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Appellate Procedure

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APPELLATE PROCEDURE†

PAUL D. BARNES* AND BRUCE ALEXANDER**

INTRODUCTION

As early as 1906, one judicial scholar observed: "Judicial power may be wasted . . . by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies"† The judicial power of the Florida appellate courts does not escape this waste. An examination of one randomly selected Southern Reporter² reveals that: of the twenty-two supreme court decisions appearing therein four (18.1%) were decided upon a pure point of practice, and twenty-three out of one hundred and eight (12.3%) district court decisions met a similar fate. One writer urges members of the Bar to "Read the Rules" when dealing with civil procedure.³ That credo applies with equal force to the practice in the appellate courts.

The discipline of appellate procedure in general does not readily lend itself to systematic organization. For the most part the outlines utilized in the two standard works on "Appeal and Error"—*Ruling Case Law* and *American Jurisprudence*—form the skeleton framework for this survey. There are, however, topics treated in this paper which are not to be found elsewhere: Affect of Appeal upon Civil Procedure Rule 1.38(b) Relief and Procedural Aspects of Criminal Procedure Rule No. I. Also considered for the first time are Motions for New Trial and Petitions for Rehearing Made in the Lower Court: Their Effect Upon Obtaining Review; Doctrine—"Law of the Case"; and Appellate Court's Power Over the Cause.

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† This survey undertakes to review the more significant and interesting decisions appearing in volumes 155 through 177 of the Southern Reporter, Second Series. Special attention is called to similarities and dissimilarities existing between Florida appellate procedure and appellate procedure in the Federal courts on specific areas of judicial review. Both facts and theory are stressed.

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1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (Part I 1906).

2. 156 So.2d.

3. Massey, *Civil Procedure*, 16 U. MIAMI L. REV. 591 (1962).

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I. SCOPE AND APPLICATION OF THE RULES

The Florida Appellate Rules⁴ govern all proceedings in the supreme court, district courts of appeal, and the circuit courts when these courts exercise their appellate jurisdiction. These Rules are promulgated pursuant to constitutional and inherent powers of the Florida Supreme Court.⁵ Effective midnight, September 30, 1962, they supersede all conflicting rules and statutes. Those statutes not superseded remain in effect as rules promulgated by the Supreme Court.⁶ Only the supreme court can nullify a Rule—trial courts are without such authority.⁷

The superseding clause of Rule 1.4 was applied in *A.N.E. v. State*,⁸ after the court concluded that section 39.14 of the Florida Statutes was in conflict with the Rules.⁹ That statute provided that "no briefs or papers other than the juvenile court file need be filed in the district court of appeal unless the said court shall specially so direct."¹⁰ The broad question involved in *A.N.E.* was whether the Florida Appellate Rules were applicable to appeals taken from juvenile courts. The appellants, in their appeal from the juvenile court, timely filed their notice of appeal but failed to file their assignments of error, directions to the clerk, the record-on-appeal and their briefs, as required by the Rules. After a determination that the statute in question was superseded by the Rules promulgated in 1957 and revised in 1962, the court concluded that appeals from orders entered in juvenile court are governed by the Rules.

4. FLA. APP. R. 1.2 provides that the correct citation for the rules is "Florida Appellate Rules, 1962 Revision." Throughout this paper they will be referred to as "the Rules."

5. FLA. CONST. art. V, § 3.

6. See FLA. APP. R. 1.4 governing effective date and repeal.

7. In *Ser-Nestler, Inc. v. General Fin. Loan Co.*, 167 So.2d 230 (Fla. 3d Dist. 1964), the supreme court in dicta stated that a trial court is without authority to nullify FLA. R. Civ. P. 2.12(b) since "the Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of authority, they remain inviolate." This statement is equally true concerning the appellate rules which are also promulgated by the supreme court.

8. 167 So.2d 769 (Fla. 1st Dist. 1964).

9. It was noted in the decision that no appellate court had previously held the statute in question to be in conflict with the Florida Appellate Rules.

10. FLA. STAT. § 39.14(8) (1963).

II. APPELLATE JURISDICTION

A. *Supreme Court*

The appellate jurisdiction of the supreme court, district courts of appeal, and circuit courts is prescribed in article V of the state constitution. As usual, no other area of judicial review causes as much trouble to practitioners as does the question—in which court is review appropriate?

In regard to the appellate jurisdiction of the supreme court, confusion invariably centers around that provision of section 4(2) providing for appeals to the supreme court as a matter of right from decisions of the district courts of appeal which *initially* pass upon the validity of a state statute. Typically, a suit is commenced in the circuit court involving constitutional issues and is then appealed to the district court of appeal. When review by the supreme court is sought, the question arises—which of the two lower courts initially passed upon the validity of the statute? If the circuit court was the first court to do so, then the supreme court lacks jurisdiction, except perhaps by certiorari. It is only when the district court of appeal initially passed upon the validity of the statute than an appeal from that decision may be taken to the supreme court. The complexity of the problem is attested to by *Tyson v. Lanier*.¹¹ Petitioners had filed a complaint in the circuit court praying for a mandatory injunction requiring the respondent to re-assess their lands. The injunction was granted on the ground that the taxing authorities had disregarded and failed to comply with the provisions of the controlling statute. The chancellor found that no constitutional question was involved. On appeal to the district court the chancellor was reversed, the majority of the court having found that the chancellor's interpretation of the act was of doubtful constitutionality. Judge White in his dissent stated that "despite protests to the contrary, the majority interpretation of the act is composed squarely in constitutional perspective because there are constitutional aspects that cannot be avoided."¹² On appeal the supreme court apparently determined that it was the district court which had initially passed upon the constitutional question because it assumed jurisdiction.

Final decrees rendered by trial courts which pass directly upon the validity of a state statute may be appealed directly to the supreme court.¹³ The jurisdiction of the supreme court is, however, limited to review of that portion of the decree which affects the constitutional validity of the statute.¹⁴ If, prior to argument on appeal, the appellant withdraws his

11. 156 So.2d 833 (Fla. 1963).

12. *Lanier v. Tyson*, 147 So.2d 365, 377 (Fla. 2d Dist. 1962).

13. See the first sentence of FLA. CONST. art. V, § 4(2).

14. This limitation was restated in *McNevin v. Baker*, 170 So.2d 66 (Fla. 2d Dist. 1964).

contentions relating to the unconstitutionality of the statute, the supreme court is deprived of its jurisdiction, and the proper reviewing court becomes the district court of appeal.¹⁵

B. District Courts of Appeal

To a limited degree, the appellate jurisdiction of the district courts of appeal is interrelated with the appellate jurisdiction of the circuit courts and the supreme court. All final judgments or decrees rendered by trial courts may be appealed as a matter of right to district courts of appeal, unless the final judgment or decree can otherwise be appealed directly to the supreme court or to a circuit court.¹⁶ Accordingly, whether any particular cause can be appealed as a matter of right to the appropriate district court of appeal is determined by whether the cause is of the type that may be directly appealed to the supreme court or to a circuit court.

In most instances a reading of sections 4(2)¹⁷ and 6(3)¹⁸ of the state constitution will reveal whether an appeal can be taken to the district courts of appeal. There are, however, exceptional cases where the answer does not lie in the bare words of the constitution, rather resort must be made to case analysis. The decisions which follow are instances wherein jurisdiction could not have been predicted from a mere reading of the pertinent sections of the constitution.

In *Zabel v. Pinellas County Water & Nav. Control Authority*,¹⁹ the second district was confronted with an appeal taken from a circuit court. Constitutional issues were raised by the appellants in the lower court, but that court determined that the appellants "had estopped themselves from urging unconstitutionality of the acts under which they were at the same time seeking relief."²⁰ The ruling that estoppel was applicable was, according to the district court, erroneous. The district court considered the merits of the constitutional issue which the appellants attempted to argue in the circuit court "in the interests of obviating the more protracted and expensive method of remanding for further proceedings."²¹ In theory, had the circuit court initially ruled upon the constitutional issue or had the cause been remanded by the district court for a ruling thereon, the appeal could have been taken directly to the supreme court and accordingly the appellants would not have had an absolute

15. *Grove Press, Inc. v. State*, 152 So.2d 177 continued at 156 So.2d 537 (Fla. 3d Dist. 1963).

16. See the first paragraph of FLA. CONST. art. V, § 5(3).

17. FLA. CONST. art. V, § 4(2) pertains to what matters may be appealed from trial courts to the supreme court.

18. This section governs appellate jurisdiction of the circuit courts.

19. 154 So.2d 181 (Fla. 2d Dist. 1963).

20. *Id.* at 182 and 183.

21. *Id.* at 186.

right to obtain review by the district court.²² This did not occur, however, and the appeal was evidently considered by the district court as one that could be taken as a matter of right. In short, the *Zabel* decision may be cited for the proposition that unless the trial court actually rules upon the constitutional issue, an appeal to the district court of appeal can be taken as a matter of right. Furthermore, it is not material to the validity of this proposition that the trial court's failure to decide upon the constitutional issue was due to a misapplication of substantive law.

According to the provisions of section 6(3) of the constitution, final judgments entered in landlord and tenant proceedings are appealable to the circuit courts when the judgment is rendered by one of the courts enumerated in that section; accordingly an appeal therefrom cannot be prosecuted to the district court of appeal. When, however, the judgment is rendered by a civil or criminal court of record, the appeal may be taken to the appropriate district court of appeal.²³

Appellate jurisdiction from a *felony* conviction entered in a criminal court of record is in the district courts,²⁴ and the circuit courts have final appellate jurisdiction on appeals from the criminal court of record when the appeal is taken from a *misdemeanor*.²⁵ This distinction raised an important problem in *Wells v. State*.²⁶ The appellants, convicted on separate counts—one a felony and the other a misdemeanor—appealed both convictions to a district court of appeal. In keeping with the distinction, the court held it lacked jurisdiction to review the misdemeanor conviction.²⁷ The question then arose as to what disposition was to be made of such appeals. Although it was clear that the district court of appeal had jurisdiction to proceed with the felony count, there was apparent disharmony as to whether the district court could on its own initiative, or, for that matter, on the motion of either party, transfer the misdemeanor conviction to the appropriate circuit court pursuant to Rule 2.1(a)(5)(d).²⁸ In *Wells*, the third district simply dismissed that

22. This result would obtain from a reading of § 5(3) art. V in *pari materia* with § 4(2). The latter section provides:

Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right . . . from final judgments or decrees passing directly upon the validity of a state statute. . . .

23. *Floyd v. Clark*, 173 So.2d 450 (Fla. 1965).

24. *Buchanan v. State*, 171 So.2d 186 (Fla. 3d Dist. 1965) (implication).

25. FLA. CONST. art. V, § 6(3).

26. 168 So.2d 787 (Fla. 3d Dist. 1964).

27. The result reached in *Wells v. State* also obtained in *Christian v. State*, 176 So.2d 561 (Fla. 3d Dist. 1965).

28. This Rule provides:

When the jurisdiction of an appellate court has been improvidently invoked, that court may of its own motion or on motion of either party to the cause enter an order transferring it to the court having jurisdiction. Five days' notice of such motion or proposed action shall be given to the other parties. Notices of appeal and other papers filed prior to the transfer shall have the same force and effect as if filed in the proper court and as of the time when filed in the court from which the transfer was made.

part of the appeal which was improvident. Subsequently, however, the majority of that court in *Christian v. State*,²⁹ sua sponte transferred the misdemeanor count to the appropriate circuit court and cited Rule 2.1(a)(5)(d) as sanctioning this procedure. One judge disagreed, however, with the majority's use of the Rule under these circumstances because "the approval of such loose practice will permit an appeal of two convictions by one notice of appeal."³⁰ Indeed it is doubtful whether the supreme court will sanction the use of the Rule to accomplish such partial transfers. *Christian* nonetheless presently stands as precedent for such a practice, at least by the third district.

The rule itself does not mention partial transfers; on the contrary it stipulates that a "court may of its own motion or on motion of either party to the cause enter an order transferring *it* to the court having jurisdiction."³¹ Furthermore, since a single notice of appeal has been held ineffective to bring two separate informations up for review,³² the supreme court may view the procedure employed in *Christian* as permitting an appellate court to do indirectly what the appellant cannot do directly. Practitioners are therefore cautioned to exercise care when considering the use of Rule 2.1(a)(5)(d) under the *Wells* and *Christian* facts.

In *Dresner v. City of Tallahassee*,³³ petitioners were tried and convicted in a municipal court for violating a local ordinance which prohibited certain forms of assembly. The subject matter ultimately presented for review concerned the federal constitutionality of the ordinance. Initially the convictions were appealed to the Florida Supreme Court, but that court determined appellate jurisdiction was absent and therefore transferred the appeal to the appropriate circuit court.³⁴ The circuit court affirmed the municipal court's decision. Petitioners then applied for certiorari to the Supreme Court of the United States. In so doing, it should be noted, they attempted to by-pass the Florida District Court of Appeal and the Florida Supreme Court. This procedural move by the petitioners gave rise to the following certified question:

On a timely petition for writ of certiorari or other process, does the Florida District Court of Appeal or any other court of Florida have jurisdiction to review a judgment of the Circuit

29. *Supra* note 27.

30. *Supra* note 27 at 562. (Judge Tillman concurring in part and dissenting in part).

31. Fla. App. R. 2.1(a)(5)(d). (Emphasis supplied.)

32. See *Wilcox v. State*, 171 So.2d 425 (Fla. 3d Dist. 1965).

33. 164 So.2d 208 (Fla. 1964).

34. By transferring the appeal an important principle was inferentially established, *viz.*, in spite of the fact that a municipal court construes a controlling provision of the federal constitution, final appellate jurisdiction is in the circuit courts. Thus, where a trial court does construe a controlling provision of the federal constitution and the trial court is a municipal court or perhaps any one of the courts enumerated in section 6(3), article V of the state constitution, the appeal can only be prosecuted to the appropriate circuit court.

Court affirming a conviction in the Municipal Court of a violation of a municipal ordinance which incorporates a state statute by reference, where the questions presented for review concern the federal constitutionality of the ordinance on its face and as applied?³⁵

In answering this question, the Florida Supreme Court held that the conviction was subject to review by the appropriate district court of appeal by petition for a so-called common law writ of certiorari. It appears, therefore, that where appeal is taken to a circuit court, from a municipal court, the *Dresner* holding is that there will be no further appeal from the appellate decision of the circuit court if that decision construes a controlling provision of the federal constitution. Section 6(3) of article V of the Florida Constitution, therefore, precludes the possibility suggested by section 4(2), of direct appeal of the municipal court judgment to the supreme court, or of the circuit court's appellate decision to the appropriate district court of appeal.

The absence of a constitutional provision providing that one district court of appeal can review decisions of another district court of appeal, precluded the first district from granting a petition for writ of habeas corpus where the effect was to bring a decision of the second district court of appeal up for review.³⁶

If an appeal is one that may be taken as a matter of right, consent of the judge who issued the order which is appealed need not be obtained. This principle was recently applied³⁷ to render provisions of section 79.11³⁸ of the Florida Statutes inapplicable when applied to appeals taken from final judgments rendered in habeas corpus proceedings at the trial court level. Since section 5(3), article V of the state constitution states that such appeals may be taken "as a matter of right," section 79.11 was superseded by both the constitution and the Florida Appellate Rules.³⁹

C. Circuit Courts

Relatively few decisions involving the appellate jurisdiction of the circuit courts were encountered during the period surveyed. Only two decisions appear worthy of note.

35. *Id.* at 210.

36. *Ryan v. Circuit Court of the Sixth Judicial Circuit*, 171 So.2d 56 (Fla. 1st Dist. 1965).

37. *State v. Mitchell*, 170 So.2d 290 (Fla. 1964).

38. FLA. STAT. § 79.11 (1963) provides:

The judge hearing the cause, or a justice of the supreme court, shall grant to any party or persons aggrieved by the judgment, including the state or any officer thereof, or any political subdivision of the state, an appeal in accordance with the Florida appellate rules.

39. It is worth while to note that "Section 79.11 . . . has been fully superseded by Sections 4(2) and 5(3), Article V of the Constitution, and Florida Appellate Rules. . . ." *Supra* note 32 at 291.

In *Washington Fed. Sav. & Loan Ass'n v. State*,⁴⁰ it was observed that a circuit court does not have appellate jurisdiction over civil courts of record. An action for a deficiency decree was filed in the civil court of record by a mortgagee who had previously prevailed in a separate suit for foreclosure brought in a circuit court. No deficiency decree was prayed for in the prior foreclosure proceedings. The mortgagor, after the suit in the civil court of record was commenced, filed a petition for writ of prohibition in the original foreclosure proceedings which was granted on the ground that the civil court of record was acting outside of its jurisdiction. On appeal the writ was quashed for lack of jurisdiction to sustain the issuance of the writ. As noted on appeal, had the final decree of foreclosure reserved jurisdiction, then the writ possibly could have been sustained on the ground that it was necessary to the exercise of jurisdiction of the circuit court. But such was not the case since the complaint in foreclosure did not pray for a deficiency decree.

The second noteworthy decision involved the principle that a state court, after removal of an action to a federal district court, is without jurisdiction to act in the suit.⁴¹ After the state circuit court appointed a receiver, the action was removed to a federal district court which relieved the receiver of any further responsibility other than to account. Prior to his discharge the receiver died. An intervenor in the federal court moved for the appointment of a successor-receiver, which motion was denied. The intervenor, on the following day, applied in the circuit court for the appointment of a successor-receiver. From the circuit court order making the appointment, the defendant appealed. On appeal the order was quashed.

D. Appeals—Plenary and Interlocutory

At law interlocutory appeals may be taken from orders relating to venue or jurisdiction over the person or from post decretal orders, except those relating to motions for new trial or reconsideration. All orders or decrees entered in chancery, including post decretal orders, but excluding those relating to motions for new trial or reconsideration, may be reviewed by an interlocutory appeal.⁴² Of course, plenary appeals, whether the action be legal or equitable in nature, can only be taken from final rulings of the lower court.

The wording of Florida Appellate Rule 4.2 raises an interesting problem, not yet considered by our appellate courts, regarding the appealability of an order granting a new trial. Section 59.04 of the Florida Statutes provides that "upon the entry of an order granting a new trial,

40. 155 So.2d 393 (Fla. 3d Dist. 1963).

41. *Rutas Aereas Nacionales v. Cauley & Martin, Inc.*, 160 So.2d 168 (Fla. 3d Dist. 1964).

42. See FLA. APP. R. 4.2(a).

the party aggrieved may, without waiting for final judgment, prosecute an appeal” However, Rule 4.2(a) excepts motions for new trials from those orders, judgments or decrees entered in law or equity after final judgment which may be reviewed by interlocutory appeal. Rule 1.4 unequivocally provides that “these rules shall supersede all conflicting rules and statutes.” Query: was section 59.04 superseded by the rules?

In *Zabawczuk v. Olin Mathieson Chem. Corp.*,⁴³ the defendants and the plaintiff took plenary appeals in a pending personal injury action. In support of his motion to dismiss defendant’s appeal, the plaintiff contended that a post decretal order granting defendant a new trial solely on the issue of damages had the effect of making both prior judgments interlocutory orders at law. The appellate court held that the argument was meritorious. Since “such an interlocutory order at law does not relate to a subject that will permit an interlocutory appeal pursuant to Rule 4.2,”⁴⁴ the appeal had to be dismissed. Implicit in the holding is the rule that an order granting a motion for new trial solely on the issue of damages will destroy the finality of the judgment entered. Orders entered subsequent to a judgment granting a new trial on all issues are held without exception to have such an effect. However, very few decisions have been encountered where an order granting a new trial only on the issue of damages was held to preclude a plenary appeal from the judgment.

Orders entered at law dismissing a complaint as to some but not all the defendants are ordinarily, according to most authorities, considered non-final orders as to the parties dismissed and accordingly are reviewable only by full appeal after final judgment has been rendered. However, such orders may be reviewed by interlocutory appeal where the scope of those orders would ordinarily establish a basis for review by interlocutory appeal. Thus, in *Paradis v. Cicero*,⁴⁵ review by interlocutory appeal was held permissible where the trial court dismissed the complaint as to a co-defendant for failure of plaintiff to give timely notice under the constructive service statute. The question on appeal was treated as one “relating to jurisdiction over the person” and for this reason it brought the order of dismissal within the provisions of the ordinary rules sanctioning interlocutory appeals.

An important problem created by the overlapping provisions of section 4(2) of article V of the Florida Constitution and Rule 4.2 was resolved during the period surveyed. Stated in the abstract the problem is as follows: Where an order is entered in chancery which is interlocutory in nature, but which also decides a constitutional issue, should the aggrieved party petition the supreme court for certiorari, or is an inter-

43. 168 So.2d 150 (Fla. 2d Dist. 1964).

44. *Id.* at 151.

45. 167 So.2d 248 (Fla. 2d Dist. 1964).

locutory appeal the appropriate method of review? The confusion stems from the constitutional provision: "the supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court." On the other hand, Rule 4.2 sanctions interlocutory appeals from equity decrees. In *Gulf Fertilizer v. Walden*,⁴⁶ this confusion was resolved in favor of review by interlocutory appeal. It should be noted, however, that in practical effect there is little if any difference in the scope of review afforded by an interlocutory appeal and review by certiorari pursuant to article V, section 4(2).

Only one decision⁴⁷ was reported during the period surveyed that dealt with the nature of post decretal orders. An appeal was prosecuted from a chancery order denying a deficiency decree pursuant to Rule 3.2. Notwithstanding the fact that the lower court held that its denial was without prejudice to proceed at law, the appellate court held that the order was final and therefore considered the plenary appeal proper. The court recognized that it is often difficult to determine whether a post decretal order is final or interlocutory in nature. It was suggested that in case of doubt, the better practice would be to follow the procedure relating to interlocutory appeals outlined under Rule 4.2.

Orders denying motions to dismiss complaints are non-final in nature. Accordingly, a plenary appeal will not succeed. Nor can such orders in actions at law be reviewed by interlocutory appeal unless the grounds upon which the motion was made relate to venue or jurisdiction over the person. The appellant in *State Road Dep't v. Brill*,⁴⁸ apparently argued, in support of his interlocutory appeal from an order denying his motion to dismiss, that his immunity from suit afforded by virtue of the doctrine of sovereign immunity related to jurisdiction over the person. The appellate court rejected this contention and dismissed the appeal.

1. SAVINGS CLAUSES

Improvidently taken appeals may be considered by an appellate court as petitions for certiorari under section 59.45 of the Florida Statutes.⁴⁹ Thus, appeals taken at law from interlocutory orders which do not relate to venue or jurisdiction over the person and which were not entered after final judgment will not necessarily be dismissed.⁵⁰ How-

46. 163 So.2d 269 (Fla. 1964).

47. *Burton v. Sanders*, 170 So.2d 591 (Fla. 2d Dist. 1965).

48. 171 So.2d 229 (Fla. 1st Dist. 1964).

49. FLA. STAT. § 59.45 (1963) provides:

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 to the supreme court.

50. In *Fennell v. Trailways*, 169 So.2d 858 (Fla. 3d Dist. 1964), an improvident plenary appeal taken from an interlocutory order was treated as a petition for certiorari.

ever, there is no provision for the converse—that an improvident petition for certiorari will be treated as an appeal.⁵¹

Florida appellate courts can, in the exercise of their discretion, treat improvident plenary appeals as interlocutory. The operation of this principle was illustrated in *Washington Security Co. v. Tracy's Plumbing & Pumps*,⁵² wherein the appellant took a plenary appeal from a chancery order which granted defendant's motion to dismiss the complaint "with leave to amend." Since the order appealed had neither dismissed the cause nor set a time limit within which appellant was to amend, it was not a final order but rather interlocutory. The court, in its discretion, considered the appeal as if it had been commenced as an interlocutory appeal.⁵³

It should be noted that an appellate court can consider an improvident plenary appeal as an interlocutory appeal only if an interlocutory appeal would lie from the order, judgment, decision or decree from which appeal is taken.⁵⁴

III. REVIEWABLE DECISIONS

A. General Principles

Appellate review, except where the rules or law sanction petitions for certiorari, shall be by appeal.⁵⁵ It is generally recognized that only judgments, orders, decisions or decrees final in nature are reviewable by plenary appeal. Decisions have appeared during the period surveyed which set forth general principles which establish guide lines as to what constitutes finality.

If the order appealed renders further judicial labor in the lower court unnecessary, the order is generally considered final. Several recent

51. In *Schneider v. Manheimer*, 170 So.2d 75 (Fla. 3d Dist. 1964) petitioner sought review by certiorari of a final summary judgment granted in favor of one of several defendants. The court considered Florida Statute § 59.45 and concluded an improvident petition for certiorari may not be treated as an appeal.

52. 166 So.2d 680 (Fla. 2d Dist. 1964).

53. The reasons were as follows: (1) progress of the case in the lower court did not go beyond the complaint and therefore the appellate court would have the very same appeal papers before it under either type of appeal, (2) "dismissal of [the] appeal would occasion only expense and delay inasmuch as plaintiff would merely be required to obtain a final decree and file another notice of appeal in accordance with Rule 3.2, F.A.R." *Id.* at 683.

54. Invariably, orders or decrees entered in chancery will meet this requirement since the Rules expressly provide that "appeals [may be taken] to the appropriate court from interlocutory orders or decrees in equity . . ." FLA. APP. R. 4.2(a). Rarely, however, will this requirement be met when the appeal is taken from an order entered at law, since interlocutory appeals from orders at law may be taken only when the order relates to venue or jurisdiction over the person or when it is entered after final judgment. However, if the order entered after final judgment relates to a motion for a new trial or a motion for reconsideration, an interlocutory appeal is not sanctioned. Most decisions that have considered the propriety of an appellate court treating an improvident interlocutory appeal as plenary, have flatly renounced such a procedure. See *Finneran v. Finneran*, 137 So.2d 844 (Fla. 2d Dist. 1962).

55. FLA. APP. R. 3.1.

cases have involved the question of the stage at which the trial court's judicial labor ends. It has been held that an order denying appellant's motion to strike an objection filed to his claim obviated further judicial labor since the denial of the motion to strike resolved the appellant's claim against the estate.⁵⁶ In *Smoak v. Graham*,⁵⁷ review by conflict certiorari was sought from a district court's determination that an order which both denied a petition for the payment of a claim in probate and required that an independent suit at law be brought was a final order. The supreme court noted the previously established Florida rule that an order is not final when it permits extension of time under section 733.18 of the Florida Statutes,⁵⁸ and held that the instant order was appealable. The rationale of the court was predicated upon the fact that "the judicial labor of the probate court is complete, for purposes of review of a ruling under § 733.18(2), at the point when recourse to suit in another court . . . is required as a condition to any further consideration of the claim in probate."⁵⁹

A second criteria that is used to determine whether a particular order is final in nature was employed in *In re Sager's Estate*.⁶⁰ The order appealed from required the filing of an inventory of assets in two estates and provided that all interested parties would have thirty days after that filing within which to file their objections to the accounting. Until the thirty day period expired, the order could not be considered final. Accordingly, if an order by its terms reveals that the court retains jurisdiction, the order is not final for purposes of appeal.

An order which does not conclusively determine a particular question adversely to the appellant is, according to general principles, not a final order. Thus, when the county judge entered an order setting aside letters of administration, and permitted the filing of a claim against the deceased's estate, the personal representative of the estate could not appeal therefrom.⁶¹ Since the claim could be objected to at a later time and the question thereafter settled, the order was not finally determinative of the claimant's rights against the estate.

Of course, orders lacking the requisite language of finality are not final in nature, but rather interlocutory. In *Altire v. Atlantic Nat'l Bank*,⁶² the absence of words of finality prevented a plenary appeal from

56. *Epperson v. Rupp*, 157 So.2d 537 (Fla. 3d Dist. 1963). In *In re Hamlin's Estate*, 157 So.2d 844 (Fla. 2d Dist. 1963), the same result was reached where the lower court entered an order denying a claimant's petition requesting the administration of the estate to pay the claim.

57. 167 So.2d 559 (Fla. 1964).

58. This statute governs payment of and objection to claims filed in decedent's estates.

59. *Id.* at 561.

60. 171 So.2d 580 (Fla. 2d Dist. 1964).

61. *Tyler v. Huggins*, 175 So.2d 239 (Fla. 2d Dist. 1965).

62. 155 So.2d 386 (Fla. 2d Dist. 1963).

an order adjudging “. . . that defendant’s motion to dismiss the Amended Complaint be and the same is hereby granted.”

B. *Nonsuits*⁶³

1. NOMENCLATURE

At early common law, nonsuits were classified as either voluntary or involuntary and the two were distinguished on the basis of who sought the nonsuit?⁶⁴ If the nonsuit was procured by the plaintiff at his own insistence, it was voluntary in nature and it mattered not why the plaintiff insisted on being nonsuited. Involuntary nonsuit was a term the common law limited to nonsuits “ordered against a defaulting party-plaintiff who has not affirmatively sought it.”⁶⁵ As used by most Florida appellate courts, the terms voluntary and involuntary nonsuits have taken on a different connotation. Unlike their early common law predecessor, involuntary nonsuits have been referred to as those sought by a plaintiff because of an adverse ruling made at trial. Motive became the established criterion in all but a few Florida decisions. Before any discussion is devoted to nonsuit problems the reader should take cognizance of the fact that subsequent discussion will utilize the nomenclature that obtained at common law.

2. HISTORY

Florida common law recognized the practice of nonsuits but from an early date the legislative and judicial process have continually limited its operative scope. The first restriction to which the common law nonsuit was subjected occurred in 1828 when the legislature declared: “No plaintiff shall take a non-suit on trial unless he do so before the jury retire from the bar.”⁶⁶ While this statute tacitly recognized that nonsuit practice was embedded in Florida law, it restricted its use by a plaintiff to the point in time prior to the jury’s return of a verdict. Nonsuit practice, as limited by the statute of 1828, continued unchallenged and unquestioned until 1962. In that year amendments to the Florida Rules of Civil Procedure failed to refer to nonsuits as found in the prior Rules.⁶⁷ This omission gave rise to the plethora of cases attempting to correctly enunciate the exact status of the nonsuit. Until July 1, 1965, the appellate courts of this state had for the most part acceded to the view that non-

63. For a recent article on nonsuits, see Note, *Whither Nonsuit?*, 20 U. MIAMI L. REV. 204 (1965).

64. See *Peaslee v. Mickalski*, 167 So.2d 242 (Fla. 2d Dist. 1964).

65. *Id.* at 244.

66. Currently, FLA. STAT. § 54.09 (1963).

67. Deleted from the Florida Rules of Civil Procedure was the phrase “nothing stated herein shall preclude a nonsuit from being taken pursuant to any applicable statute.” The statute referred to was section 54.09. For prior treatment, see *Barns and Mattis, 1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 281 (1963).

suits were a procedural device which plaintiffs, and theoretically⁶⁸ defendants, could utilize. However, its use was not unrestricted. Where the nonsuit was sought after the adverse party either answered or moved for summary judgment, an order of court had to be obtained, and it was thus grantable only upon such terms and conditions as the court deemed proper. On July 1, 1965, the supreme court affirmed the First District Court of Appeal in *Crews*⁶⁹ v. *Dobson*,⁷⁰ and expressly and unequivocally stated that "the purpose of omission from the rule was to remove the use of nonsuits from our procedure."⁷¹

3. APPELLATE REVIEW OF NONSUIT ORDERS

During the biennium surveyed, a problem concerning the reviewability of nonsuit orders emerged and although the supreme court in *Crews* discredited the plaintiff's right to effectuate an abandonment of his action by simply absenting himself from court after the adverse party has answered or moved for summary judgment (*viz.*, the nonsuit as recognized at early common law), it is foreseeable that appellate courts will be confronted with the reviewability of such orders in the immediate future. The problem is whether a plaintiff "coerced" into voluntarily nonsuiting himself by a ruling of the court can successfully obtain review of the ruling which induced the nonsuit when no final judgment has been entered in the action.

At an early date,⁷² the Florida legislature by statute restricted writs of error on appeals of law actions to final judgments. In 1885 the legislature enacted the forerunner to section 59.05 which now provides:

When, because of any decision or ruling of the court on the trial of a cause, it becomes necessary for the plaintiff to suffer a nonsuit, he may appeal therefrom⁷³

Did this statute sanction appellate review of nonsuit orders entered at law even though no final judgment appears in the action?

a. Conflict in the Courts

The Florida Supreme Court, for a period of approximately twenty-eight years commencing in 1909 with its decision in *Mizell Live Stock Co. v. J. J. McCaskill Co.*,⁷⁴ and ending in 1937 with *State ex rel. L. &*

68. No Florida case has been found wherein a plaintiff was nonsuited at the insistence of the defendant. Yet, such practice was recognized in early England. See 111 BLACKSTONE'S COMMENTARIES (11th ed. 1791) at 376-377.

69. *Dobson v. Crews*, 164 So.2d 252 (Fla. 1st Dist. 1964); Massey and Weston, *Civil Procedure*, 18 U. MIAMI L. REV. 745, 774 (1964).

70. 177 So.2d 202 (Fla. 1965). Noted in 20 U. MIAMI L. REV. 204 (1965).

71. *Id.* at 6.

72. REV. STAT. § 1263 (1892).

73. FLA. STAT. § 59.05 (1963).

74. 57 Fla. 118, 49 So. 501 (1909).

L. Freight Lines, Inc. v. Barrs,⁷⁵ without exception maintained that the predecessor of section 59.05 did not create an exception to the rule that writs of errors and appeals at law lie only from a final judgment and nonsuit orders were not excepted.⁷⁶

Since 1961, the third district has adhered to a contrary view. *Greene v. American Trash Hauling Co.*,⁷⁷ best articulates that court's position. In determining that a plaintiff may appeal an order of nonsuit though not in final form, the court, citing to section 59.05, reasoned: "in 1941 the law was changed to except orders of involuntary nonsuit from the statute restricting writs of error or appeals in law actions to final judgments."⁷⁸ In *Bennett v. Fratus*,⁷⁹ when confronted with a defendant's appeal from a plaintiff's procured order of nonsuit, which order lacked the requisite language of finality, the third district noted, in dicta, that 59.05 "permits a plaintiff to appeal from an order, nonfinal in form, which allows an involuntary nonsuit."⁸⁰

The only indication of the first district position on the question is in accord with the view adhered to by the third district. In *Dobson v. Crews*,⁸¹ that court in obiter dicta observed:

Prior to the enactment of Sec. 59.05 . . . , no writ of error could be taken to an order of nonsuit because it was not a final judgment. However, this statute was adopted to provide the plaintiff with a review by an appellate court on bill of exception of an adverse ruling which necessitated the taking of the nonsuit.⁸²

At odds with the views expressed by the first and third districts is the attitude of the second district, expressed in the opinions of Judge Barns in *Peaslee v. Michalski*⁸³ and *Gregg v. Gray*.⁸⁴ *Peaslee* pointed out that "an appropriate and regular way to conclude a case nonsuited is to procure the entry of a final judgment."⁸⁵ More significantly, the opinion in *Gregg* developed the purpose underlying the promulgation of section 59.05. In interpreting the crucial phrase "may appeal therefrom" the court construed this language as meaning a "plaintiff, after having

75. 129 Fla. 668, 176 So. 756 (1937).

76. For cases in addition to those mentioned in the text accompanying notes 13 and 14 see *Goldring v. Reid*, 60 Fla. 78, 53 So. 503 (1910); *Downing v. Weaver-Loughridge Lumber Co.*, 94 Fla. 1096, 114 So. 666 (1927); *Whitaker v. Wright*, 100 Fla. 282, 129 So. 889 (1930). The leading case decided under common law establishing that no appeal lies from a nonfinal nonsuit order was *Anderson v. Presbyterian Church*, 13 Fla. 592 (1869).

77. 154 So.2d 726 (Fla. 3d Dist. 1963).

78. *Id.* at 727.

79. 164 So.2d 827 (Fla. 3d Dist. 1964).

80. *Id.* at 828.

81. *Supra* note 69.

82. *Id.* at 256.

83. 167 So.2d 242 (Fla. 2d Dist. 1964).

84. 176 So.2d 520 (Fla. 2d Dist. 1965).

85. *Supra* note 83 at 244.

been coerced to take or suffer a nonsuit, has a right to have the rulings coercing a voluntary nonsuit reviewed in the event of an *appropriate* appeal or judicial review."⁸⁶ In short, these words "are not to be taken to mean that an appeal would lie from a ruling at trial"⁸⁷

Thus, the positions taken by the Florida appellate courts are in conflict on the issue of whether a plaintiff may appeal directly from a nonsuit order without awaiting the entry of a final judgment. Those arguing in support of appellate review of a nonsuit order, non-final in form, will rely upon the decision in *Greene* and the dicta and obiter dicta appearing in *Bennett* and *Dobson*, respectively. Those seeking a dismissal of an appeal taken by a plaintiff from a non-final order of nonsuit procured by the plaintiff will contend that the early supreme court decisions and *Gregg* and *Peaslee* enunciate the correct view.

b. A Prognostication

The prohibition against review at law of non-final orders is now constitutional in origin and jurisdictional in nature. Because the legislature is without power to abrogate a constitutional provision, section 59.05 of the Florida Statutes, it would seem, can no longer be interpreted as sanctioning an exception to the rule that review at law lies only from an order, final in nature, as was the case in *Greene*. Parenthetically it should be noted that *Greene* is the only decision that squarely held that appellate review can be had of a non-final order of nonsuit while all other decisions on point held contra.

The purpose of the act was not to permit an appeal from a ruling at trial permitting a nonsuit, but the object, purpose and intent of the statute was to overcome the decisional law of review that a voluntary nonsuit was a waiver of all previous errors⁸⁸

Thus, it is submitted that appellate review of a non-final order of nonsuit cannot be had.

c. Posture in the Trial Court of a Cause Nonsuited

Assume the trial court has sanctioned the taking of a nonsuit by a plaintiff after the adverse party has answered or moved for summary judgment. The question is then presented: What is the posture of the cause in the trial court and how should an appellate court dispose of an appeal taken from a final judgment entered on the nonsuit?

In regard to the posture of the cause in the trial court, only one conclusion seems possible. Since the action could not be terminated by

86. *Supra* note 84 at 522. (Emphasis added.)

87. *Id.* at 522.

88. *Gregg v. Gray*, 176 So.2d 520, 522 (Fla. 2d Dist. 1965).

nonsuit at the election of the plaintiff after answer or motion for summary judgment by the adverse party, the cause must still be pending in the trial court. An appellate court, therefore, in disposing of an appeal taken from a final judgment entered on a nonsuit should remand the case with directions to set aside the order of nonsuit.

C. *Orders Granting or Denying Motions for New Trial*

In Florida, unless a final judgment has been rendered in the cause, an order granting a new trial is reviewable only by virtue of section 59.04 of the Florida Statutes.⁸⁹ According to the provisions of the statute "no other grounds than those specified by the trial judge as a basis for the order granting the new trial shall be considered as arguable upon said appeal."⁹⁰ The above qualification on the statutory right to appeal an order granting a new trial was construed to preclude an appellee from cross-assigning as error the trial court's denial of his motions for judgment notwithstanding the verdict, or in the alternative, for a new trial on all issues.⁹¹ The appeal was prosecuted by the plaintiff from an order granting the appellee a new trial on the issue of damages. In reaching its decision, the court was required to determine whether the withdrawal of the issue of liability from the jury on retrial was tantamount to a final judgment. If such was the case, the appellee could have maintained an independent and direct appeal from that judgment and on appeal he could assign as error those matters attempted to be cross-assigned on the appellant's present appeal. Such an order was held interlocutory in nature. Accordingly, an independent appeal would not lie.

Since no provision is made by the Florida Statutes or Appellate Rules for an appeal by a defendant from an order denying a motion for new trial in a criminal case, these orders are not reviewable unless assigned as error on an appeal from the final judgment.⁹²

D. *Orders Entered During Arbitration Proceedings*

Orders entered pursuant to arbitration proceedings are reviewable only if they are of a type enumerated in the Arbitration Code.⁹³ Thus,

89. See, however, page 27 wherein the question whether § 59.04 was superseded by Rule 4.2(a) is raised.

90. FLA. STAT. § 59.07(4) (1963).

91. *Johnson v. City of Pensacola*, 164 So.2d 844 (Fla. 1st Dist. 1964).

92. See *Griffith v. State*, 171 So.2d 597 (Fla. 3d Dist. 1965).

93. FLA. STAT. § 57.29 (1963) lists the orders appealable. They are as follows:

(a) An order denying an application to compel arbitration made under § 57.12;

(b) An order granting an application to stay arbitration made under § 57.12(2)-(4);

(c) An order confirming or denying confirmation of an award;

(d) An order modifying or correcting an award;

(e) An order vacating an award without directing a rehearing; or

(f) A judgment or decree entered pursuant to the provisions of this law.

appellate jurisdiction was found to be lacking on an appeal from an order of the trial court which vacated an award and directed a rehearing *de novo* by the arbitrators.⁹⁴ However, an order affirming or denying confirmation of an award previously entered is a reviewable order. Such an order was present in *State v. Pearson*,⁹⁵ wherein the circuit court entered a subsequent order amending a prior order which adopted the findings of the arbitrators. The amending order merely deleted that part of the prior order directing the payment of funds to the relators.

It should be noted that if an order entered pursuant to arbitration proceedings is a reviewable order, "the appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action."⁹⁶

E. Orders Entered During Discovery Proceedings

As a general rule, orders entered in discovery proceedings in actions at law do not qualify for review. "However, review has been granted in exceptional cases where it appeared . . . that such orders were reasonably likely to result in substantial injury."⁹⁷ Only a case by case analysis can illustrate what a court may consider exceptional for the purposes of this rule. In *Leithauser v. Harrison*,⁹⁸ for example, an order entered during pretrial discovery proceedings in an action at law which required the disclosure of privileged information was held to come within this exception. Accordingly, review of the order by certiorari was held to be appropriate.

F. Orders Dismissing Complaints Which Leave a Counterclaim Pending

The reviewability of one further type of order remains to be considered—an order granting summary judgment which dismisses the complaint and leaves a counterclaim pending. Although such an order is a final determination of the plaintiff's rights, it is treated as interlocutory in nature and therefore is not appealable.⁹⁹

94. *Carner v. Freedman*, 175 So.2d 70 (Fla. 3d Dist. 1965). The rule announced in *Carner* is in accord with the federal position. "An order setting aside an arbitration award and directing a resubmission to arbitration lacks finality and is non-appealable." 7 MOORE, FEDERAL PRACTICE ¶ 81.05(7), at 4441 (1955). *Stathates v. Arnold Bernstein S.S. Corp.*, 202 F.2d 525 (2d Cir. 1953), is cited by Moore in support of the quoted rule. Note, however, the well reasoned dissent by Judge Frank which is revealed in the following language:

My colleagues' decision will establish a precedent which . . . means that if a judge enters an obviously erroneous order that an arbitration award be set aside, the person who won the arbitration must endure the expense and delay entailed by a new arbitration before he can appeal and obtain a reversal of that order.

95. 154 So.2d 833 (Fla. 1963).

96. FLA. STAT. § 57.29(2) (1963).

97. *Leithauser v. Harrison*, 168 So.2d 95, 97 (Fla. 2d Dist. 1964).

98. 168 So.2d 95 (Fla. 2d Dist. 1964).

99. *McLean v. Plant Fruit Co.*, 167 So.2d 332 (Fla. 2d Dist. 1964).

IV. PERSONS ENTITLED TO REVIEW

A. *Who Are Parties?*

Notwithstanding the common law rule that an appeal may only be prosecuted by a party to an action who is aggrieved by the final decision, order, judgment or decree,¹⁰⁰ questions sometimes arise as to who are parties for the purposes of appellate review.

In *Miller v. Stavros*,¹⁰¹ the successful bidder at a foreclosure sale, although not a named party in the initial proceeding, was nonetheless held to have standing for the purpose of appealing an order denying his motion for reimbursement of a resulting surplus. This decision is consonant with the common law rule since the appellant was "aggrieved" by the final decree.

A decision of the third district¹⁰² denied a treating physician's petition for writ of certiorari to review an order of the trial court requiring him to answer questions propounded in an interrogatory apparently for the reason that a treating physician was not a party "aggrieved by a final decision, order, judgment or decree." The court noted that the procedure which should have been followed would have been for the petitioner to refuse to comply with the court order. If the court then held him in contempt, the physician would have been an "aggrieved" party.

Persons acting in a capacity as officers of the courts are not, as a rule, proper parties to prosecute appeals.¹⁰³

As a general proposition, a party may only appeal from a judgment that is adverse to him. However, Florida and most of the other jurisdictions recognize an exception to the rule when the appellant receives a favorable verdict and assigns as error the denial of a motion for a new trial which was made on the ground that the verdict was inadequate.¹⁰⁴

A corollary to the requirement that a party may only appeal from a judgment that is adverse to him is the rule that the appealing party

100. See 2 FLA. JUR., *Appeals* § 55 (1963).

101. 174 So.2d 48 (Fla. 3d Dist. 1965).

102. *Strain v. Miami Transfer Co.*, 155 So.2d 170 (Fla. 3d Dist. 1963).

103. In *Buchanan v. Jimenez*, 155 So.2d 724 (Fla. 3d Dist. 1963), the Sheriff of Dade County, upon the chancellor's suggestion, attempted to appeal an order dismissing his petition which sought instructions on what to do under the following circumstances: The Sheriff, acting as custodian for the Federal Government of persons under Federal detention, had custody of Jimenez. A writ of ne exeat instructing the Sheriff to take Jimenez into custody was issued by a Florida chancellor. Upon demand made by the Federal Government to deliver Jimenez to the Federal Marshall, the Sheriff filed a petition requesting instructions from the chancellor. The petition, as above noted, was dismissed whereupon the Sheriff appealed. The appellate court held the Sheriff of Dade County was not a proper party to prosecute the appeal since he was merely acting in his capacity as Executive Officer of the Circuit Court in and for Dade County.

104. *Paul v. Kanter*, 155 So.2d 402 (Fla. 3d Dist. 1963).

must be aggrieved by the order or judgment appealed. It is because of this requirement that appellate courts have held that a co-defendant may not complain of a verdict rendered in favor of another co-defendant. In *Durbin Paper Stock Co. v. Watson-David Ins., Co.*,¹⁰⁵ the appellant sought to prevent the adverse operation of the above rule by attempting to distinguish his case on the ground that the cases in which the rule was formulated involved joint tortfeasors. Although the court agreed "the principle may have been first recognized in regard to such situations,"¹⁰⁶ it held that the principle is not limited to fact patterns where the co-defendants are joint tortfeasors.

1. EFFECT OF AN APPEAL TAKEN BY A DEFENDANT UPON A NON-APPEALING CO-DEFENDANT

Rule 3.11 provides in part that when an appeal is taken and all parties to the cause are not named as parties-appellant, they shall automatically become parties-appellee "regardless of the effect on such party or parties of any order, judgment or decree appealed from." This proviso was recently employed where a co-defendant in the trial court neither filed a brief nor appeared in the appellate court, but was held, nevertheless, to be a party-appellee on an appeal taken by the other defendant.¹⁰⁷

B. *Waiver of Right*

Parties otherwise entitled to review can by their conduct relinquish that right. As a general rule, a party who consents to the rendition of the order sought to be appealed is not entitled to review.¹⁰⁸ This principle was applied by the third district notwithstanding the trial court order, which stated that compliance shall not be deemed to be a waiver or estoppel of a right to review the consented-to-order. Thus, in *Dargis v. Maguire*,¹⁰⁹ plaintiff-appellee was held precluded from cross-assigning as error the order of the trial court requiring her to remit part of the jury verdict. Although the remittitur was apparently agreed to by the plaintiff as a condition to the denial of defendant's motion for new trial, the order specified that such compliance "shall not be deemed to be a waiver or estoppel on her part insofar as her right to cross assign as error (in any subsequent appeal) that portion of the order * * * which directed the

105. 167 So.2d 34 (Fla. 3d Dist. 1964).

106. *Id.* at 36.

107. See *Pan Am. Window Corp. v. Eason*, 163 So.2d 318 (Fla. 3d Dist. 1964). The action was originally against the defendants in equity for an accounting. The complainant and the non-appealing defendant had entered into an exclusive royalty agreement whereby this defendant was given an exclusive right to manufacture complainant's designs. Apparently the agreement was breached when the contractee subsequently leased the exclusive manufacturing right to another and accordingly, the lessee was ordered to account to the complainant. The appeal was taken by the lessee. His co-defendant in the trial court, although not represented in the appellate court, was considered a party appellee.

108. 2 AM. JUR. *Appeal & Error* § 211 (1936); 4 C.J.S., *Appeal & Error* § 213 (1957).

109. 156 So.2d 897 (Fla. 3d Dist. 1963).

plaintiff to enter said remittitur."¹¹⁰ Because "the trial judge could not confer upon her the right to appeal from the remittitur order which she voluntarily accepted,"¹¹¹ the appellee was precluded from cross-assigning it as error.

A rather unusual application of the same principle occurred where the lower court granted plaintiff's motion to transfer the cause from equity to law after denying the same motions made by defendant-appellant on two prior occasions. On appeal from the order transferring the cause, the lower court was affirmed on the ground that the action of the trial court was sought and induced by the defendants.¹¹²

Although it is generally conceded that "one cannot ordinarily accept or secure a benefit under a judgment or decree and then appeal from it . . . , when the effect of his appeal . . . may be to annul the judgment,"¹¹³ the period of this survey has seen a conflict of opinion as to the application of that rule to the acceptance of alimony payments. The principle itself is one deeply rooted in Florida jurisprudence.¹¹⁴

In a case of apparent first impression, the first district, in *Fort v. Fort*,¹¹⁵ held the principle applicable to a post decretal order reducing the amount of alimony awarded in the final decree. In arriving at its decision, the majority of the court was influenced by the provisions of appellate Rule 3.8(b) which, upon proper notice and hearing, permits the lower court, in its discretion, to order the payment of alimony pending appeal. That Rule further provides:

The acceptance of the benefits thereof shall be without prejudice to the rights of the beneficiary to raise as issues on the appeal the correctness of any of the terms or provisions of the original order or decree appealed.¹¹⁶

Apparently the court viewed the Rule as limiting the rights of the parties and not as remedial in nature. Contrary to the *Fort* holding, the second district, in *Blue v. Blue*,¹¹⁷ adopted the view that an appeal by a wife from an order reducing alimony previously awarded does not bring into play the principle that one cannot accept the fruits of a decree and at the same time appeal from it.

110. *Id.* at 898.

111. *Id.* at 898-899.

112. *McSwiggin v. Edson*, 172 So.2d 490 (Fla. 3d Dist. 1965).

113. 2 R.C.L. § 44 (1929).

114. *McMullen v. Fort Pierce Fin. & Const. Co.*, 108 Fla. 492, 146 So. 567 (1933).

115. 167 So.2d 315 (Fla. 1st Dist. 1964); Note, *Appeal—Acceptance of the Benefits of a Divorce Decree*, 19 U. MIAMI L. REV. 659 (1965). See also *Carter v. Carter*, 141 So.2d 591 (Fla. 1st Dist. 1962) treated in Murray, *Family Law*, 18 U. MIAMI L. REV. 231, 239 (1963).

116. FLA. APP. R. 3.8(6).

117. 172 So.2d 502 (Fla. 2d Dist. 1965). After the period of this survey, the Florida Supreme Court in *Brackin v. Brackin*, 182 So.2d 1 (Fla. 1966), adopted the view adhered to in *Blue*.

An offshoot of this general rule is that after receiving payment of a judgment or decree, a party cannot appeal. In *Fowler v. Alterman Transp. Lines, Inc.*,¹¹⁸ plaintiff-appellant sought to appeal from an order granting the defendant a new trial and requiring the defendant to pay to the plaintiff the costs of the former trial and the sum of 500 dollars as a condition precedent to the granting of the new trial. The plaintiff's acceptance of the payment was held to amount to a waiver of error and hence precluded an appeal.

In *Rubin v. Gordon*,¹¹⁹ the principle that prohibits an appellant from appealing from an error which he invited, was applied to a plaintiff who submitted a letter in the trial court requesting that the court grant defendant's motion to dismiss the complaint for failure to state a cause of action in libel per se. Notwithstanding the fact that the letter was written "not in agreement with the contentions of the Defendant nor in agreement with the indications of the Court to rule against Plaintiff, but [was] done with the thought in mind that further delays can be avoided by presenting the Complaint in the Appellate Court,"¹²⁰ the entry of the order dismissing the complaint without leave to amend was held to have been invited by the appellant and accordingly he was precluded from maintaining the appeal.

V. PRESENTING AND PRESERVING QUESTIONS IN THE TRIAL COURT

A. General Rules

The general rule that an appellate court will consider only those questions that were properly raised in the lower court is adhered to by the appellate courts of Florida.¹²¹ However, our appellate courts, as well as the appellate courts of other jurisdictions, do recognize some limitations on, and exceptions to, the general rule.

The purpose of the rule requiring a party to properly raise and preserve, in the trial court, alleged errors for which review is ultimately sought, is to increase the likelihood that litigation will seasonably end. Indicative of this policy is *Thal v. Roth*,¹²² wherein the third district held that failure of the appellant to object in the trial court that the parol evidence rule barred the defense proffered by appellees precluded the appellant from raising this point on appeal.

A recent decision regarding the sufficiency of objections made pursuant to Florida Civil Procedure Rule 2.6(b) also reflects the policy precluding review of questions not properly raised and preserved in the

118. 159 So.2d 675 (Fla. 1st Dist. 1964).

119. 165 So.2d 824 (Fla. 3d Dist. 1964).

120. *Id.* at 824.

121. For an exhaustive treatment of this principle, see 41 C.J.S. *Appeal & Error*, § 228 (1957).

122. 173 So.2d 174 (Fla. 3d Dist. 1965).

lower court. Florida Civil Procedure Rule 2.6(b) provides "no party may assign as error the giving of any charge unless he objects thereto" at the time prescribed in that Rule. It has been held that an objection to the court's instructions to the jury made on the ground that there was no evidence in the record to support the charge is not sufficient compliance with that Rule.¹²³ In short, an objection to the instruction given by the trial court must, in order to properly preserve the question of the correctness of the charge, state distinctly the portion or omission of the charge alleged to be erroneous and the specific grounds which render the charge erroneous. The reason for requiring this practice is to inform the trial court of his possible errors and give him an opportunity to correct them and thereby obviate the necessity for resort to an appellate court.

Where the point assigned as error was not properly preserved in the lower court because of mistake, misunderstanding, or inadvertence on the part of the lower court, relief may be obtained by proceeding under Florida Civil Procedure Rule 1.38. Such relief was held to be available in the rather involved factual situation presented in *In re Ward's Estate*,¹²⁴ where the co-executors appealed a final order which determined that no compensation was due to them. The basis of this determination was that the lower court believed, as reflected in the order appealed, that the co-executors had stated to the court that no compensation would be claimed. Affidavits filed in support of a rehearing on the contested final order contained averments that at no time did the co-executors make such a statement. After a hearing, the lower court entered an order which reaffirmed that the co-executors had made an announcement waiving compensation. In their briefs the appellants argued that the recitations contained in both orders were a result of mistake, misunderstanding or inadvertence on the part of the trial court. Since the record did not affirmatively establish the alleged error, the appellate court had no choice but to affirm the order. However, to enable the appellants to proceed under Rule 1.38, the appellate court stated that the order of affirmance was without prejudice.

B. *Fundamental Error Exception*

An exception to the general rule that an appellate court will consider only those questions properly raised in the lower court obtains where the error complained of is of such a fundamental nature that a fair trial could not have resulted. Failure to preserve the question in the trial court under such circumstances will not preclude appellate review. Thus, in one decision,¹²⁵ the appellate court permitted review of an

123. *Henningsen v. Smith*, 174 So.2d 85 (Fla. 2d Dist. 1965).

124. 172 So.2d 869 (Fla. 1st Dist. 1965).

125. *Wofford Beach Hotel, Inc. v. Glass*, 170 So.2d 62 (Fla. 3d Dist. 1964).

erroneous instruction which was based upon the introduction of an inapplicable ordinance. Review was granted notwithstanding the failure of the appellant to object at trial to the contested instruction. However, the same result could have been reached on other grounds since the trial judge indicated that the contested instruction would not be given and Florida law is that no objection to a charge need be made where the appellant is without notice prior to the time that the instruction is given to the jury.¹²⁶

Also coming within the fundamental error exception is that class of cases wherein: (1) a party desires to assign error in the denial of a motion for a directed verdict made at the conclusion of the plaintiff's case, but (2) fails to renew his motion at the close of all the evidence and (3) the record reveals that the evidence is insufficient to support the verdict.¹²⁷ As a general rule, the renewal of the directed verdict motion at the close of all the evidence is deemed a prerequisite to appellate review of the sufficiency of the evidence in the lower court to support the verdict.¹²⁸ In *Pickard v. Maritime Holdings Corp.*,¹²⁹ the above noted exception to the general rule was given application. The court, quoting from *Barron* and *Holtzoff*, adopted the following passage as the test to be employed in determining whether appellate review can be had notwithstanding the failure of the appellant-defendant to renew his motion for a directed verdict at the close of the evidence:

[W]here the insufficiency of the evidence constitutes plain error apparent on the face of the record which if not noticed would result in a manifest miscarriage of justice.¹³⁰

It should be noted that this test is broader in application than the facts of the *Pickard* decision warranted since the court noted a total lack of evidence to support the verdict of the lower court. Whether or not the test will be given a liberal application and just what the courts will consider "plain error" can only be determined by a case-by-case analysis of future cases.

1. APPELLATE RULE 6.16

Florida Appellate Rule 6.16, pertaining to scope of review in criminal appeals, embodies an exception to the general rule. The applicable provision of that rule sanctions appellate review of "any other things said or done in the cause which appear in the record" which the review-

126. The *Wofford* court cited *Louisville & Nashville R.R. v. Flournoy*, 136 So.2d 32 (Fla. 1st Dist. 1961), for this principle.

127. *Pickard v. Maritime Holdings Corp.*, 161 So.2d 239 (Fla. 3d Dist. 1964).

128. See *6551 Collins Ave. Corp. v. Millen*, 104 So.2d 337 (1958) discussed in *Massey*, *Civil Procedure*, 16 U. MIAMI L. REV. 637 (1962).

129. *Supra* note 127.

130. *Id.* at 242; 2 BARRON AND HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE*, § 1081 (1961).

ing court, in its discretion, "deems the interests of justice to require." *Burnette v. State*,¹³¹ vividly illustrates the application of that provision. Although no objection was made when the trial court informed the jury on the accused's eligibility for parole in response to the jury's inquiry, the appellant was held to be able to assert this error on appeal.

There is no similar rule applicable to civil appeals. Where the error committed below was not properly raised and preserved, unless the case comes within the fundamental exception to the general rule which was discussed previously, the appellant will be unable to seek appellate review of the alleged error.

C. Motion for New Trial Not a Prerequisite for Review of Judgment on Directed Verdict in Criminal Cases

On appeal from a judgment of conviction in a criminal action, the appellant asserted error in the denial of his motion for a directed verdict and in the denial of an untimely motion for new trial. Since the motion for new trial was untimely, the question on appeal as stated by the appellate court was whether the absence of a timely motion for new trial precluded appellate review of the sufficiency of the evidence. Although the trial court was affirmed, the appellate court considered the merits of the alleged error and answered the question presented by stating that

[I]f a defendant makes a timely motion for a directed verdict it is unnecessary for him to then move for a new trial in order to preserve for appellate review an assignment of error contesting the legal sufficiency of the evidence.¹³²

The significance of this decision must be viewed in light of both prior civil appeals cases and criminal appeals cases. In both classes of appeals a distinction has been delineated between review of a verdict as being contrary to the manifest weight of the evidence, and review of the evidence adduced below in order to determine whether it was "legally insufficient." Only in the latter situation can an appellant successfully obtain review of the sufficiency of the evidence notwithstanding his failure to move for a new trial.¹³³ The ability to obtain review of the evidence on the ground that it is legally insufficient notwithstanding the

131. 157 So.2d 65 (Fla. 1963).

132. *Hogwood v. State*, 175 So.2d 817, 819 (Fla. 3d Dist. 1965).

133. See *Furr v. Gulf Exhibition Corp.*, 114 So.2d 27 (Fla. 1st Dist. 1959) treated in *Massey, Civil Procedure*, 16 U. MIAMI L. REV. 591 at 639-640 (1962) and *Sheehan v. Allred*, 146 So.2d 760 (Fla. 1st Dist. 1962) treated in *Massey and Weston, Civil Procedure*, 18 U. MIAMI L. REV. 745, 793 (1964). The majority of the court did note that "many previously decided criminal cases hold that the absence of a timely motion for new trial precludes appellate review of sufficiency of evidence." *Supra* note 130, at 818. However, those cases espousing this principle were distinguished from the facts in the *Hogwood* case on the ground that in none of the prior cases was it indicated that the defendant moved for a directed verdict.

appellant's failure to move for a new trial is, however, conditioned upon the making of a motion for directed verdict at the conclusion of all the evidence.

VI. PROCEDURE FOR OBTAINING REVIEW

A. *Limitation as to Time*

1. APPLICABILITY OF RULE APPEAL TIMES

Essential to the jurisdiction of appellate courts is the timely taking of an appeal. An appeal is timely if the notice of appeal together with filing fees, where required, are filed with the clerk of the lower court within sixty days from the rendition of the final decision, order, judgment, or decree appealed.¹³⁴ The sixty-day period is applicable to all appeals "unless some other period of time for taking an appeal is specifically provided by statute" or appellate rules.¹³⁵ In *Saffan v. Dade County*,¹³⁶ the question before both the Third District Court of Appeal and the supreme court¹³⁷ was which of three possible appeal time periods was applicable to appeals from judgments of conviction entered in the Metropolitan Courts. The circuit court, exercising its appellate jurisdiction, dismissed an appeal from a judgment of conviction of a traffic violation entered in the Dade County Metropolitan Court which had been filed more than twenty days, but less than ninety days, after the entry of the judgment. That court held that the Metropolitan Home Rule Charter which provides a twenty-day appeals period was applicable. On certiorari to the Third District Court of Appeal, the circuit court was affirmed but on the ground that section 932.52¹³⁸ of the Florida Statutes, which governs appeals from municipal courts, was controlling. However, the supreme court specifically held that metro courts are not municipal courts, and therefore reversed the district court of appeal with directions to affirm the judgment of the circuit court. Although neither of the courts specifically determined the applicability of Florida Appellate Rules 6.1 and 6.2,¹³⁹ the supreme court's determination that metro courts are not municipal courts precludes the application of these Rules.

Where the Superintendent of the Division of Road Prisons prosecuted an appeal from a final judgment entered in a habeas corpus proceeding, the sixty-day period applicable to civil appeals which is

134. See FLA. APP. R. 3.2(a).

135. FLA. APP. R. 3.2(b).

136. 159 So.2d 102 (Fla. 3d Dist. 1963).

137. *County of Dade v. Saffan*, 173 So.2d 138 (Fla. 1965).

138. FLA. STAT. § 932.52(2) (1963) stipulates a thirty-day period within which an appeal may be taken from municipal courts.

139. FLA. APP. R. 6.1 sets forth that part VI of the Rules shall govern appeals in criminal cases taken to the supreme court, the district courts of appeal and the circuit courts including appeals from municipal courts. Rule 6.2 prescribes a ninety-day period within which a defendant may prosecute an appeal.

prescribed in the rules was held controlling and not the thirty-day period found in section 924.10 which governs appeals taken by the state in criminal cases.¹⁴⁰ This result, obtained in *Crownover v. Shannon*,¹⁴¹ was said to follow since section 924.10 "is only a limitation on the time within which the 'State of Florida' may appeal from a decision in a criminal case, which is prosecuted in its name as a party."¹⁴² Evidently, an appeal by the Superintendent of the Division of Road Prisons is not an appeal by the state. Furthermore, habeas corpus proceedings are civil in nature and not criminal and therefore section 924.10 cannot be controlling since that statute is applicable only to appeals in criminal cases. The latter factor is significant because it establishes that appeals from habeas corpus proceedings, whether by the defendant or the state, are governed by the sixty-day period prescribed in the rules for non-criminal appeals.

By virtue of a rewording of section 73.14 of the Florida Statutes, appeals of final judgments rendered in eminent domain proceedings are now evidently controlled by the sixty-day period under the Rule. The prior 1961 statutes prescribed a thirty-day limitation within which an aggrieved party could prosecute an appeal.¹⁴³ However, the current statute reads:

Any person aggrieved by the final judgment may appeal to the appropriate district court of appeal, unless review by the supreme court is authorized by Article V of the state constitution, in the manner and *within the time prescribed by the Florida Appellate Rules*. . . .¹⁴⁴

2. COMPUTING TIMES UNDER THE RULES

The rules provide that when an act is required to be performed within a specific time after service of a notice or paper and service is made by mail, three days are to be added to the otherwise controlling time period.¹⁴⁵ During the period surveyed this proviso was expressly employed in one decision and was apparently the underlying basis for the result reached in another decision.

In *New York Ins. Co. v. Kurz*,¹⁴⁶ the application of the above Rule resulted in a respondent's cross-petition for certiorari filed on the twenty-second day after petitioner mailed his brief and the transcript of the

140. *Crownover v. Shannon*, 170 So.2d 299 (Fla. 1964).

141. *Ibid.*

142. *Supra* note 138 at 300.

143. "Any person aggrieved by the final judgment may appeal to the supreme court, but no appeal shall be entered after thirty days from the rendition of the judgment" FLA. STAT. § 73.14 (1961).

144. FLA. STAT. § 73.14 (1963) (Emphasis added.).

145. See FLA. APP. R. 3.4(b)(3).

146. 174 So.2d 537 (Fla. 1965).

record. Although Rule 4.5(c)(3) prescribes a twenty-day period after service of the designated papers within which a respondent may cross-petition for certiorari, three days were added to the twenty-day period since service of the designated papers was made by mail.

Martorano v. Florida Industrial Comm'n,¹⁴⁷ involved the timeliness of a petition for certiorari filed sixty-one days after the mailing of the order which denied the petitioner's application for an appeal. The Third District Court of Appeal noted that the applicable statute sanctioning review by certiorari of such orders does not prescribe how or when they become "rendered" and accordingly was confronted with the issue whether the sixty-day period prescribed for the filing of a petition for certiorari commenced to run from the date of mailing or from some time thereafter. The court held that the petition was timely and reasoned that the "date of notice" was the critical event.

[W]hen notice of such an order is given by mailing, the date or time of *notice* should be held to be some time after the mailing. . . . three days should be allowed, making the *date of notice*, and therefore the beginning of the 60 day period for certiorari, three days after the date of mailing.¹⁴⁸

a. Sundays

Two schools of thought exist on the subject of the proper construction to be afforded statutory provisions prescribing that certain acts must be accomplished within a certain number of days.¹⁴⁹ The difference between the two views becomes apparent when the last day for performance of the required act falls on a Sunday. Those who adhere to the strict construction school of thought maintain that Sunday is not to be excluded and that the required act must be performed by the prior Saturday. The liberal view, however, permits an extension of time so that the required act may be performed on the following Monday. From an early date,¹⁵⁰ both views were recognized in Florida—the strict construction view was applied to statutory provisions; the liberal view was incorporated in the Rules.¹⁵¹ This distinction was recently obviated by the supreme court in *Dade County Planning Dep't v. Ransing*.¹⁵² There the

147. 160 So.2d 744 (Fla. 3d Dist. 1963).

148. *Id.* at 745-746.

149. See Annot., 61 A.L.R.2d 482 (1958) for a thorough treatment of the question whether terminal Sundays are to be included or excluded in the computation of appeal periods.

150. See *Simmons v. Hanne*, 50 Fla. 267, 39 So. 277 (1905) cited in *Ransing*, *infra* note 152.

151. The Federal Rules also reflect the liberal view. See Fed. R. Civ. P. 6(a).

152. 158 So.2d 528 (Fla. 1963). *Dade County Planning Dep't v. Ransing* was followed in *State Road Dep't v. White*, 161 So.2d 828 (Fla. 1964) wherein the respondent questioned whether a terminal Sunday can be excluded in computing the time for filing the notice of appeal under section 73.14 of the Florida Statutes.

court held that an application for review before the Workmen's Compensation Commission was timely even though it had been filed with the deputy commissioner on the twenty-first day which was a Monday. Judge Terrell dissented on the ground that the above noted distinction should have been retained. One further aspect of the *Ransing* case should be considered. Rule 3.18, governing the computation of times, by its terms, encompasses "any applicable statute." But the question of whether or not the adopters of Rule 3.18 intended the liberal view to be applicable in all instances was not considered by the *Ransing* court. The decision did, however, achieve that result.

3. TIMELINESS OF APPEAL NOTICES IN CRIMINAL APPEALS

Although the timely filing of the notice of appeal with the clerk of the lower court is a requisite to appellate jurisdiction, recent district court of appeals' decisions have revealed a liberal judicial attitude in regard to the filing of appeal notices in criminal actions. In one decision,¹⁵³ rendered prior to this survey, the appellant, an inmate of a state prison, had presented a notice of appeal in proper form for mailing to prison authorities seven days before the last day for filing. The court held that the notice was timely even though it was mailed after the time for filing had expired. In a more recent decision,¹⁵⁴ a notice of appeal actually filed more than ninety days after the judgment and sentence were entered was held timely where the incarcerated appellant delivered the appeal notice to prison officials who mailed it on a date which in the normal course of the mail would have been timely delivered to the clerk of the lower court.¹⁵⁵

This liberal attitude was rejected by the supreme court in *State v. Smith*¹⁵⁶ in favor of the principle that the "timely filing of a notice of appeal is jurisdictional and neither [the supreme court] nor the District Courts have any power to waive the requirement." In *Smith*, prohibition proceedings were instituted by the attorney general to prevent the district court from exercising jurisdiction over an appeal previously dismissed. The notice of appeal was dated May 14, 1962, but was filed on May 22, 1962—ninety-one days after conviction and sentence were entered. Rule absolute was issued and the court noted that the other decisions of the district courts of appeal, which recognized an exception to the rule that the timely filing of a notice of appeal is jurisdictional, were never presented to the supreme court for review.

153. *Perez v. State*, 143 So.2d 663 (Fla. 3d Dist. 1962).

154. *Henry v. State*, 158 So.2d 807 (Fla. 1st Dist. 1963). This decision, however, was recalled and quashed at 163 So.2d 24 (Fla. 1st Dist. 1964).

155. However, where the notice of appeal was actually filed 108 days after the order appealed was entered but was in the front office of the prison 19 days before the incarcerated appellant was called to notarize it, the appeal was dismissed as being untimely. See *Burke v. State*, 160 So.2d 523 (Fla. 1st Dist. 1964).

156. 160 So.2d 518 (Fla. 1964).

In the *Perez*, *Henry* and *Smith* cases, the failure of the appellant to timely file his notice of appeal was caused by the conduct of a state functionary. In considering what possible relief is available under these circumstances, the court analogized to a practice sanctioned by the United States Supreme Court and suggested that relief may be sought by proceeding in habeas corpus.

4. TIMELINESS OF A MOTION FOR NEW TRIAL

Provision is made in the Rules for the tolling of the period within which an appeal may be taken when a timely and proper motion for new trial or petition for rehearing or reconsideration has been made in the lower court.¹⁵⁷ The question of when a motion for new trial is timely for the purposes of tolling the running of the appeal period was at issue in *Miami Transit Co. v. Ford*,¹⁵⁸ where the appellant served the motion upon appellee within ten days after the verdict was rendered but did not file the motion in the trial court within that period. The third district construed Florida Civil Procedure Rule 1.4(d) *in pari materia* with Rule 2.8(b)¹⁵⁹ and held that a motion for new trial must be filed within the ten-day period prescribed for service of the motion on the opposing party in order to be timely under Appellate Rule 1.3. On certiorari to the supreme court, the motion was held timely, despite the "hip-pocket" filing, since it was timely "served."

As illustrated above, it is the service of the motion for a new trial upon the opposing party, not the filing of the motion in the lower court, that is the critical act for purposes of tolling the running of the appeal period. This construction by the Florida Supreme Court is in accord with a recent federal interpretation of the analogous Federal Rule—73 (a). Rule 73(a) of the Federal Rules of Civil Procedure provides in part that "the running of the time for appeal is terminated by a timely motion . . . under Rule 52(b) to amend or make additional findings of fact . . ." ¹⁶⁰ Rule 52(b) provides that such a motion shall be "made not later

157. See FLA. APP. R. 1.3 on the definition of "rendition."

158. 155 So.2d 360 (Fla. 1963).

159. FLA. R. CIV. P. 2.8(b) provides that "a motion for a new trial . . . , shall be served not later than 10 days after the rendition of verdict or the entry of a summary judgment." FLA. R. CIV. P. 1.4(d) requires that "all original papers, copies of which are required to be served upon parties, shall be filed with the court either before service or immediately thereafter."

160. The complete text of the pertinent provisions of that rule reads:

The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required of the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

than 10 days after entry of judgment. . . ." In *Koehane v. Swarco, Inc.*,¹⁶¹ the appellant served a motion to amend upon defendants' counsel within the ten-day period required by Rule 52(b). However, it was filed with the clerk eleven days after the entry of judgment. The federal court held the motion timely, reasoning that a motion is "made" under Rule 52(b) when it is served upon opposing counsel.

5. EXTENDING TIME FOR FILING ASSIGNMENTS

Assignments of error must be filed within ten days after the notice of appeal has been filed.¹⁶² Where, however, a motion for extension of time for filing assignments of error is made in either the appellate court or lower court, the ten-day period is suspended until the entry of the order denying the motion.¹⁶³ These principles were applied where the appellant filed a motion for extension of time in the lower court which was denied. A similar motion made in the appellate court was also denied.¹⁶⁴ The concurrent orders of denial were held to have tolled the ten-day period. The time sequence of the case may be illustrated as follows:

Notice of appeal filed—September 25.

Motion for extension of time in lower court—September 25.

Motion for extension of time in appellate court—October 25.

Entry of lower court's order of denial—October 28.

Entry of appellate court's order of denial—November 27.

Filing of assignments of error—December 2.

The assignments of error were held timely since the required ten-day period was suspended from September 25 (the date the motion was made in the lower court) to October 28 (the date the lower court's order denying the motion was entered) and was further suspended until the appellate court entered on November 27 (the date of its order denying the motion for extension of time made on October 28).

6. TIME GOVERNING THE SUPERSEDING OF ORDERS TAXING COSTS

Florida Appellate Rule 3.2(f) provides that appeals may not be taken by the original plaintiff until all accrued costs specifically taxed

161. 320 F.2d 429 (6th Cir. 1963).

162. See FLA. APP. R. 3.5(a).

163. Under Rule 3.5 subd. (a), Florida Appellate Rules, appellant had ten days after filing notice of appeal to file his assignments of error. Under Rule 3.5, subd. (d), the time for filing assignments of error may be extended by the appellate court or by the lower court. Rule 3.9, subd. (f) contemplates suspension of time in the proceedings, pending disposition of the motion. See *Connell v. Mittendorf*, Fla. App. 1962, 147 So.2d 169, where this Court recognized that Rule 3.9, subd. (f) could be utilized to extend the time for filing briefs upon the filing of timely motions. Compare: *Quality Furniture House v. General Bond & Discount Co.*, Fla. App. 1957, 97 So.2d 203, where the appellant's motion for an extension of time was not timely made and no good cause was shown for the default. *Coggan v. Coggan*, 161 So.2d 550, 552 (Fla. 2d Dist. 1964).

164. *Coggan v. Coggan*, 161 So.2d 550 (Fla. 2d Dist. 1964).

against him in the lower court have been paid. However, accrued costs need not be prepaid by the original plaintiff when: (1) the taxation of costs has been assigned as error, and (2) the order, judgment or decree taxing costs has been superseded.¹⁶⁵

Within what time must the original plaintiff supersede the order taxing costs in order to prosecute an appeal without paying accrued costs? This question was resolved in *Abrahams v. Mimosa*.¹⁶⁶ The appellate rules, as the majority and dissenting opinions testified, were susceptible of two entirely different interpretations. Rule 3.2(f) provides an original plaintiff need not, as a condition precedent to taking an appeal, pay accrued costs "when he has assigned as error the taxation costs and has superseded the order" The superseding of the order could be read *in pari materia* with the requirement that the order taxing costs be assigned as error and accordingly the conclusion could be reached that the superseding bond must be perfected at or before the original plaintiff files his assignments of error. On the other hand, Rule 5.5 recognizes that a party desiring to supersede a final decision can do so "at any time prior to filing the record-on-appeal" in the appellate court. The majority of the court concluded that the former interpretation of the rules was the better interpretation. The court based its conclusion on the fact that

Prior appellate decisions have held that the appellee may waive his right to move to dismiss an appeal for failure to pay costs, by filing cross-assignments, cross-directions, entering into stipulations on filing his brief. Therefore, if the appellee can be considered as having waived his right to move to dismiss at this early stage of appellate proceedings then certainly the appellant must be in default by failing to post the supersedeas.¹⁶⁷

Judge Carroll strongly dissented on the ground that appellate Rule 5.5, not the majority's interpretation, ought to govern the time within which an order taxing costs must be superseded.¹⁶⁸

It is worth mentioning the disparity in their calculations of time between the effect of the majority decision and that of the dissenting opinion. In practical effect, the time difference is significant. Under Rule 3.5, the assignments of error must be filed within ten days after the notice of appeal has been filed. However, under Rule 5.5 a supersedeas

165. See FLA. APP. R. 3.2(f).

166. 174 So.2d 82 (Fla. 3d Dist. 1965).

167. *Supra* note 166 at 83. The majority of the court's position was followed in *Nolan v. Eshleman*, 176 So.2d 559 (Fla. 2d Dist. 1965).

168. [I]t does not appear to be consistent to hold that "has assigned," as contained in the proviso in the cost rule, is complied with by assigning error any time within the 10 day period allowed in the appellate rules for filing assignments of error, and at the same time to hold that the requirement of "has superseded" must be complied with by perfecting supersedeas in less time than is allowed by the appellate rules. *Abrahams v. Minnosa*, 174 So.2d 82, 84 (Fla. 3d Dist. 1965) (Judge Carroll, dissenting).

bond can be applied for at any time before the record-on-appeal is required to be filed in the appellate court and under Rule 3.6(j)(1) the record-on-appeal is required to be filed within one hundred and ten days after the notice of appeal has been filed. There is accordingly a one hundred-day difference between the two views.

7. TIME GOVERNING APPEALS OF ORDERS GRANTING NEW TRIALS IN EMINENT DOMAIN PROCEEDINGS

In *Dean v. State Road Dep't*,¹⁶⁹ the supreme court was confronted with the question whether appeals of orders granting motions for new trial when entered in eminent domain proceedings are governed by section 73.14 or whether section 59.08 is controlling. The order appealed which granted a new trial was entered forty-six days prior to the filing of the notice of appeal. On appeal, the third district¹⁷⁰ dismissed the appeal as being untimely—that court expressly ruling statute 73.14 as controlling. The supreme court, however, held that “appeals from orders granting motions for new trial in eminent domain proceedings are governed by sections 59.04 and 59.08. . . .”¹⁷¹ Accordingly, where an appeal is taken from an order granting a motion for new trial entered in eminent domain proceedings, the aggrieved party has sixty days from the entry of the order within which to file his notice of appeal.

Dean it should be noted was decided on the basis of the 1961 statutes which prescribed a thirty-day period within which a final judgment in eminent domain proceedings could be appealed. Furthermore, the decision turned upon whether the order appealed was final or interlocutory in nature which determined whether the then statutory prescribed thirty-day appeals period was controlling or whether the sixty-day period prescribed in section 59.08 was applicable. Because of the recent rewording of statute 73.14, which stipulates that the time prescribed by the Florida appellate rules is to govern the time within which a final judgment rendered in eminent domain proceedings may be appealed, the question in *Dean* is now moot. In either eventuality, *i.e.*, whether the judgment appealed is a final or an interlocutory order granting a new trial, the sixty-day period under the appellate rules is controlling.

8. PETITIONS FOR REHEARING: THEIR EFFECT UPON THE TIMELINESS OF RULE 3.16 PETITIONS AND APPEALS FROM MOTIONS DENYING CRIMINAL PROCEDURE—RULE ONE HEARINGS

The use of petitions for rehearing in the trial court has been considered in light of particular situations—cost judgments and proceedings under Criminal Procedure Rule Number One. From an appellate pro-

169. 156 So.2d 649 (Fla. 1963).

170. 144 So.2d 867 (Fla. 3d Dist. 1962).

171. *Supra* note 169 at 650-651.

cedure view point, the problem is whether or not such petitions are sanctioned by the Florida Rules of Civil Procedure since a timely and proper petition for rehearing will toll the running of the review period until an order denying the petition is entered.

In general, petitions for certiorari to review cost judgments taxed in the lower court after the filing of the mandate must be filed within twenty days after the entry of the cost judgment.¹⁷² It has been held that such petitions are not timely filed when filed more than twenty days after the entry of the cost judgment, but less than twenty days after a "petition for rehearing" has been denied.¹⁷³ In short, Appellate Rule 1.3 providing for the tolling of the rendition of a decision, judgment, order or decree, when a timely and proper motion for rehearing has been made, is not applicable to petitions for review of cost judgments since according to Rule 3.16(c) the time of the entry of such judgments is the effective time and not "rendition."¹⁷⁴

In *Taylor v. State*,¹⁷⁵ the use of petitions for rehearing in proceedings under Criminal Procedure Rule Number One was considered. On August 7, 1963, the defendant moved to vacate the judgment under Rule One. That motion was denied on October 2, 1963, but a petition for rehearing was filed on September 20, 1963, which was not denied until December 23, 1963. In dicta, the court stated:

There is no provision in Criminal Procedure Rule No. 1 nor in the Statutes pertaining to criminal procedure for the filing of a petition for rehearing. In the absence of such statute or procedural rule there cannot be 'a timely and proper motion or petition for a new trial, rehearing or reconsideration' which will suspend the rendition of the order as provided by Florida Appellate Rule 1.3, 31 F.S.A.¹⁷⁶

This statement, made by the *Taylor* court, raises some problems. Although that court correctly stated that neither Rule One nor the statutes governing criminal procedure expressly sanction petitions for rehearing, petitions for rehearing are sanctioned by the Florida Rules of Civil Procedure. If proceedings under Rule One are civil in nature, petitions for rehearing including motions for new trial and reconsideration would seem proper thereunder. Whether or not proceedings under Criminal Procedure Rule No. 1 are civil in nature or criminal is not easily answered. The rule itself is entitled "Criminal" and is found in a new section headed Florida Rules of Criminal Procedure and not in the civil procedure

172. FLA. APP. R. 3.16(c).

173. *Dames v. Dames*, 156 So.2d 532 (Fla. 3d Dist. 1963).

174. Judge Hendry, concurring specially, agreed with the result reached by the majority but did not agree that the use of the word "entry" instead of "rendition" had any significance. He concurred with the majority on the ground that the Rules do not provide for the filing of a petition for rehearing of a cost judgment.

175. 167 So.2d 93 (Fla. 2d Dist. 1964).

176. *Id.* at 94.

rules which supports the conclusion that proceedings under Rule One are criminal. Accordingly, petitions for rehearing motions for new trial and reconsideration would appear not to be allowable thereunder. Rule One proceedings are, however, essentially independent actions displacing the common law writ of coram nobis which was civil in nature. Furthermore, the sixth paragraph of Rule One specifically states that appeals from final judgments under Rule One are as "on application for a writ of habeas corpus." In *Crownover v. Shannon*, habeas corpus proceedings were characterized as civil in nature which is suggestive of the belief that petitions for rehearing are appropriate under Rule One proceedings.

B. *Power of the Lower Court to Affect Appellate Proceedings*

After the notice of appeal is filed or a motion to dismiss is lodged in the appellate court, the lower court is divested of jurisdiction and accordingly cannot rightfully affect the appellate proceedings.¹⁷⁷ A notable exception to that rule exists where a notice of appeal is filed after the rendition of an appealable order but within the time allowed for filing a petition for rehearing. In theory, when such a petition is filed in the lower court, its effect is to negative appellate jurisdiction depriving the appellate court of any power other than that of dismissing the appeal. The operation of both the above rule and its exception were exemplified in *Citizens Cas. Co. v. Oaks*,¹⁷⁸ and *State v. Pearson*.¹⁷⁹ In the former case, appellant, after a motion to dismiss was lodged in the appellate court for failure of appellant to timely file his brief and the record on appeal, procured an order of the trial court extending the time for filing those papers. Since the motion to dismiss preceded the order of the lower court, that order was held a nullity. Relief from failure to prosecute under those same circumstances, however, could have been sought under Rule 3.8(a).¹⁸⁰ In *Pearson*, the final decree appealed was rendered on September 25th; notice of appeal was filed on September 29th; and petition for rehearing was filed in the lower court on October 3rd, which was followed by the order granting rehearing on October 20th. The timely filing of the petition for rehearing was held to destroy the finality of the order appealed and accordingly divested the appellate court of jurisdiction.

C. *Notice of Appeal*

1. CONTENTS

According to the terms of Rule 3.2(c), notices of appeal must contain five items: (1) the titles of the courts from which the appeal is taken

177. In *Citizens Cas. Co. of N.Y. v. Oaks*, *infra* note 178, the filing of a motion to dismiss the appeal was held to divest the trial court of power to grant the appellant an extension of time for filing his brief and the record on appeal in the appellate court.

178. 167 So.2d 232 (Fla. 1st Dist. 1964).

179. 156 So.2d 4 (Fla. 1963).

180. Since the record on appeal had not been filed, the appellant should have moved the appellate court for leave to file a motion in the lower court requesting an extension of time.

and to which the appeal is taken and the title of the cause appealed; (2) the name of the appealing party, indicating whether he was the plaintiff or defendant in the trial court; (3) the name of the opposing party, indicating his status in the trial court; (4) the nature and date of rendition of the order, judgment or decree appealed from; and (5) the date, book and page of the public record in which it is recorded.

Compliance with the requirement of the name and designation of the appealing and opposing parties is necessary in order that the appellate court can determine over whom and to whom the court will look for compliance with its judgments and orders. Two cases have considered the sufficiency of notices of appeal in view of this requirement. Failure of appellants in one case¹⁸¹ to state the name and designation of all the appealing parties resulted in a dismissal of the appeal, even though the contempt proceedings out of which the judgment appealed arose involved one hundred and fifty individuals, approximately thirty-seven of whom were ordered to pay a fine or be imprisoned. No one was named as an appellant; the notice of appeal read "The defendants affected by the below described order. . . ."

Moreover, the notice of appeal must be directed to an order, judgment or decree appealable in nature. If the orders to which the notice of appeal is directed are not appealable, jurisdiction to entertain the appeal is lacking and the appeal will be dismissed. Thus, where the notice of appeal was directed to an order denying "Appellant's Motions for Judgment Notwithstanding the Verdict or for a New Trial" rather than to the final judgment, the First District Court of Appeal,¹⁸² under those circumstances, dismissed the appeal.

If the notice of appeal is directed to two final judgments, and the second judgment is the only effective final judgment, mention of the first judgment will be treated as surplusage, and accordingly the notice will be held effective. This reason was assigned by the appellate court in *Preston v. Grant Advertising, Inc.*,¹⁸³ wherein the orders referred to in the notice of appeal were an order granting appellee's motion to dismiss with prejudice and a subsequent order entered on appellant's petition for rehearing which set aside the first order of dismissal but again dismissed the complaint, this time for lack of jurisdiction. Although the subsequent order was "without prejudice," the appellate court apparently treated it as a final order. In the course of its discussion, the court indicated that had the second order not been final, the notice of appeal would be defective.

The requirement that the notice of appeal recite the date, book and page of the public record in which it is recorded was liberally construed in

181. *Due v. Tallahassee Theatres, Inc.*, 160 So.2d 169 (Fla. 1st Dist. 1964).

182. *Greyhound Corp. v. Carswell*, 171 So.2d 220 (Fla. 1st Dist. 1964).

183. 166 So.2d 219 (Fla. 3d Dist. 1964).

a recent case¹⁸⁴ wherein the appellant in its notice of appeal recited that the appeal was taken from a decree recorded on page one hundred and twenty-one of the official record book. In point of fact this page merely contained the findings of fact and conclusions of law of the court—the final decree appearing three pages later on in the official record book. Because of “this obvious scrivener’s error” the appellee asserted that the apparent deficiency of the notice of appeal defeated the appellate court’s jurisdiction. The court stated:

The form and content of the notice of appeal should be liberally construed in the interest of manifest justice and if it gives the adverse party and the court information by which the appealed decree can be discovered in the record with a reasonable degree of certainty it should be held sufficient.¹⁸⁵

2. SINGLE NOTICES OF APPEAL

In the protracted litigation of *Dye v. Reichard*,¹⁸⁶ a husband and wife in a personal injury action filed a single complaint in which they averred each was bringing suit on separate causes of action. There was one trial, two verdicts and two judgments. A new trial, however, was granted as to one of the judgments. The defendant filed a single notice of appeal in which he named each judgment and designated where each was recorded. On appeal the Second District Court of Appeal held that the notice of appeal was insufficient and did so on the assumption that both judgments were appealable. Plaintiffs procured a rule to show cause why the judges of the district court should not exercise appellate jurisdiction. The supreme court ruled that the specification of the non-appealable order in the notice of appeal was surplusage and therefore the notice of appeal was in fact directed to a single judgment. However, the court did state:

Even if the two judgments specified in the notice of appeal were both appealable orders . . . , the court would have jurisdiction under the notice filed.¹⁸⁷

The above quoted dicta should be contrasted with *Vander Car v. Pitts*,¹⁸⁸ where separate suits were brought against the defendant which were consolidated for trial and, following the delivery of a single verdict, the court entered two final judgments. The single notice of appeal was dismissed. The court reasoned that separate notices of appeal were necessary in order to appeal judgments rendered in separate cases even though such cases were consolidated for trial.¹⁸⁹

184. *City of Pinellas Park v. Cross-State Util. Co.*, 176 So.2d 384 (Fla. 2d Dist. 1965).

185. *Id.* at 386.

186. 169 So.2d 39 (Fla. 2d Dist. 1964), *reversed* 177 So.2d 340 (Fla. 1965).

187. *Reichard v. Smith*, 177 So.2d 340, 341 (Fla. 1965).

188. 166 So.2d 837 (Fla. 2d Dist. 1964).

189. *Id.* at 839. *Borland v. South Patrick Util. Corp.*, 122 So.2d 44 (Fla. 2d Dist. 1960), was cited to in support of this proposition.

D. *Prepayment of Costs Not Essential Where Appeal Is by the State*

It is now settled that prepayment of costs taxed in the lower court is not a condition precedent to the right to maintain an appeal where the original plaintiff prosecuting the appeal is the state.¹⁹⁰ The appellate court, as authority for this holding, cited *State v. Rushing*¹⁹¹ and Appellate Rule 5.12¹⁹²—the statutory codification of that decision. It should be noted that this exception to the general rule requiring costs to be pre-paid by the original plaintiff before he can appeal has, to date, only been extended in favor of the state. A municipal corporation must comply with Appellate Rule 3.2(f).¹⁹³

VII. EFFECT OF APPEAL ON PROCEEDINGS BELOW

A. *Supersedeas Stay*

The rule at common law was that a writ of error operated *per se* as a supersedeas, thereby staying the issuance of execution on the judgment.¹⁹⁴ In Florida, as in most jurisdictions, the common law rule has given way to express statutory provisions.¹⁹⁵

Except when the appeal is prosecuted by the state in a purely official capacity,¹⁹⁶ a supersedeas bond must be posted if the appeal is to prevent the issuance of execution to enforce the judgment.¹⁹⁷ Whether or not a supersedeas bond can be posted as a matter of right depends upon the nature of the proceedings appealed. Only where an appeal is taken from a final money decision, a decision in probate, guardianship or one involving estates of infants is supersedeas bond available as a matter of right.¹⁹⁸ In appeals to review interlocutory orders, decrees in equity or reviews of compensation orders of the Florida Industrial Commission, the granting of the supersedeas bond is within the discretion of the lower court.¹⁹⁹ In the instance of workmen's compensation orders, provision is made in the rules for review of an order denying supersedeas.²⁰⁰ Where the granting of supersedeas pending appeal would have been tantamount to issuing a provisional license to appellant to operate as a milk distributor

190. *State Road Dep't v. Bramlett*, 171 So.2d 34 (Fla. 1st Dist. 1965).

191. 17 Fla. 223 (1879).

192. The material provisions of Rule 5.12(1) in substance recognizes that the filing of the notice of appeal when the appeal is taken by the state in a purely official capacity perfects the appeal and, unless supersedeas is expressly required by the court, automatically stays the execution or performance of the judgment.

193. See *Miami v. Murphy*, 132 So.2d 361 (Fla. 3d Dist. 1961).

194. R.C.L. § 97, *Effect As Supersedeas in General*, p. 122.

195. FLA. STAT. § 59.13 (1963) governs supersedeas in civil cases.

196. See FLA. APP. R. 5.12(1).

197. See FLA. APP. R. 5.2.

198. FLA. APP. R. 5.3(a) and (b).

199. FLA. APP. R. 5.1 and 5.4.

200. FLA. APP. R. 5.10.

when his license had been lawfully revoked, no abuse of discretion was established.²⁰¹

Florida appellate courts have again reaffirmed that the typical "no action" clause as found in the standard form of automobile liability insurance policies issued in Florida, do not stay garnishment proceedings during the insured's appeal from the final judgment.²⁰²

B. *Motions for New Trial and Petitions for Rehearing Made in the Lower Court—Their Effect upon Obtaining Review*

Where either a petition for rehearing or a motion for new trial are made in the trial court important questions arise as to the affect of these actions upon appellate jurisdiction. Different principles are applicable depending upon when and by whom the petition or motion is made.

Where one party timely serves a petition for rehearing and the adverse party, during the pendency of the petition, attempts to appeal, it was held in *Seiferth v. Seiferth*²⁰³ that such an appeal is improper since the timely petition for hearing destroys the finality of the judgment appealed.

A different result, however, is reached where the petition for rehearing and the appeal are served and filed by the same party. In this class of cases, the rule applied is that "the filing of a notice of appeal by a party constitutes an abandonment of his previously filed undisposed of petition for rehearing."²⁰⁴ Thus, in *Scott-Whitaker Co. v. Joyce Properties, Inc.*,²⁰⁵ the appellee's motion to dismiss an appeal, taken three days after appellant petitioned for a rehearing in the lower court, was denied.

The rule announced in *Scott-Whitaker*, however, is not applicable in the converse situations, *viz.*, the appeal is taken first and then either party petitions for a rehearing. In *State ex rel. Owens v. Pearson*,²⁰⁶ the timely filing of a petition for rehearing by the appellee was held to have

201. *Polar Ice Cream & Creamery Co. v. Andrews*, 159 So.2d 672 (Fla. 1st Dist. 1964).

202. *Conley v. Singleton*, 171 So.2d 65 (Fla. 1st Dist. 1965).

It is well settled in Florida that a plaintiff who has obtained a judgment against a defendant may proceed in garnishment against the defendant's insurer immediately upon the entry of a final judgment by the trial court, regardless of whether an appeal is taken, where the judgment is not superseded.

Grange Mut. Cas. Co. v. Stroud, 173 So.2d 171, 172 (Fla. 2d Dist. 1965).

203. 121 So.2d 689 (Fla. 3d Dist. 1960) discussed in Nash, *Appellate Procedure*, 15 U. MIAMI L. REV. 645, at 649 (1962).

204. *Scott-Whitaker Co. v. Joyce Properties, Inc.*, 155 So.2d 661, 662 (Fla. 3d Dist. 1963).

205. *Ibid.*

206. 156 So.2d 4 (Fla. 1963). This problem, Moore observes, will rarely arise in practice since the time for moving for a new trial or serving a petition for rehearing is relatively short in comparison with the time allowed for taking an appeal. 6 MOORE, FEDERAL PRACTICE, § 59.09(5), at 3856. *State v. Pearson* was previously discussed in Part VI, Subtopic B—Power of the Lower Court to Affect Appellate Proceedings.

the effect of nullifying the appellant's previously filed appeal. *Pearson* also established that the question whether the petition was timely and properly presented in the trial court is to be determined by the trial court and not the appellate court.

Florida's position on the effect upon appellate jurisdiction of a petition for rehearing or a motion for new trial made in the lower court should be contrasted with the federal view.²⁰⁷ Federal courts adhere to the position that "while a timely motion for new trial is pending before the lower court, an appeal by either the movant or the opposing party cannot be perfected"²⁰⁸ Apparently, then, the rule announced in *Scott-Whitaker Co.* is not in accord with federal practice. There is no unanimity of opinion in the federal courts concerning the procedure to be followed when a timely and proper petition for rehearing is made in the lower court after an appeal has been taken.²⁰⁹ It is clear, however, that the filing of a notice of appeal negatives the jurisdiction of the trial court so that it may not thereafter consider a motion for new trial or a petition for rehearing where either are made subsequent to the taking of the appeal.

*C. Relief from Judgment under Florida Civil Procedure Rule
1.38(b)—Its Effect upon Appellate Proceedings*

Both the Florida Rules of Civil Procedure²¹⁰ and the Federal Rules²¹¹ provide that a party may apply to the trial court for relief from a judgment, decree, or order on the ground of mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud. It is clear that leave of the appellate court must be sought if the motion is to be presented in the trial court after a notice of appeal has been filed and while the appeal is still pending.²¹² Of course, leave of the appellate court is unnecessary,

207. See Note, *Procedure—Rendition of Judgment*, 19 U. MIAMI L. REV. 314 (1964).

208. MOORE, FEDERAL PRACTICE, § 59.09(4), at 3856.

209. Moore recommends the following procedure:

FIRST, serve the motion in the district court within the time stated in Rule 59(b) or, if the motion is to alter or amend the judgment, then within the similar time stated in Rule 59(e).

SECOND, move the court of appeals (or the Supreme Court if a direct appeal has been taken to it) to remand the case to the district court so that the latter court may pass on the motion for new trial that was timely made there.

THIRD, a showing of substantial merit underlying the motion for new trial should be made to the appellate court in order to satisfy the latter that the trial court would be justified in granting a new trial.

FOURTH, the party desiring to move for new trial, if not the party that has taken the appeal, should consider whether in addition to moving for new trial he also desires to take an appeal. If so, he should perfect a cross-appeal within the time for appeal as computed from the entry of the judgment.

6 MOORE, FEDERAL PRACTICE, § 59.09(5), pp. 3860-3864.

210. See FLA. R. CIV. P. 1.38(b).

211. The Federal counterpart of FLA. R. CIV. P. 1.38(b) is FED. R. CIV. P. 60(b).

212. "The general rule is that when an appeal is taken from the district court the latter court is divested of jurisdiction except to take action in aid of the appeal, until the case is remanded to it by the appellate court." 7 MOORE, FEDERAL PRACTICE, § 60.30(2), at 335.

if not impossible, where the notice of appeal still remains to be filed in the reviewing court.²¹³ Whether or not leave of the appellate court must be obtained after the decision on appeal is a question upon which there is a conflict.

In 1954, and again in 1955, the advisory committee on the rules for civil procedure in the federal courts proposed amendments which provided that a motion made pursuant to Rule 60—the counterpart of Florida Civil Procedure Rule 1.38(b)—“does not require leave from an appellate court, though the judgment has been affirmed or settled upon appeal to that court.”²¹⁴ Although the proposed amendments were not adopted by the Supreme Court, there are federal cases²¹⁵ expressly negating “any such barren requirement.”²¹⁶

A recent Florida case, *State v. Anderson*,²¹⁷ indicates that leave of the appellate court is necessary. In *Anderson*, a complaint entitled “Original Proceedings by Petition in the Nature of a Bill of Review” was filed in a circuit court whereby the complainant sought to obtain review of a judgment of the district court which had reversed the circuit court’s decree. The complaint alleged that “the original oversight or error of the District Court of Appeal, in reversing the Circuit Court Chancellor, resulted in a legal or technical fraud of [the complainant] . . .” In answer to the writ of prohibition directed to the judge of the circuit court, the state urged that the complaint was brought under authority of Rule 1.38(b), and therefore it was not necessary to seek and obtain leave from the appellate court as a prerequisite to bringing the complaint. Though the Rule “does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or

213. In *Odum v. Morningstar*, 158 So.2d 776 (Fla. 2d Dist. 1963), relief under FLA. R. Civ. P. 1.38(b) was obtainable where a motion thereunder was made nine months after the “mistaken decree” was entered and no appeal was taken from the final decree.

The decisions rendered by the appellate courts of this state recognize that any judgment, order or decree rendered by a trial court may be amended by that court to speak the truth or to supply inadvertently omitted facts or recitals *any time before appeal of the order is taken*.

Spencer Ladd's, Inc. v. Lehman, 167 So.2d 731, 733 (Fla. 1st Dist. 1964) (Emphasis added.).

214. *Rules of Civil Procedure for the United States District Courts*, Advisory Committee on Rules for Civil Procedure, Preliminary Draft (May 1954).

215. Moore cites the following Federal cases in support of the statement that in the event the

motion for relief will not raise matters that are within the compass of the mandate . . . the district court clearly has the power to proceed with the 60(b) motion without leave of the appellate court:

Carpenter v. Rohn & Haas Co., 9 F.R.D. (D. Del. 1949), *aff'd* 18 F.2d 749 (3d Cir. 1950); *Maddrix v. Dize*, 61 F. Supp. 946 (D. Md. 1945). 7 MOORE, FEDERAL PRACTICE, § 60.30(2), at 339.

216. The 1955 advisory committee expressed the view that such a requirement of leave from the appellate court is a useless and delaying formalism. An appellate court cannot know whether the requirements for reopening a case under the rule are actually met without a full record which must obviously be made in the district court.

1955 Advisory Committee on Rules for Civil Procedure, note, p. 62.

217. 157 So.2d 140 (Fla. 3d Dist. 1963).

proceeding,"²¹⁸ the appellate court held that it was necessary to first obtain leave from the appellate court. Without that leave the circuit court could not obtain jurisdiction to grant relief to a party from a judgment, decree, order, or proceeding which has become the judgment of the appellate court.

An appellate court can, apparently *sua sponte*, temporarily relinquish jurisdiction to the trial court for the purpose of receiving and disposing of a motion for relief made under Rule 1.38(b).²¹⁹

VIII. RECORD-ON-APPEAL

It is an incontrovertible rule of appellate procedure that the record-on-appeal must clearly establish the error, *vel non*, complained of by the appealing party.²²⁰ Where the alleged error involves the weight and sufficiency of the evidence, all the evidence which the trial judge or jury had the benefit of examining must be made a part of the record—the appellant cannot be selective when he prepares the record-on-appeal. Both of these principles were involved in *Reynolds v. Reynolds*.²²¹ The husband appealed from that portion of the decree granting separate maintenance to his wife based on her counterclaim interposed in the divorce action. On appeal, the appellant urged that there was a failure of proof upon which the decree awarding separate maintenance could be sustained. Although witnesses other than the parties had given testimony, the record-on-appeal was limited to a transcript of the testimony given by the parties. "Since a complete record was not presented to the appellate court, there was no basis upon which error could be found,"²²² and accordingly the judgment was affirmed.

When the pleading and proving of certain types of evidence is con-

218. FLA. R. CIV. P. 1.38(b).

219. This conclusion is implicit in the procedural aspects of *Southern Ry. v. Wood*, 171 So.2d 614 (Fla. 1st Dist. 1965). On November 14, 1962, plaintiff served a series of requests for admissions on the defendant, one of which requested that defendant admit that plaintiff's decedent was employed by defendant at the time of his death. Within ten days the defendant filed a response denying the request but failed to verify the response as required by Civil Procedure Rule 1.30. However, on December 11, 1962, defendant filed and served, this time under oath, responses to the requests for admissions. These apparently were held timely, for a pre trial order was entered stipulating that the case would be tried on the issue of "whether or not deceased . . . was an employee of the defendant corporation." *Id.* at 616. At trial, plaintiff's counsel invoked Civil Procedure Rule 1.30 in order to obtain a ruling by the court that plaintiff established the issue of employment since defendant failed to answer, *under oath*, the first request for admissions within ten days. The motion was evidently left without disposition. After a verdict for the defendant, judgment was entered and an appeal followed. On its own initiative the appellate court temporarily relinquished jurisdiction to the trial court for the purpose of receiving and disposing of a Rule 1.38(b) motion.

220. 3 AM. JUR., *Appeal and Error*, § 572, p. 213 (1960). "The record must clearly show and point out the error complained of, as all questions must be determined by the record as certified to the appellate court."

221. 155 So.2d 188 (Fla. 2d Dist. 1963).

222. *Id.* at 189.

trolled by express statutory provisions, the record must clearly establish that the statutory provisions were complied with in the trial court. This principle was evidently the reason why the Second District Court of Appeals in a recent decision²²³ refused to consider foreign law which was raised for the first time in the appellate court. The court stated in support of its conclusion that the record must establish that foreign law was pleaded and proved in the trial court. Where the record does not so indicate, the appellate court will indulge in one of two presumptions: either that the foreign law was not introduced at trial, or that it was introduced, but not in compliance with the statute.

Where an appellee in her brief referred to testimony disclosed in a deposition which was not introduced into evidence at the trial, the appellate court held that the failure to introduce the evidence precluded it from being considered a part of the record-on-appeal.²²⁴

IX. ASSIGNMENTS OF ERROR

It is through the assignments of error that the appellate court and the adverse party are informed of the questions of which the appellant or the appellee desire review.²²⁵ For this reason, it is most infrequent that an appellate court will consider errors which have not been properly assigned or cross-assigned, even when the errors were properly preserved below. In *Purvis v. Inter-County Tel. & Tel. Co.*,²²⁶ the defendant, on appeal to the district court, by appropriate assignment of error challenged the trial court's order granting plaintiff's motion for summary judgment as to the issue of liability. Although a motion for new trial was made and denied after the jury returned its verdict fixing damages, the denial of that motion was not assigned as error. The judgment was reversed and the cause remanded for a new trial upon the issues of liability and damages. In ruling upon petitioner's writ of certiorari which, if granted, would have permitted the district court to review its decision, the supreme court quashed that part of the district court's judgment which remanded the cause for a new trial on the issue of damages. In so doing, the supreme court stated: "[W]e believe the rule in *Larabee v. Capeletti, supra*, should be followed here, since the assignment of error by appellant (respondent here) in the District Court of Appeal only referred to the issue of liability and not that of damages."²²⁷

A proper assignment should designate the specific act which is al-

223. *Brotherhood's Relief & Compensation Fund v. Cagnina*, 155 So.2d 820 (Fla. 2d Dist. 1963).

224. *Gross v. Hatmaker*, 173 So.2d 158 (Fla. 2d Dist. 1965).

225. 3 AM. JUR., *Appeal and Error*, § 695, at 287 (1960). See textual discussion on page 125 of *Bailey v. Keene & Applefield v. Commercial Standard Ins. Co.*, *infra*, notes 241 and 242, respectively.

226. 173 So.2d 679 (Fla. 1965).

227. *Id.* at 681.

leged to be erroneous.²²⁸ An appellate court is not charged with the duty to search the record for errors.²²⁹ However, since "grounds for error need not be stated in the assignment,"²³⁰ it is not essential to there state why the designated judicial act was erroneous. Illustrative of the operation of these principles is *Porter v. Childers*,²³¹ wherein the appellant's assignment of error "that the court erred in making and entering that 'Final Decree' dated May 1, 1963, and filed in the above styled cause on May 3, 1963, and Recorded on May 6, 1963, in Chancery Order Book 1678 on Page 291 of said Circuit" was held effective. The proper place to inform the court why the error assigned is considered erroneous is in the argument section of the brief and not in the assignment of error.²³²

If any part of an assignment which is based on multiple grounds is bad, the entire assignment fails.²³³

X. BRIEFS

The Rules require that the appellant's main brief contain a statement of the case in a clear and concise manner.²³⁴ A more liberal attitude²³⁵ appears to prevail when infractions of the Rules occur in criminal appeals. It was, nonetheless recently held in a criminal appeal that a statement of a single question consisting of ninety-eight lines and covering more than two pages does not meet the requirements of this rule.²³⁶ The court, however, granted the appellant an additional fifteen days within which to amend the brief so as to contain an appropriate statement of the point involved.

The appellant's main brief must contain an appendix unless the record-on-appeal consists of a certified transcript or stipulated statement of seventy-five pages or less.²³⁷ Furthermore, where the appeal is interlocutory in nature, "no record on appeal shall be required or permitted other than certified copies of the appeal papers and the judgment or order

228. ". . . [I]t is well settled that the assignment must be specific; a general assignment without specification of the particular point relied on . . . will not as a general rule be considered." 2 R.C.L. § 135, p. 161. The above Rule was apparently the reason why the appellate court in *Flex v. Blair*, 173 So.2d 518 (Fla. 2d Dist. 1965) declined to consider on rehearing failure of the appellate court to initially rule upon the granting of a new trial in the alternative by the lower court. The court stated: "Although the general assignment of error may have preserved the point, it was not specifically assigned as error and it was neither raised in appellants' point on appeal nor pointedly argued by brief." *Id.* at 520.

229. 3 AM. JUR., *Appeal and Error*, § 695, pp. 287-288 (1960).

230. Indeed, in *Peoples Gas Sys., Inc. v. City Gas Co.*, 167 So.2d 577 (Fla. 3d Dist. 1964) it was observed that assignments and cross-assignments lie to judicial acts and not to the grounds given by the court for its judicial acts.

231. 155 So.2d 403 (Fla. 3d Dist. 1963).

232. *Bailey v. Keene*, 171 So.2d 444 (Fla. 2d Dist. 1965); see Rule 3.7(f)(4).

233. *Winn-Dixie Stores Inc. v. Sellers*, 161 So.2d 251 (Fla. 3d Dist. 1964).

234. FLA. APP. R. 3.7(f)(3).

235. See *Nash, Appellate Procedure, op. cit. supra* note 176.

236. *State v. Hodges*, 169 So.2d 359 (Fla. 3d Dist. 1963).

237. FLA. APP. R. 3.7(j).

appealed from.”²³⁸ These provisions have been liberally construed. In *Grace v. Grace*,²³⁹ the appellant filed a record-on-appeal, a portion of which was designated as “testimony and proceedings.” Although it consisted of seventy-eight pages, it was filed as a portion of the record-on-appeal in lieu of being incorporated in an appendix. Being of the opinion that there had not been such a violent departure from the requirements of the rules as would justify striking the offensive portion of the record, the appellate court considered the record as it had been prepared by the appellant.

Rule 3.7(f)(4) stipulates which matters should be contained in the argument section of the appellant’s brief and how those matters should be presented.

Argument in support of the position of the appellant. This section of the brief shall contain a division for each of the points involved. Specific assignments of error from which the points argued arise should be stated, and if any reference to the original record or appendix is made, the page should be given.²⁴⁰

This Rule is rarely complied with in practice and is infrequently interpreted by the courts. For these reasons, two decisions are worthy of note.

*Bailey v. Keene*²⁴¹ and *Applefield v. Commercial Standard Ins. Co.*,²⁴² reasoned that the Rule was promulgated for the benefit of the appellate court. It also “serves the important purpose of alerting adverse counsel . . . to the particular phase of the proceedings assailed by the appeal.”²⁴³

The reason for the rule is that the basis of an appeal is the assignment of errors and on review the appellate court’s first mental inquiry is what ‘error’ does the appellant claim as a ground for reversal—*what was it the lower court did that was erroneous? What did the judge do—what act?*²⁴⁴

Merely stating that the point argued arises out of certain numbered assignments of error does not satisfy the provision of the Rule that specific assignments of error be *stated*.

XI. REVIEW

A. Orders Granting New Trials

By statute,²⁴⁵ Florida appellate courts, when reviewing orders granting motions for new trial, are confined to the grounds specified by the

238. FLA. APP. R. 4.2(d).

239. 162 So.2d 314 (Fla. 1st Dist. 1964).

240. FLA. APP. R. 3.7(f)(4).

241. 171 So.2d 444 (Fla. 2d Dist. 1965).

242. 176 So.2d 366 (Fla. 2d Dist. 1965).

243. *Id.* at 375-376.

244. *Supra* note 242, at 445.

245. FLA. STAT. § 59.07(4) (1963).

trial judge in granting such motions. Thus, where a new trial was granted pursuant to a motion grounded upon the improper admission of evidence, the appellate court held that it could not consider, on appeal, a finding which was not made by the trial judge,²⁴⁶ *i.e.*, that the verdict was against the manifest weight of the evidence.

Although it is true that review of an order granting a new trial is confined to the grounds specified by the trial judge, where several grounds are listed by the trial judge, any one of which is sufficient to warrant a new trial, the order granting the new trial will be affirmed. In *Austria v. Donovan*,²⁴⁷ six grounds were listed by the trial judge in granting the plaintiff's motion for new trial. Before the appellate court considered the merits of appellant's contentions, it announced: "If the lower court was correct on any one of the six grounds given, we would be required to affirm."²⁴⁸

B. Orders Granting Reinstatement of a Cause after Dismissal

Previous to this survey period,²⁴⁹ the first district had indicated that a lower court's discretion, exercised to reinstate an action at law after it had been properly dismissed for failure to prosecute, could not be reviewed by common law certiorari or interlocutory appeal.²⁵⁰ The question left open—Whether such orders may be reviewed by plenary appeal—was answered in the negative during the period surveyed. Although the second district in *Carns v. Quarles*,²⁵¹ assigned as a reason for dismissing the appeal the lack of finality of the order appealed, it would appear to be axiomatic that such orders by their very nature cannot be final in form. Both decisions warrant the conclusion that there is no appropriate means for reviewing an order reinstating a cause prior to a complete determination of the cause.

C. Orders Transferring a Cause from Equity to Law

Appeals taken from orders transferring the cause from equity to law with leave to file an amended complaint are premature where the

New Trials, Review of Order Granting—In every case in which the trial court shall enter an order granting a motion for a new trial, the trial judge shall indicate in the order granting said motion the particular ground or grounds upon which said motion was granted, and upon appeal from any such order, if taken under the statutes providing for appeal from orders granting new trials, no other grounds than those specified by the trial judge, as a basis for the order granting the new trial, shall be considered as arguable upon said appeal.

See *Gates v. Fisher Hardware Co.*, 167 So.2d 33 (Fla. 1st Dist. 1964).

246. *Ewing v. Miller*, 172 So.2d 889 (Fla. 2d Dist. 1965).

247. 169 So.2d 377 (Fla. 2d Dist. 1964).

248. *Id.* at 377.

249. *United States Life Ins. Co. v. Jowers*, 118 So.2d 85 (Fla. 1st Dist. 1960).

250. Nash, in the 1961 survey of *Appellate Procedure* cites *Jowers*, *supra* note 225 to illustrate this proposition.

251. 157 So.2d 536 (Fla. 2d Dist. 1963).

trial court's action is alleged erroneous "because the plaintiff cannot have an action at law."²⁵² In short, until the amended complaint is filed, the appellate court cannot anticipate what cause of action, if any, the plaintiff will allege at law.

D. Orders Taxing Costs

Cost judgments, by themselves, are not appealable orders.²⁵³ However, at least three distinct means of securing review of orders taxing costs are available in Florida when the orders are entered either in a final judgment or subsequently. The three available means were thoroughly considered in *Craft v. Clarembaux*.²⁵⁴ Plenary appeal from the final judgment and a proper assignment of error will bring the cost order to the appellate court for review when the cost determination is entered in the final judgment. Plenary appeal can also be utilized where the order taxing costs has been entered subsequent to rendition of the final judgment, but prior to a timely appeal from the final judgment. Where the cost determination is made after entry of a final judgment and an appeal has been taken from the final judgment, interlocutory appeal can be used either when the time for appealing the final judgment has expired or when the aggrieved party does not desire to appeal from the final judgment. Where the order taxing costs recurs below on mandate of the appellate court, after the cause has been appealed, an appropriate means for securing review is prescribed in Rule 3.16. Finally, as was the case in *Craft*, writ of certiorari may be an appropriate means of securing review of cost determinations. In *Craft*, the order was entered subsequent to a non-final, unappealable, voluntary nonsuit. The court in *Craft* expressly limited the applicability of Rule 3.16(c) exclusively to those cases where "the cost judgment is entered after the mandate of the appellate court has been lodged in the cause."²⁵⁵ Evidently the writ of certiorari sanctioned in *Craft* is brought under, and governed by, Rule 4.5.

E. Municipal Legislative Action

Section 176.16²⁵⁶ of the Florida Statutes recognizes that statutory certiorari is the appropriate way to seek review of municipal legislative action. The petition for the writ, as provided in that statute, must be presented within thirty days after the filing of the decision. In *Thompson v. City of Miami*,²⁵⁷ the question presented was whether relief, in addition to section 176.16, can be sought in an equity injunction suit notwith-

252. See *MacMermell v. McKinley*, 158 So.2d 142 (Fla. 2d Dist. 1963).

253. See generally 2 AM. JUR., *Appeal and Error*, § 98, p. 906 (1961).

254. 162 So.2d 325 (Fla. 2d Dist. 1964).

255. *Id.* at 327.

256. FLA. STAT. § 176.16 (1961). The 1963 legislature substantially amended section 176.16 so that review is now governed by the Florida Appellate Rules.

257. 167 So.2d 841 (Fla. 1964).

standing the fact that the time for bringing certiorari has passed. The court construed the statute as directory and not mandatory. Thus, it does not impair the basic equity jurisdiction conferred by the constitution.

XII. DECISIONS ON APPEAL AND SUBSEQUENT PROCEEDINGS

A. *Doctrine—Law of the Case*

The doctrine of the law of the case, in general, operates to preclude a reviewing court on a successive appeal or a trial court upon remand from considering questions²⁵⁸ which were decided on a previous appeal. Therefore, "when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case. . . .'"²⁵⁹ It has been stated that the purpose underlying the doctrine is the same that controls the application of the doctrines of *res judicata* and *stare decisis*.

[They] are adhered to by [the Florida supreme court] and courts of other jurisdictions in order to lend stability to judicial decisions and the jurisprudence of the state, as well as to avoid "piecemeal" appeals and to bring litigation to an end as expeditiously as possible.²⁶⁰

According to prior Florida cases, the doctrine (1) applies only to subsequent stages of procedure in the same case, (2) is not decisive of points presented in a second writ of error that were not presented in a former writ of error, and (3) is not applicable when the facts are different at the two trials.²⁶¹ Two recent decisions demonstrate that the doctrine continues to operate only within this restricted area.

The question posed in *Strazzulla v. Hendrick*,²⁶² was whether the doctrine must be adhered to in all instances or whether an appellate court has the power to disregard the doctrine in exceptional cases. Al-

258. When a case has been once decided . . . on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

Rinker Materials Corp. v. Holloway Materials Corp., 175 So.2d 564, 565 (Fla. 2d Dist. 1965).

Florida's position, as evidenced in the above quote, is in accord with the position obtaining in the federal courts.

The authorities seem uniform that a mandate from a reviewing court is controlling as to all matters within the compass of such mandate and as to such matters the district court, after remand, can take no further action.

7 MOORE, *FEDERAL PRACTICE*, 60.30, p. 339 quoting from *Carpenter v. Rohn & Hass Co.*, 9 F.R.D. 535, 537 (D. Del. 1949).

259. 3 AM. JUR., *Appeal and Error*, § 985, p. 541 (1960).

260. *Strazzulle v. Hendrick*, 177 So.2d 1, 3 (Fla. 1965).

261. These conclusions were stated by the supreme court in *Furlong v. Leyborne*, 171 So.2d 1, 3-4 (Fla. 1963).

262. *Supra* note 261.

though the question was not one of first impression it is significant. Two conflicting lines of case authority had emerged in Florida law, each supporting a contrary answer.²⁶³ In *Strazzulla*, a tort action was commenced against the petitioners but which terminated in their favor. The cause was affirmed by the district court of appeals, and then was brought before the supreme court by conflict certiorari. The court there quashed the judgment of affirmance and remanded the cause to the trial court. After the second trial, the plaintiff again appealed, assigning as error the giving of an instruction, an error which was previously considered on the first appeal. In the first appeal the court had found no error; in the second appeal the court reconsidered the propriety of the instruction and held it improper under the facts and circumstances of the case. In answer to the appellees' contention that a reconsideration and reversal on this point was precluded by the application of the doctrine "law of the case," the second district stated:

With this contention we cannot agree. The facts and circumstances on this appeal are materially different from those on the former appeal; but even if we now should find that we were in error on that point of the case, we have the power to correct it.²⁶⁴

On certiorari the supreme court discharged the writ and held the decision of the second district to be correct. However, the supreme court expressly limited the operative scope of the exception recognized in the instant case to "unusual circumstances and . . . only where 'manifest injustice' will result from a strict and rigid adherence to the rule."²⁶⁵ For example, the exception is proper in order to give effect to the law of a sister state under the full faith and credit clause of the federal constitution.

It is also proper where non-adherence to the doctrine will permit correction of an error created by an intervening decision of binding affect which would call for the application of different law in the subsequent appeal.²⁶⁶ In the second appellate appearance of *Maryland Cas. Co. v. Hallatt*,²⁶⁷ the Fifth Circuit Court of Appeals, compelled by the *Erie* doctrine to apply Florida law, was confronted with the problem of whether it should grant a petition for rehearing and reconsider its prior determination of what the Florida law was. After the second trial of the

263. *Supra* note 261. Wherein the court exhaustively cited to and classified prior Florida cases along these two conflicting lines.

264. *Hendrick v. Strazzulle*, 168 So.2d 156, 161 (Fla. 2d Dist. 1964).

265. *Supra* note 263.

266. Both of these examples were cited in the instant case as exemplifying exceptional circumstances under which the doctrine "law of the case" need not be adhered to. *Beverly Beach Properties v. Nelson*, 68 So.2d 604 (Fla. 1963), was cited in support of the first exception while reference was made to *In re Reamer's Estate*, 331 Pa. 117, 200 Atl. 35 (1938) in support of the second exception. See 87 A.L.R.2d at p. 299 for other exceptions to the general rule.

267. 326 F.2d 275 (5th Cir. 1964), which was predicated upon the leading case, *Messenger v. Anderson*, 225 U.S. 436 (1912).

cause a Florida appellate court had rejected the federal court's view of the applicable Florida law. Determining that the facts created an exceptional situation, the Fifth Circuit Court of Appeals on the second appeal granted the petition for rehearing and vacated its initial decision decided on the first appeal.

In a second case, the Florida supreme court in *Furlong v. Leybourne*²⁶⁸ held the doctrine inapplicable. Three sisters brought an action in the circuit court seeking a determination of their right to be subrogated to the rights of mortgagees. The circuit court held, in substance, that should the sisters satisfy the indebtedness of the estate they would have a right to be subrogated to the rights of the mortgagees. The district court of appeal reversed the circuit court on the ground that it had ignored the doctrine "law of the case," which, if applied, would have denied the right of subrogation. This conclusion was reached from an examination of two prior appellate decisions "involving the same parties and factual situation." The supreme court ruled that the doctrine "law of the case" was inapplicable. In so ruling they drew a fine distinction between the issues involved in the two earlier cases and the issue involved in the *Furlong* case. Since the court found that issues involved in both cases were not precisely identical, the doctrine "law of the case" was inapplicable.

A final, related problem which arises concerns the procedure which should be followed in order to effect a reconsideration of the point previously decided either in the appellate court or the lower court. This problem, in turn, involves a consideration of the duration of an appellate court's jurisdiction over a cause and the ability of a lower court to modify the appellate mandate upon remand. Both topics are treated in the succeeding sections.

B. Termination of Appellate Jurisdiction

A rather astonishing principle was announced by the Second District Court of Appeal in *Jerry v. State*,²⁶⁹ concerning the power of an appellate court to reconsider its decision after it has entered its mandate. The significance of this decision can be better visualized once the reader's attention is directed to general principles, well-nigh universally accepted, which pertain to the termination of jurisdiction on appeal.

In the absence of fraud, accident, inadvertence, or mistake, it is well settled that an appellate court "is without jurisdiction to recall the mandate and entertain a petition for a rehearing."²⁷⁰ The policy underlying this rule is based upon the notion that somewhere in the prosecution

268. 171 So.2d 1 (Fla. 1963).

269. 174 So.2d 772 (Fla. 2d Dist. 1965).

270. 2 R.C.L., *Appeal and Error*, § 150, p. 175.

of a cause there must be a point when finality is achieved "and the logical point for appellate jurisdiction over an action to terminate is that time when there is again vested in the trial court jurisdiction to proceed, carry out and enforce any judgment delivered."²⁷¹ Though there is authority for the proposition that jurisdiction of an appellate court extends to the end of the term during which the decision in question was rendered, "it seems to be the well-nigh universally recognized rule that . . . the jurisdiction of an appellate court over a given cause terminates whenever, regularly, without inadvertence or fraud, it returns the record to the court of general jurisdiction."²⁷²

In *Jerry v. State*, an appeal was taken from an order denying relief under Criminal Procedure Rule No. 1. Relief was denied by the trial court on the authority of numerous cases, including *White v. State*.²⁷³ Those decisions were followed on appeal and a per curiam affirmance was filed on March 12, 1965. The mandate of affirmance was issued on April 2, 1965; prior to that time the Second District Court of Appeal receded from its holding in *White v. State*. A motion for rehearing, not timely under Rule 3.14,²⁷⁴ was stricken. Subsequently, the appellate court, sua sponte, recalled and set aside their mandate and granted a rehearing. In so doing, the court stated:

[T]his court retains the right to recall and vacate a mandate for good cause until the end of the term in which said mandate was issued.²⁷⁵

Since no mention was made of fraud, accident, inadvertence, or mistake, the action of the Second District Court of Appeal must be viewed as having been taken, not in accord with the above discussed general rules, but rather as an exception thereto. It is submitted that the *Jerry* decision must be limited to its precise facts.

C. Power of a Lower Court to Modify the Mandate of an Appellate Court

In the second appellate appearance of *Rinker Materials Corp. v. Holloway Materials Corp.*,²⁷⁶ the question was whether a lower court, after an appellate mandate has been issued and the cause transferred to the lower court, can, sua sponte and without leave of the appellate court, depart from the terms of the appellate mandate. The second district

271. *Ibid.*

272. 2 R.C.L., *Appeal and Error*, § 217, p. 265.

273. 165 So.2d 799 (Fla. 2d Dist. 1964) receded from in *Jones v. State*, 174 So.2d 452 (Fla. 2d Dist. 1965).

274. The time within which a petition for rehearing can be filed is "15 days after the filing of the decision or order of the Court." FLA. APP. R. 3.14.

275. *Supra* note 271, at 773.

276. 175 So.2d 564 (Fla. 2d Dist. 1965).

answered in the negative.²⁷⁷ The court did suggest that the proper procedure to be followed in presenting new matter in the lower court after remand would be to seek and obtain permission of the appellate court.

The question decided in *Rinker* is not new to Florida courts. In *State v. Knott*,²⁷⁸ the supreme court was confronted with a trial court's order granting a motion to file a bill of review. The motion was granted after the cause had been in an appellate court and remanded with directions that a decree compelling specific performance be entered. The supreme court decided that, "[t]he trial court had no jurisdiction to enter the questioned order."²⁷⁹

D. *Impossibility of Furnishing a Record*

In a case of apparent first impression, the question was: What relief, if any, is available to an appellant who is unable to perfect an appeal because essential stenographic notes were destroyed by the court reporter. A provision is made in the rules whereby the parties may sign a statement showing how the points to be presented arose and how they were decided in the lower court. That statement constitutes a part of the record-on-appeal.²⁸⁰ That rule, however, presupposes the parties can agree on what occurred in the lower court.

According to the weight of authority,²⁸¹ where a material portion of a record, through no fault of appellant's counsel, has been lost or destroyed, without possibility of substitution, the reviewing court will order a new trial. In *Van Scoyoc v. York*,²⁸² this position was adopted by the second district which reasoned that an appellate court, incident to its power to require that it be furnished a complete and accurate record-on-appeal, necessarily has the power to award a new trial where essential records have been destroyed by an official of the lower court through no fault of the appellant. A possible limitation upon such relief was intimated. It was suggested that appellate jurisdiction must have attached prior to the discovery of the misfortune and the portion of the record that was lodged in the appellate court must unequivocally establish the appellant's right to relief. Under these circumstances, the *York* court awarded a new trial on all issues.

However, in *Thomas v. State*,²⁸³ appellant's motion to remand the

277. See *Rinker Materials Corp. v. Holloway Materials Corp.*, 167 So.2d 875 (Fla. 2d Dist. 1964), *cert. denied*, 173 So.2d 145 (Fla. 1965).

278. 97 So.2d 265, 268 (Fla. 1957). "Accord, *Berger v. Leposky*, Fla. 1958, 103 So.2d 628; *King v. L & L Investors, Inc.*, Fla. App. 1962, 136 So.2d 671; *Petition of Dermeulen*, Fla. App. 1960, 122 So.2d 318." *Supra* note 280, at 566.

279. *Supra* note 280, at 566.

280. FLA. APP. R. 3.6(h).

281. 3 AM. JUR., *Appeal and Error*, § 1225, p. 723 (1960).

282. 173 So.2d 483 (Fla. 2d Dist. 1965).

283. 160 So.2d 119 (Fla. 2d Dist. 1964).

cause to the trial court with instructions to grant a new trial was denied where the basis for the motion was that the notes taken by the reporter assigned to report the trial proceedings were illegible and therefore could not be transcribed. In denying the motion, the court merely cited Rule 6.7(f), which permits parties to file with the clerk of the lower court an agreed upon condensed statement of all or part of the testimony. Evidently, the *Thomas* court was of the opinion that both parties could reach an agreement as to what transpired in the trial court. Accordingly, the facts of *Thomas* were not the same as *York*.

E. Recoupment of Attorney's Fees by Appellee

The appellate rules recognize that some attorney's fees incurred by the appellee may be taxed against the appellant in the appellate court.²⁸⁴ Whether or not they will be taxed against the appellant depends upon the limiting clause of Rule 3.16(e), "where . . . allowable by law."

A special statutory provision grants appellees in appeals from condemnation proceedings the right to recoup attorney fees as against the appellants where the appellee is successful in the appeal.²⁸⁵ In *State Road Dep't v. Mutillo*,²⁸⁶ an appeal was prosecuted by the condemning authority from an order granting the appellees a new trial. Because the order failed to specify the particular ground for granting the new trial, the order was reversed. Since the appellees were not successful in the appeal, they were not entitled to recover attorney's fees incurred on appeal as against the appellant.

XIII. PENALTY FOR VIOLATION

The rules expressly recognize the power of an appellate court to subject persons committing violations of the rules to penalties.²⁸⁷ Rarely, however, have penalties been imposed where the violation occurred in connection with new or unusual questions. The recency of the warning and the magnitude of the violation are apparent factors considered by the courts in determining whether a penalty should be imposed as well as the form the penalty should take.²⁸⁸

284. FLA. APP. R. 3.16(e).

285. *Supra* note 287.

286. 155 So.2d 179 (Fla. 2d Dist. 1963).

287. FLA. APP. R. 3.17.

288. In *State Farm Mut. Auto. Ins. Co. v. Lee*, 171 So.2d 899 (Fla. 1st Dist. 1965) the recency of the warning was assigned as the reason for not imposing a penalty against the appellant-insurer after the court concluded the appeal was taken merely as a dilatory tactic.

Grain Dealers Mut. Ins. Co. v. Quarrier, 175 So.2d 83 (Fla. 1st Dist. 1965) is indicative of the severity of a penalty that may be assessed. 500 dollars plus 6 percent interest from the date of order were assessed against the appellant and awarded to the appellee under Rule 3.17 after the court concluded that the appeal by the appellant-garnishee was frivolous and not taken in good faith.

XIV. CERTIFIED QUESTIONS

Questions of great public concern will generally be accepted by the supreme court, especially where the question involves statutory validity. Although there is no mechanical test which readily indicates which questions are of a great public concern, the supreme court has recently set forth two criteria that can be utilized in determining whether a particular question is of this class.

In *Dade County v. Philbrick*,²⁸⁹ the supreme court was requested to accept the following question for its consideration—"whether chapter 63-787, Laws of Florida, * * * is invalid and unconstitutional." This statute vests those counties having a population in excess of 450,000 inhabitants with exclusive authority to regulate ambulances. The court declined to consider the question and in so doing stated: "We cannot agree . . . [that] the question, involving, as it does, only a limited locality and a specific industry, is of great public concern." Accordingly, it may be stated that in order for a question to be of great public concern, it must affect more than a limited locality and more than one specific industry.

XV. EXTRA-ORDINARY WRITS

A. *Prohibition*

In general, a writ of prohibition will issue to correct errors of a court which is acting outside the scope of its jurisdiction. It will not lie to correct errors of a court which is acting within its jurisdiction, although proceeding improperly in the exercise of that jurisdiction.²⁹⁰ The latter principle was applied to a situation where plaintiff, after taking a nonsuit, instituted a subsequent suit based on the same cause of action.²⁹¹ The defendant's motion for summary judgment on the ground of res judicata was denied. The court expressly ruled that the practice of taking a nonsuit was not abolished by the 1962 amendments. Because the judgment in the first action did not deprive the court of jurisdiction to proceed in the second action,²⁹² prohibition was improper.

B. *Mandamus*

*Keating v. State*²⁹³ involved an appeal prosecuted by the Beverage Director from an order granting a writ of mandamus which was brought

289. 162 So.2d 266 (Fla. 1964).

290. See 25 FLA. JUR., *Principles Governing Issuance Generally* § 6 (1960).

291. *State v. White*, 162 So.2d 697 (Fla. 2d Dist. 1964).

292. Where two actions have been instituted involving the same parties and the same subject matter, the general rule is that, upon the entry of a judgment in the first action, remedy of prohibition is not available to prohibit further proceedings in the second action. . . . This rule is based upon the fact that a judgment in the first action does not, of itself, deprive the court of jurisdiction to proceed in the second action. *Id.* at 699.

293. 167 So.2d 46 (Fla. 1st Dist. 1964).

by a business competitor. At issue was whether the relator had sufficient standing to seek and procure the writ. On February 7, 1962, a beverage license issued to Gala Showplace was revoked with prejudice. The order of revocation further provided that no license could be issued for that location for a two year period commencing October 1, 1962. Prior to the expiration of the two year period, the lessees of the premises sought and obtained a modification of the order from one of revocation to suspension without the two year prohibition period. Evidently, the order of modification was granted on the lessees' allegation that the premises had been leased to Shell's Super Store, Inc. for use as a package store and that Shell, upon the promise of being furnished a beverage license, had expended a considerable sum of money. Mandamus proceedings were brought by a person who was both a citizen of the state and the operator of a package store located one block from the premises in question. The writ issued. On appeal, the first district held the relator had a sufficient interest to seek and procure the writ.

A competitor is the one most likely to challenge the effect of an unlawful act committed by an official purportedly acting under the authority of law. The fact one is a competitor does not place him in a different category from any other citizen. To hold otherwise would in effect encourage the procurement of 'straw men' to institute law suits rather than to permit interested parties to insist that officials observe the law in carrying out their administrative duties.²⁹⁴

C. Habeas Corpus

The use of habeas corpus to attack defective informations in criminal cases has historically been a bothersome question in Florida jurisprudence. Judging from the decisions rendered during the period surveyed, it continues to perplex members of the Florida Bar. In *Ex parte Prince*,²⁹⁵ it was early established that "where an indictment has been found which, although subject to attack and overthrow upon demurrer, contains enough to show that an offense has been committed of which the court has jurisdiction, the party charged cannot be discharged on writ of habeas corpus. . . ."²⁹⁶ This rule is valid today. In *Buchanan v. State*,²⁹⁷ a petition in habeas corpus was filed in the circuit court whereby the petitioner contended that the information failed to state a crime. On appeal by the state, the circuit court was held in error for issuing the writ; a crime had been stated. The inquiry in the circuit court was limited to a determination ". . . as to whether the allegations of the information wholly failed to state any offense under the laws of the State of Florida."

294. *Id.* at 50.

295. 27 Fla. 196, 9 So. 659 (1891).

296. *Id.* at 660.

297. 167 So.2d 38 (Fla. 3d Dist. 1964).

Habeas corpus proceedings are appropriate to determine the illegality of a petitioner's restraint where it is due to a lack of jurisdiction over the person or a lack of jurisdiction over the subject matter in the trial court. However, "it is not a substitute for appeal and it cannot be invoked for use in correcting mere errors or irregularities in the proceedings of a trial court, no matter how flagrant, that are not jurisdictional and at most would merely render a judgment voidable."²⁹⁸

D. *Certiorari*

1. GENERAL PRINCIPLES

Three types of certiorari proceedings exist in Florida—common law, rule,²⁹⁹ and supreme court certiorari. Each operates within well defined spheres and requirements applicable to each must be fulfilled before the writ will issue. Whatever type of certiorari is employed, it must be presented procedurally in accordance with the appellate rules. Rule 4.5(c)(6) prescribes the correct procedural steps to be followed in presenting a petition for certiorari to the supreme court or district courts of appeal.

At issue in *Martorano v. Florida Industrial Comm'n*,³⁰⁰ was the timeliness of a petition filed sixty-one days after an order denying the petitioner's application for an appeal was mailed. As formulated by the third district, the question was whether the sixty day period allowed for the filing of a petition commences to run from the date of mailing or from some time thereafter. It should be noted that the applicable statute³⁰¹ sanctioning review by certiorari of orders entered by the Industrial Commission which deny applications for appeal does not prescribe how or when such orders become "rendered." The court thus held the instant petition to be timely, and reasoned that the "date of notice" is the critical act. Moreover:

When notice of such an order is given by mailing, the date or time of *notice* should be held to be some time after the mailing. Three days should be allowed after actual mailing of the notice making the *date of notice* and therefore the beginning of the 60 day period for certiorari, three days after the date of mailing.³⁰²

As a general proposition, certiorari cannot be used to review purely administrative action. However, administrative proceedings of a quasi-

298. *Buchanan v. State*, 167 So.2d 42, 45 (Fla. 3d Dist. 1964).

299. Both common law and rule certiorari are exhaustively treated in 5 FLA. JUR. *Certiorari* (1960).

300. 160 So.2d 744 (Fla. 3d Dist. 1963).

301. FLA. STAT. § 443.07(e) (1963).

302. *Martorano v. Florida Industrial Comm'n*, *supra* note 300, at 746. *Accord*, *New York Ins. Co. v. Kurz*, 174 So.2d 537 (Fla. 1965).

judicial nature can be reviewed by certiorari. Accordingly, that provision of the Code of Metropolitan Dade County which prescribes for review of any zoning resolution by certiorari is valid when review of an interpretation and application of an ordinance by the Zoning Appeals Board is sought.³⁰³ Before review of administrative proceedings can be obtained by certiorari, however, the petitioner must first exhaust his administrative remedies. The point at which a petitioner has exhausted his administrative remedies was at issue in *Hoffman v. Board of Control*.³⁰⁴ Petitioner, after being notified that his position with the University of Florida would be abolished, appealed to a faculty committee. After the committee rendered a decision adverse to the petitioner, a hearing was sought and obtained before the Board of Control which resulted in an affirmance of the order of the faculty committee. Petitioner then filed a petition for review of the Board of Control with the State Board of Education. However, before any action was taken on that petition, he filed a petition for writ of certiorari. The appellate court refused to consider the writ since petitioner had not exhausted available administrative remedies. The *Hoffman* decision may be cited for the proposition that administrative remedies are not exhausted until a decision is rendered by the last administrative board sanctioned to rule upon the subject matter of the cause. Merely invoking the jurisdiction of the last administrative tribunal will not be sufficient.

2. COMMON LAW

The propriety of using common law certiorari was involved in *Ellison v. City of Fort Lauderdale*.³⁰⁵ Petitioner unsuccessfully contended that the writ was appropriate because the circuit court, in the exercise of its appellate jurisdiction, upheld a conviction for which there was no authority and accordingly deviated from essential requirements of the law. The district court determined that jurisdiction was lacking. "[C]ommon law certiorari contemplates only an examination into the jurisdiction of the courts below and the regularity of the procedural steps followed and not a re-examination of the merits. . . ."³⁰⁶ This is a principle of early vintage.³⁰⁷

Prior to the entry of a final judgment at law, common law certiorari may be used only if there is no full, adequate and complete remedy available by appeal after final judgment. Except in these situations, to permit certiorari prior to a final judgment would be tantamount to sanctioning the use of the common law writ so as to "circumvent the rule of

303. *Sun Ray Homes, Inc. v. Dade County*, 166 So.2d 827 (Fla. 3d Dist. 1964).

304. 172 So.2d 874 (Fla. 1st Dist. 1965).

305. 172 So.2d 867 (Fla. 2d Dist. 1965).

306. *Id.* at 868.

307. The leading Florida case establishing this principle is *Deans v. Wilcoxon*, 18 Fla. 531 (1882), footnoted in 5 FLA. JUR. *Certiorari*, § 24, n.15 (1960).

law which narrowly restricts the class of orders entered in a law action which may properly be reviewed prior to the entry of final judgment in the case.³⁰⁸ In *Girten v. Bouvier*³⁰⁹ and *Van Devere v. Holmes*,³¹⁰ the Second and Third District Courts of Appeal, respectively, were concerned with determining the circumstances under which there could be said to exist no adequate remedy available by appeal after final judgment. In the latter case, an order directing a co-executor to produce original or photostatic copies of all bank statements, cancelled checks, and deposit slips concerning his trust account and further directing him to furnish any other data which he may have or which he may be able to acquire was held the proper subject matter for writ of common law certiorari. The *ratio decidendi* of the decision was that the accounts to be examined included privileged communications and that the order was too broad in application. In *Girten*, petitioner sought review by common law certiorari of the trial court's order which had sustained the plaintiff's objections to the bulk of written interrogatories propounded by petitioner. The writ, petitioner argued, was proper since plenary appeal would not afford adequate remedy. This contention was supported by the following two reasons: (1) the result of a successful appeal would merely result in a new trial; and (2) the lack of information sought would cause him material injury throughout the trial since it was essential to an effective preparation of his case. The majority of the court held that these reasons did not establish that substantial injury would result to the petitioner if he was required to wait until plenary appeal could be brought. Judge Shannon dissented on the ground that a *prima facie* case for the granting of the writ was established.

3. RULE

Article V, section 4(2) of the Florida Constitution sanctions supreme court review by certiorari of interlocutory orders or decrees entered in chancery which, upon final decree, are of the type which would support a direct appeal to the supreme court. Clearly a chancellor's order dismissing a complaint with leave to amend and expressly ruling upon the constitutionality of a challenged statute fulfills those requirements. However, since Rule 4.2 sanctions review by interlocutory appeal of non-final orders or decrees entered in equity, prior to the survey period aggrieved parties had an option as to which method of review they could utilize. In *Gulf Fertilizer v. Walden*,³¹¹ already dis-

308. *Witten v. Howard Vernon Lodges & Rest., Inc.*, 169 So.2d 531 (Fla. 1st Dist. 1964). The quoted matter accompanying note 305 of the text refers to the rule that interlocutory appeals may be taken at law only from orders relating to venue or jurisdiction over the person or from post decretal orders not relating to motions for new trial or reconsideration. To permit certiorari at law as a means for reviewing orders from which no interlocutory appeal could be taken would severely curtail this rule.

309. 155 So.2d 745 (Fla. 2d Dist. 1963).

310. 156 So.2d 899 (Fla. 3d Dist. 1963).

311. 163 So.2d 269 (Fla. 1964).

cussed,³¹² the supreme court held that the proper method of review is interlocutory appeal, not rule certiorari.

4. SUPREME COURT

Under Rule 4.5(c)(6), certiorari will lie to the supreme court to review a decision of a district court of appeal that "is in direct conflict with a decision of another district court of appeal or the Supreme Court on the same point of law. . . ."³¹³ In determining whether the requisite conflict of decisions is present, the supreme court verbalizes the following standard: The district court of appeal's decision must on its face collide with another district court of appeal's decision or a prior supreme court decision.³¹⁴ It has been held that a conflict of decisions rendered by the same appellate court,³¹⁵ or a conflict among a district court decision and a Florida Statute³¹⁶ will not support a writ of certiorari. Three decisions decided during the surveyed period further refine the concept of "direct conflict."

In *Huguley v. Hall*,³¹⁷ the district court's decision of which review was sought consisted of the single word "Affirmed" and four case citations. There was a dissenting opinion in which all the salient facts were set forth. Initially, the supreme court viewed the decision as entirely distinguishable from the standard per curiam affirmance and accordingly granted the petition for certiorari. On reconsideration, the writ was discharged because "petitioner . . . failed to establish that the instant decision . . . is in direct conflict with the decision of another District Court of Appeal or the Supreme Court on the same point of law. . . ."³¹⁸

The second decision rendered during the surveyed period, *Wilcox v. State*,³¹⁹ stands for the proposition that the supreme court will not give effect to inferences implicit in a decision in order to ascertain whether a conflict exists. Nor will it scrutinize the facts of a decision to determine what unannounced rule of law was applied in denying a motion for new trial. The dissenting opinion³²⁰ in *Wilcox* reveals that petitioner was convicted of a felony under a statute prescribing that where the death of another is "caused by the operation of a motor vehicle by any person while intoxicated" the offender is guilty of manslaughter. The following

312. See pages 29-30 of text.

313. The textually discussed ground is but one of three grounds recognized by the Rule. The two grounds not considered are where a decision of a district court of appeal (1) affects a class of constitutional or state officers, and (2) passes upon a question certified by the district court to be of great public interest. FLA. APP. R. 4.5(c)(6).

314. See *Kincaid v. World Ins. Co.*, 157 So.2d 517, 518 (Fla. 1963).

315. *Grisillo v. Franklyn S. Inc.*, 173 So.2d 682 (Fla. 1965).

316. *Pickman v. State*, 164 So.2d 805 (Fla. 1964).

317. 157 So.2d 417 (Fla. 1963).

318. *Id.* at 418.

319. 171 So.2d 884 (Fla. 1965).

320. Judge Roberts was the dissenter.

facts, established in the trial court, gave rise to the judgment of conviction: the defendant was proceeding in an easterly direction following a tractor trailer and the deceased was a passenger in a panel truck proceeding in the opposite direction. Fifteen or twenty minutes prior to the accident, the defendant was stopped by a patrolman, but she was permitted to proceed after some words were exchanged by the officer and the defendant. The ill-fated accident occurred shortly after the defendant's car and the tractor trailer passed a stretch in the highway narrowing the traffic lanes from four in number to two. At that point, defendant's care side-swiped the trailer "causing" the trailer to enter the lanes used by on-coming traffic. After the criminal action was commenced against the defendant, a tort action was brought against the driver of the trailer truck which resulted in a jury verdict for the plaintiffs. Before the verdict and judgment in the civil action were entered, the criminal suit against defendant was concluded. The judgment in the tort action establishing the negligence of the trailer truck driver was entered while the defendant's appeal in the criminal action was pending. A verified motion was filed by the defendant requesting the appellate court to relinquish jurisdiction to the trial court in order that an "Extraordinary Motion for New Trial" could be presented in that court. In support of the motion, defendant contended that "had the fact of the truck driver's negligence been known at the time of the criminal trial, it would have put an entirely different light upon the question whether the defendant's alleged driving while intoxicated caused the death of the decedent."³²¹ The appellate court denied the motion without stating the reason for its decision. The majority of the court, as previously noted, denied the petition for writ of certiorari. Justice Roberts, in an exhaustive dissent, viewed the lower court's order denying the motion for "new trial" as establishing that "a person can lawfully be convicted of manslaughter when it affirmatively appears, from the indictment itself, that the accused did not perform the act from which the death of the deceased directly resulted, and when it is judicially determined that the person who, in effect, wielded the fatal blow . . . has committed an act or been guilty of negligence which has operated as an efficient proximate cause of the fatal blow."³²² This inference implicit in the lower court's order was viewed by Judge Roberts as in direct conflict with a prior supreme court decision establishing that the statute under which the defendant was convicted requires that the death "be caused by the operation of a motor vehicle. . . ."

Young Spring & Wire Corp. v. Smith,³²³ a third noteworthy decision, recognizes an exception to the rule that a per curiam affirmance without opinion will not support conflict certiorari. The exception recognized obtains "where an examination of the record proper discloses that the

321. *Supra* note 319, at 886.

322. *Id.*

323. 176 So.2d 903 (Fla. 1965).

legal effect of such per curiam affirmance is to create conflict with a decision of [the supreme court] or another district court of appeal."³²⁴ Petitioner, defendant in the trial court, moved to quash service of process made pursuant to sections 47.16 and 47.30 of the Florida Statutes. Affidavits were filed by the parties in support of their respective positions. Those of the petitioner averred that it "is a Michigan corporation with an office in California and that in Florida it has never registered as a foreign corporation, conducted business, owned or leased real estate, appointed a resident agent, had a telephone listing, paid taxes, maintained bank accounts or held stock, had any salesmen, officers or places of business."³²⁵ It did admit that petitioner manufactures a product in Ohio which is sold and shipped in interstate commerce to independent distributors or dealers for resale to customers. Respondent's affidavit stated only that petitioner had informed respondent that its "nearest distributor is . . . a Florida corporation with address in Miami."³²⁶ From a denial of petitioner's motion to quash made in the trial court, an interlocutory appeal was taken to the third district which affirmed per curiam the lower court's order. This order of affirmance was viewed by the supreme court as constituting a "direct decisional conflict" with another district court's decision which had held that "a plaintiff must substantiate the jurisdictional allegations of a complaint in effecting substituted service ' . . . by affidavit containing statements of fact, or by other proof.' "³²⁷ Since the statement of facts referred only to statements of material fact and respondent's affidavit lacked any material fact clearly showing that petitioner was doing business in Florida, the conflict requisite to support a writ of certiorari was apparent.

XVI. CRIMINAL PROCEDURE RULE I—ITS EFFECT UPON OTHER REMEDIES

Criminal Procedure Rule No. I, patterned after title 28, section 2255, of the United States Code was adopted in Florida in 1963. Since that time, a significant number of cases have considered that Rule's effect upon other remedies, both appellate and of an independent nature, that previously were available in the state. It is the purpose of this section to review some of the more important principles that have emerged from those cases.

A. *Rule I Compared with Appellate Review*

Both functionally and theoretically, proceedings under Rule I and appellate review differ. Fathered by the common law writ of coram nobis,

324. *Id.* at 904, quoted from *Foley v. Weaver Drugs, Inc.*, 172 So.2d 907 (Fla. 3d Dist. 1965).

325. *Id.* at 905.

326. *Id.* at 905.

327. *Id.* at 905. The other district court of appeal decision referred to was *Fawcett Publications, Inc. v. Brown*, 146 So.2d 899 (Fla. 1962).

proceedings under Criminal Procedure Rule I are independent suits of a civil nature brought in the court that committed the alleged error. Each of these remedies operates within its own exclusive sphere.

In *Lee v. State*,³²⁸ based on two federal decisions, *Smith v. United States*³²⁹ and *Bowen v. United States*,³³⁰ it was established in Florida that "a collateral attack under Rule 1 proceedings may not be used to retry issues or correct errors reviewable only upon direct appeal from the conviction."³³¹ To date, there is no rule of universal application which clarifies which issues or errors are reviewable only upon direct appeal from the conviction. For the most part, an examination of individual decisions is necessary to clarify this point. Yet, the import of the distinction is plain and accordingly practitioners are cautioned to carefully categorize errors occurring during trial as to whether they are of the type reviewable only by direct appeal or whether they may be asserted in an independent action collaterally attacking the judgment. It is clear that where the alleged error falls within any one of the first three stated grounds in the Rule,³³² relief under Rule I is appropriate. A different situation, however, is presented when the fourth and seemingly all encompassing ground is considered: "For any other reason that the judgment is subject to collateral attack." Because the time period within which a party can seek relief under either of the remedies is different,³³³ failure to make timely appeal when the alleged error can only be raised on direct appeal will preclude all available relief. For example, in *Harper v. State*,³³⁴ the appellant, some thirteen years after conviction, filed a motion to vacate the sentence on the ground that he was denied equal protection by refusal of the trial judge to furnish an official court reporter after he was advised that defendant was financially unable to employ one. No appeal was taken. Because the alleged error was reviewable only upon direct appeal from the conviction, the collateral attack under Rule 1 would not lie.

B. *What About Coram Nobis?*

The Florida Rules of Civil Procedure, as well as the federal rules, by their terms abolish the common law writ of coram nobis.³³⁵ There

328. 165 So.2d 443 (Fla. 2d Dist. 1964).

329. 252 F.2d 369 (5th Cir. 1958).

330. 260 F.2d 266 (5th Cir. 1958).

331. *Harper v. State*, 168 So.2d 325, 326 (Fla. 1st Dist. 1964).

332. See the first paragraph of FLA. R. CRIM. P. 1.

333. A motion for relief under Rule I can be made at any time so long as the defendant is in custody under sentence of court. On the other hand, appeals prosecuted by a defendant in criminal cases must be commenced within ninety days after the judgment has been entered. See FLA. APP. R. 6.2.

334. *Supra* note 336.

335. FLA. R. CIV. P. 1.38(b) provides:

Writs of coram nobis . . . are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

recently has appeared, however, evidence that an independent action based on the substantive law applicable to writs of coram nobis may be utilized where relief under Rule 1 is not available for the reason that the defendant is not in custody under sentence of court.³³⁶ In *United States v. Morgan*,³³⁷ the analogous provision of the federal rules³³⁸ has been construed to permit a motion in the nature of coram nobis in criminal cases. Since the Florida rules are patterned after their federal prototype, an independent action collaterally attacking a judgment of conviction governed by the substantive law applicable to writs coram nobis may also be an available procedural remedy in Florida. In view of the fact that such an action may be proper in Florida, a procedural distinction existing between the two should be noted.

Proceedings under Criminal Procedure Rule I do not require that application be made in an appellate court for leave to collaterally assail, in the trial court, a conviction and sentence affirmed by the appellate court. Such leave is necessary to application for coram nobis.³³⁹

C. Rule I and Habeas Corpus

In general, a writ of habeas corpus will not issue where the applicant has failed to exhaust his remedies under Criminal Procedure Rule 1. Thus, where relief under Rule 1 was denied for the reason that the record of the original trial showed that petitioner was represented by counsel and no appeal from the orders denying relief was taken, relief in habeas corpus was not available.³⁴⁰ In a similar vein, a writ of habeas corpus was not available where petitioner's appeal, taken after his motions for hearing under Rule 1 were denied, was dismissed for lack of jurisdiction—the appeal was directed to the original judgment of conviction and not to the adverse ruling of the trial court on the motion under Rule 1. Relief by appealing the order denying the Rule 1 hearing still remained.³⁴¹

An interesting situation was presented in *Foxworth v. Wainwright*,³⁴² wherein habeas corpus was held appropriate. Petitioner, after his motion for a Rule 1 hearing was denied, filed an affidavit asserting insolvency and by motion requested court appointed counsel to assist in the appeal. An order denying the adjudication of insolvency and

336. See *Grant v. State*, 166 So.2d 503 (Fla. 2d Dist. 1964), wherein the court stated: "We need not nor do we decide if writ of error coram nobis would be available to one not in custody and thus not able to invoke Rule I."

337. 346 U.S. 502 (1954).

338. See FED. R. CIV. P. 60(b).

339. *Solitto v. State*, 166 So.2d 474 (Fla. 2d Dist. 1964).

340. *Gentry v. State*, 172 So.2d 433 (Fla. 1965).

341. *Gafford v. Wainwright*, 157 So.2d 138 (Fla. 1963). Of course, the time for appealing must not have run in the interim.

342. 167 So.2d 868 (Fla. 1964).

request for appointment of counsel was entered by the court. The clerk of the trial court refused to file petitioner's notice of appeal without payment of filing costs since there was no adjudication of insolvency. The effect of these occurrences was to preclude appellate review of the order denying the motion for a Rule 1 hearing since petitioner's appeal period had expired in the interim. Under these circumstances, a writ of habeas corpus was available. During the period surveyed, the First³⁴³ and Second District Courts³⁴⁴ of Appeal have promulgated special rules which, if followed, render unnecessary the use of habeas corpus under the instant circumstances. Both courts provide:

No clerk of any trial court in this district from which an appeal may be taken to this court from an order entered on a motion for relief under Criminal Procedure Rule No. 1, shall require the payment of any fee or any costs upon the filing of any such notice of appeal, irrespective of whether or not the appellant has been adjudged insolvent.³⁴⁵

343. *In re* Internal Gov't. of the Dist. Ct. App., 156 So.2d 896 (Fla. 1st Dist. 1963).

344. *In re* Internal Gov't of the Dist. Ct. App., 156 So.2d 655 (Fla. 2d Dist. 1963).

345. *Id.* at 656.