661 (emphasis supplied).
85. Midstate Hauling Co. v. Liberty Mut. Ins. Co., 189 So.2d 826 (Fla. 4th Dist. 1966).
86. *Id.*

sidered the dismissal of a permissive counterclaim a final adjudication whereas the dismissal of a compulsory counterclaim was treated as an interlocutory order.[87]

In *Hotel Roosevelt Co. v. City of Jacksonville*,[88] a full appeal was allowed from the dismissal of a third party complaint and in *Leeward & Hart Aeronautical Corp. v. South Central Airlines Inc.*,[89] the same court allowed a full appeal from the dismissal of a cross claim. In both cases the dismissals were treated as final adjudications.

Florida has adopted rules of civil procedure which are similar to federal rules in allowing liberal joinder of claims and parties. However, the practitioner in state court has no steady guidelines to allow him to determine the finality of adjudication when only a part of a particular case is disposed of. A perusal of the cases mentioned in this subsection will make the point obvious.

If dismissal of part of a litigation *is* considered as a final adjudication, then the time for taking an appeal *must* start running upon such dismissal. Without guidelines to determine finality of adjudication, the only safe course is to file an appeal each time a part of the litigation is concluded and again at the conclusion of the entire litigation.

A guideline could be provided by the adoption of a rule similar to Federal Rule of Civil Procedure 54(b), which provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

D. *Problems Likely to be Caused by the Merger of Law and Equity*

In *Lehman v. King's, Inc.*,[90] the plaintiff brought a suit in equity for a declaratory decree to construe a lease. The defendant filed a counterclaim, alleging in count one a claim for breach of contract, and in count

87. 6 J. MOORE, FEDERAL PRACTICE ¶ 54.23[2] (2d ed. 1966).
88. 192 So.2d 334 (Fla. 1st Dist. 1966).
89. 184 So.2d 455 (Fla. 1st Dist. 1966).
90. 181 So.2d 228 (Fla. 2d Dist. 1965).

two a claim for punative damages. The trial court granted a motion dismissing the claim for punitive damages and an appeal was taken from that order.

The appellees asserted that the counterclaim stated a common law action and that an interlocutory order relating to the counterclaim was not appealable except as to venue or jurisdiction over the person. The appellate court held that the original suit was brought in equity, and was therefore controlled by Florida Appellate Rule 4.2(a).

> No distinction is made as to [the] character of equity orders contemplated, and the rule is meant to encompass all such orders. . . . The order appealed is one entered pursuant to equitable proceedings and may therefore be appealed pursuant to Rule 4.2, subd. a, Fla. App. Rules.[91]

An action which begins as equitable in form is not necessarily to be treated as equitable throughout its course.[92] If an action contains several claims for relief, some legal in character and others equitable, then each order of the court should be examined to see whether it relates to a "legal" or an "equitable" claim for relief. For purposes of interlocutory appeals under Rule 4.2(a) those orders relating to "legal" claims for relief should be treated as interlocutory orders at law.

E. *Review of Interlocutory Orders by Certiorari*

Interlocutory orders in actions at law

> may be reviewed by certiorari under exceptional circumstances, such as where it clearly appears that the trial court has acted without or in excess of its jurisdiction, or the order does not comply with the essential requirements of law and may cause material injury throughout subsequent proceedings for which the remedy by appeal would be inadequate.[93]

IV. NOTICE OF APPEAL

> Deficiencies in form or substance in the notice of appeal shall not be jurisdictional and shall not be ground for dismissal unless it be clearly shown that the complaining party was misled or prejudiced by such deficiencies.[94]

Under the above-quoted rule the supreme court reversed the dismissal of an appeal where the notice of appeal erroneously recited that the

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91. *Id.* at 230.

92. *Cf.* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) and Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1958).

93. First Nat'l Bank v. J. M. Montgomery Roofing Co., 189 So.2d 239, 241 (Fla. 1st Dist. 1966).

94. Fla. App. R. 3.2c.

order appealed from was recorded in the "Minute Book" instead of the "Chancery Order Book."[95]

Another dismissal was reversed in which the notice of appeal erroneously stated the date upon which final judgment had been entered.[96]

> [I]n testing the sufficiency of the notice, the record itself should be examined. Where the examination of the notice of the appeal and other appellate documents such as assignments of error, briefs and other pertinent papers show that the parties have not been misled or prejudiced by any deficiencies or ambiguities in the notice itself, the dismissal of such an appeal . . . [would be] inconsistent with the concept of our appellate procedures and the true administration of justice.[97]

The filing of the notice of appeal is the event which fixes all subsequent times for performance of acts required in the appellate process (such as filing assignments of error). The filing of an amended notice of appeal cannot be the means by which the appellant may alter the time for performance of acts relating to the appeal.[98]

V. Assignments of Error and Points on Appeal

Florida Appellate Rule 3.5b requires that an appellee file his cross assignments of error within ten days after the appellant has filed his assignments of error.

In *Florida Board of Pharmacy v. Hall*,[99] the district court of appeal, reversing the trial court, held that the defense of entrapment was not effective. The appellee advanced other points in support of the trial court's judgment which the appellate court refused to consider because the appellee had not made cross assignments of error within ten days after appellant had filed its assignments of error. In reversing the district court, the supreme court held that Florida Appellate Rule 3.5b requires cross assignments of error *only* when the trial court has made a ruling adverse to the appellee. The appellee

> is not required to file assignments that the lower court has erred when his position is that *the lower court was correct* and was not in error in what it did, even if in error as to its reasoning.[100]

95. Robbins v. Cipes, 181 So.2d 521 (Fla. 1966).

96. Greyhound Corp. v. Carswell, 181 So.2d 639 (Fla. 1966).

97. Robbins v. Cipes, 181 So.2d 521, 522 (Fla. 1966). See also State *ex rel.* Poe v. Allen, 196 So.2d 745, 746 (Fla. 1967) in which the court stated:

> The signficant factors . . . are proper identification of the litigation in the notice, a clear intent to prosecute an effective appeal, specification of errors reviewable only upon appeal from the final judgment, presentation of a record sustaining an appeal, and the absence of any record basis for genuine prejudice as a result of the defective notice.

98. Laug v. Murphy, 191 So.2d 581 (Fla. 4th Dist. 1966).

99. 157 So.2d 824 (Fla. 2d Dist. 1963).

100. Hall v. Florida Bd. of Pharmacy, 177 So.2d 833, 835 (Fla. 1965).

As the above-quoted opinion suggests, it is not reasonable to expect that an appellee will raise suggestions of error to the appellate court when the trial court has ruled in his favor. However, this view is apparently not shared by the Supreme Court of the United States.

In *Neely v. Martin K. Eby Construction Co.*,[101] the Supreme Court upheld the power of a court of appeals to order the entry of a judgment *n.o.v.* where the appellee suggested no grounds for a new trial in the event that her judgment was reversed. In her brief to the Supreme Court the petitioner did suggest a valid ground for a new trial, but the majority of the Court refused to deviate from the "normal policy" of not considering issues which have not been presented to the court of appeals. The majority also emphasized that the appellee had failed to petition for a rehearing in the court of appeals.

In a vigorous and well reasoned dissent, Mr. Justice Black stated:

> [A] court of appeals in reversing a trial court's refusal to enter judgment *n.o.v.* on the ground of insufficiency of the evidence is entirely powerless to order the trial court to dismiss the case, thus depriving the verdict winner of any opportunity to present a motion for new trial to the trial judge who is thoroughly familiar with the case. . . . [E]ven if a court of appeals has that power, I find it manifestly unfair to affirm the Court of Appeals' judgment here without giving this petitioner a chance to present her grounds for a new trial to the Court of Appeals as the Court today for the first time holds she must.[102]
>
> . . . .
>
> The special suitability of having a trial judge decide the issue of a new trial in cases like this is emphasized by a long and unbroken line of decisions of this Court holding that exercise of discretion by trial judges in granting or refusing new trials on factual grounds is practically unreviewable by appellate courts.[103]

Ordinarily a party cannot appeal a judgment in his favor.[104] An exception is made in the instance of a denial of a motion for a new trial upon the grounds of inadequacy of the verdict.[105]

In *Nasrallah v. Corley*,[106] a final judgment was entered pursuant to a jury verdict awarding damages to the plaintiff. On appeal the plaintiff raised three points alleging procedural errors, none of which raised the question of the trial court's ruling on a motion for a new trial based on

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101. 386 U.S. 317 (1967).
102. *Id.* at 331.
103. *Id.* at 337-38.
104. Credit Indus. Co. v. Re-Mark Chem. Co., 67 So.2d 540 (Fla. 1953).
105. Paul v. Kanter, 155 So.2d (Fla. 3 Dist. 1963) (dictum).
106. 180 So.2d 476 (Fla. 3d Dist. 1965).

insufficiency of the verdict. The appellant did assign as error the denial of his motion for a new trial, but the point was not argued and was therefore deemed abandoned.[107] The appeal was quashed.

The correct method to proceed in a case such as *Nasrallah* would be to assign the denial of a new trial as error and to argue that a new trial should have been granted based on procedural errors (such as failure to admit certain evidence) made during the trial which may have had an effect on the amount of the verdict.

VI. Acceptance of Benefits Doctrine

It is a well settled doctrine that a party who, voluntarily and knowing the facts, accepts the benefits of a judgment is estopped from seeking to have that judgment reversed. His acceptance of payment or enforcement of a judgment or decree is a waiver of error[108] (or more properly, an estoppel from seeking reversal).

The plaintiffs in *McDaniel Gift Shop v. Baffee*[109] had obtained a writ of execution and delivered it to the sheriff, but because of defendant's timely posting of supersedeas bond and the court's stay order the sheriff neither executed the writ nor levied on the defendant's property. The "acceptance of benefits doctrine" was not held to apply to the plaintiff's cross appeal because the plaintiffs had received nothing of value.

A modification of the "acceptance of benefits doctrine" in cases involving an order or decree awarding separate maintenance, support or alimony is found in Florida Appellate Rule 3.8(b).

VII. Briefs

The Florida Appellate Rules do not authorize an appellee to file a reply brief and as a general rule such a brief will be striken on motion.[110]

VIII. Attorney's Fees

A trial court does not have jurisdiction to fix attorney's fees for appellate services.[111] An attorney who fails to file a motion for fees in accordance with Florida Appellate Rule 3.16e waives his right to appellate fees.[112] Appellate fees must be requested "by motion filed with the clerk of the appellate court at or before the time of filing the party's first brief . . . ."[113]

107. Fla. App. R. 3.7i.

108. Sedgwick v. Shaw, 188 So.2d 29 (Fla. 2d Dist. 1966).

109. 179 So.2d 588 (Fla. 1st Dist. 1965).

110. St. Regis Paper Co. v. Hill, 198 So.2d 365 (Fla. 1st Dist. 1967).

111. *See* Fla. App. R. 3.16e; Howell v. Howell, 183 So.2d 261 (Fla. 2d Dist. 1966); Anderson v. Anderson, 180 So.2d 360 (Fla. 3d Dist. 1965). *But cf.* Saloman v. Saloman, 186 So.2d 39 (Fla. 3d Dist. 1966).

112. *Cf.* Poling v. City Bank & Trust Co., 189 So.2d 176 (Fla. 2d Dist. 1966).

113. Fla. App. R. 3.16e.

When the notice of appeal is filed more than sixty days after final judgment the appellate court has no jurisdiction to hear an appeal with respect to the issues finally adjudicated. However, the court can hear the issue of sufficiency of attorney's fees fixed by an order entered less than sixty days before the notice of appeal was filed.[114]

IX. SUPERSEDEAS

Even though a final decree which is being appealed contains provisions rendering it in part other than a money judgment, if it nonetheless contains a judgment for the recovery of money not otherwise secured, it may be superseded only by compliance with Appellate Rule 5.7.[115]

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114. Lovett v. City of Jacksonville Beach, 187 So.2d 97 (Fla. 1st Dist. 1966).

115. Florida E. Coast Ry. v. Atlantic Coast Line R.R., 178 So.2d 215 (Fla. 1st Dist. 1965).