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Civil Procedure

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CIVIL PROCEDURE

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INTRODUCTION

The Florida Rules of Civil Procedure should be a means and not an end.

> Would that lawyers might be induced to refrain from making procedure an end in itself! Would that judges and publishers might be induced to stop publishing opinions on horrible examples of "waste motion in the legal process"! Would, too, that law teachers (like myself) might be induced to refrain from commenting on such examples! All of these seem vain hopes in our day, as hundreds of decisions pour forth each year dealing with procedural problems, many fascinating, some foolish. Reporting cases in this area can be dangerous because of what Chief Judge Charles E. Clark calls a "Gresham's Law" of procedure, whence bad precedents tend to drive out the good.[1]

This article surveys the more important and interesting cases, amendments to the rules and legislative acts which have occurred during the period.[2] The format follows that of the Florida Rules of Civil Procedure. The first major division is Actions at Law and Suits in Equity. [Prior to the discussion of the rules and their judicial interpretation, there are contained in this division sections on Statutory Process and Notice Requirements and on Venue.[3]] The other major divisions are Actions at Law Only, and Suits in Equity.

If it were necessary to offer one sweeping conclusion or suggestion it would be: READ THE RULES! Too many cases need never have been decided if the Bar, yes, and even the Bench, would heed this admonition.

The outline of the *Survey* is as follows:

I. LAW AND EQUITY

A. *Statutory Process and Notice Requirements*

B. *Venue*

C. *Commencement of Action*

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1. Peterfreund, *Civil Practice*, 34 N.Y.U.L. REV. 1563 (1959).

2. Cases reported in the Southern Reporter 112 So.2d through 131 So.2d; comments, where appropriate, are included on more recent amendments to the Florida Rules of Civil Procedure (1954), contained in later opinions of the Florida Supreme Court.

3. Carey A. Randall, Executive Editor of the U. MIAMI LAW REV., contributed these sections.

I. ACTIONS AT LAW AND SUITS IN EQUITY

A. *Statutory Process and Notice Requirements*

1. NEVER ON A SUNDAY

"Under the common law, Sundays are dies non juridices—non judicial days—and the offices of the court are not open on these days."[4] The statutes contain a provision allowing service or execution on Sunday which is in derogation of the common law and is strictly construed.[5] In the absence

4. Harden v. Harden, 125 So.2d 124, 125 (Fla. App. 1960). Under the common law the period of time included within the prohibition of judicial proceedings on Sunday is from sunrise to sunset. Harrison v. Bay Shore Dev. Co., 92 Fla. 875, 111 So. 128 (1926).

5. FLA. STAT. § 47.46 (1961).

of a showing of compliance with the requirements of the statute necessary to the validity of service of process on Sunday such service is void.[6]

Cases involving problems relating to process are classified under a variety of headnotes and are easily overlooked in a review of the reporters. Classifications were found under Sunday, Associations, Automobiles, Corporations, Divorce, Infants, International Law, Landlord and Tenant, Limitation of Actions, Mental Health, Partnership, and occasionally under *Process*. The table of statutes construed appears to be the most reliable source.

2. SERVICE OF PROCESS ON MINORS AND INCOMPETENTS

The statutes controlling service of process on minors[7] and incompetents[8] are strictly construed and the requirements of the statutes should be literally followed. An original summons named as defendants a widower and his minor children. The return of the sheriff with respect to service of process showed that no type of service was made upon the minor children. It was held that the attempted service was inadequate to bring the minor children within the jurisdiction of the court.[9] The defect was not cured by the filing of an answer by the guardian ad litem. The failure of the court to appoint a guardian ad litem to represent a minor defendant, where the record does not show any prejudice to his rights or result in a miscarriage of justice, is not fatal to the court's jurisdiction.[10]

The delivery of a summons to the father of an incompetent, residing in the same residence as the incompetent, was held not to be good service.[11] *Mitchell v. Brown*[12] is a case of first impression with regard to service of process on an incompetent person. The plaintiff contended that the sheriff's costs showed that only one copy of the summons was served although there were two defendants in the case, one an incompetent in the care or custody of the other. The court concluded that the sheriff's cost bill was not a part of the service and that it could be ignored. A sheriff's return is presumed to be valid, and clear and convincing evidence is required to overcome the statements contained in the return. The court further noted that the real purpose of service of process is to give a defendant notice that a legal

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6. 125 So.2d at 125.
7. FLA. STAT. § 47.23 (1961). "The courts of this state shall obtain jurisdiction of minors when the original writ of subpoena in chancery or summons in common law actions, as the case may be, is served by reading the writ or summons to be served to the minor to be served, and also to the guardian or other person in whose care or custody such minor may be, or by a delivery of a copy thereof to such minor and to his guardian or other person in whose care or custody such minor may be, and by further serving the writ or summons upon the guardian ad litem thereafter appointed by the court to represent said minor . . . ."
8. FLA. STAT. § 47.25 (1961).
9. Foster v. Thomas, 112 So.2d 33 (Fla. App. 1959).
10. Brown v. Ripley, 119 So.2d 712 (Fla. App. 1960).
11. Drake v. Wimbourne, 112 So.2d 27 (Fla. App. 1959).
12. 114 So.2d 178 (Fla. App. 1959), *quashed*, 119 So.2d 385 (Fla. 1960).

proceeding has been instituted against him and to afford him the opportunity to defend against it. When the co-defendant received notice of the action pending against the incompetent, service of another copy upon her would have given her no additional notice or information and the service was held to be good in spite of the failure to serve an additional copy.[13] The supreme court failed to agree with the district court of appeal and quashed the decision.[14] "Strict construction will not permit ignoring the requirement of service on the incompetent in addition to service on the one having him in custody. The service on both suggests duplication but it is a duplication commanded by the law."[15]

3. NONRESIDENT MOTORISTS

A personal injury suit was brought against a nonresident of Florida and service of process effected under the nonresident motorists statute.[16] The defendant was a resident of Texas and the injury occurred in Florida. The complaint did not allege that the defendant was either a resident or a nonresident of Florida at the time of the injury. *Held,* the statute permits service on the Secretary of State as to a nonresident who is charged with negligent injury in an automobile accident in Florida either while a nonresident or after changing a Florida residence at the time of the injury to nonresidence at time of suit and service.[17] The court pointed out that *Red Top Cab & Baggage Co. v. Holt*[18] was not controlling since that case was decided under an earlier statute,[19] which by its terms applied only to persons who were nonresidents at the time of the injury.

It is not necessary to allege the legal relationship between the owner and the driver in order to determine whether the complaint states facts sufficient to make the alleged owner amenable to service of process under the nonresident motorist statute.[20] The same case held that though a nonresident motorist was a minor at the time of the automobile accident in Florida, service of process on him in accordance with the statute was sufficient without complying with the requirements of the Florida statute[21] for service of process on a minor.[22]

A registered letter sent to the defendant and subsequently returned marked "unclaimed" is not the equivalent of a refusal to accept the letter.[23]

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13. *Id.* at 183.
14. Brown v. Mitchell, 119 So.2d 385 (Fla. 1960).
15. *Id.* at 387.
16. FLA. STAT. §§ 47.29, .30 (1961).
17. Howland v. Bevis, 276 F.2d 906 (5th Cir. 1960).
18. 154 Fla. 77, 16 So.2d 649 (1944).
19. FLA. STAT. § 47.30 (1941).
20. Culver v. Tucker, 182 F. Supp. 385 (N.D. Fla. 1960).
21. FLA. STAT. § 47.23 (1961).
22. 182 F. Supp. at 387.
23. Lendsay v. Cotton, 123 So.2d 745 (Fla. App. 1960).

The fact that the defendant did not claim the letter is susceptible not only to the inference that he refused to do so, but is also susceptible to the inference that he did not then live at the address to which the letter was directed. It appears that had the letter been sent special delivery the result in the case may have been different and would have been controlled by *Cherry v. Heffernan.*[24]

The statute for substituted service on nonresident motorists is also in derogation of the common law and is strictly construed. The forwarding to a nonresident defendant motorist of copies of summons before it was served on the Secretary of State, with no notice as to the fact of the service, is not a substantial compliance with the statutory requirement of "notice of such service" of process on the Secretary of State.[25]

4. SERVICE BY PUBLICATION

The word "address" and the word "residence" are not synonymous within the contemplation of the statute[26] providing for constructive service of process.[27] In another action service was by publication against a particular named defendant as having an unknown place of residence, and if dead on his unknown heirs. A subsequent investigation extending over a period of months revealed that the party in question was dead and resulted in locating his heirs in another state. The court held that the lower court erred in rejecting the service by publication, which was otherwise regular.[28]

5. PARTNERSHIPS AND UNINCORPORATED ASSOCIATIONS

The retired partner of a Pennsylvania partnership, living in Florida, was served personally in Florida. The return showed an inability to locate the other partner, presumably living in Pennsylvania. The partnership was not doing business in Florida. The court held the service to be good on the partner served, and that a judgment could be entered and enforced against the individual assets of the partner who was served although it would not bind the assets of any partner not served.[29] The court pointed out that the statutes provide:

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24. 132 Fla. 386, 182 So. 427 (1938). "The purpose of the Act was to give the classes named therein notice of any action brought against them that they might submit themselves to the jurisdiction of the Court and offer such defense as they may be advised. It is shown here that the terms of the Act in so far as giving notice was required were complied with to the letter. If defendant chooses to flout the notice and refuse to accept it, he will not be permitted to say in the next breath that he has not been served." *Id.* at 391, 182 So. at 429. In *Cherry* the letter was returned marked "refused."

25. Conway v. Spence, 119 So.2d 426 (Fla. App. 1960).

26. FLA. STAT. § 48.04(3) (1961).

27. Wilmott v. Wilmott, 119 So.2d 54 (Fla. App. 1960).

28. Munro v. Bechard, 132 So.2d 429 (Fla. App. 1961).

29. Fidelity & Cas. Co. v. Homan, 116 So.2d 444 (Fla. App. 1959).

> When any original process is sued out against several persons composing a mercantile or other firm, the service of said process on any one member of said firm shall be as valid as if served upon each individual member thereof; and the plaintiff may, after service upon any one member as aforesaid, proceed to judgment and execution against them all.[30]

There is no special statutory prerequisite for service of process upon a partnership that it be engaged in business within the state.[31]

An unincorporated voluntary association is essentially different from a co-partnership and does not come within the purview of the statute providing for service of process with respect to a co-partnership of several persons composing a mercantile or other firm.[32] The common law rule for making effective service on a voluntary association must be pursued and the members served individually.

6. CORPORATIONS AND PERSONS DOING BUSINESS

The United States Supreme Court in *International Shoe Co. v. Washington*[33] held that the defendant, if he be not present within the forum, should have certain minimum contacts with it in order for substituted service upon him to come within the purview of the due process clause of the Federal Constitution. In *McGee v. International Life Ins. Co.*[34] the Court still relied upon the "substantial connection" rule. Florida statutes[35] provide for service of process upon nonresidents engaged in doing business within the state. The interpretation of the terms of the statute is difficult and each case seems to be resolved upon the basis of the facts in the particular case, Florida going as far towards upholding service of process as the Supreme Court opinions will permit.

The sale by a nonresident owner, through Florida agents, and on terms negotiated within the State of Florida, of a tract of Florida real estate, and the taking back of a recorded purchase money mortgage and installment note designating a Florida bank as collection agent, does not constitute a "business or business venture" within the meaning of the statutes.[36] A corporation shipping goods in interstate commerce to a single customer, who is not a broker, jobber, wholesaler or distributor, from a point outside the state, is not engaged in carrying on a business or business venture.[37]

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30. FLA. STAT. § 47.15 (1961).
31. Fidelity & Cas. Co. v. Homan, 116 So.2d 444 (Fla. App. 1959).
32. Florio v. State, 119 So.2d 305 (Fla. App. 1960).
33. 326 U.S. 310 (1945).
34. 355 U.S. 220 (1957).
35. FLA. STAT. §§ 47.16, .161, .17, .171, .30 (1961).
36. Toffel v. Baugher, 125 So.2d 321 (Fla. App. 1960), *cert. discharged*, 133 So.2d 420 (Fla. 1961).
37. Newark Ladder & Bracket Co. v. Eadie, 125 So.2d 915 (Fla. App. 1961).

Nonresidents, to whom the plaintiffs had conveyed land within the state allegedly as security for a usurious loan, which could, under an option contract, be repaid with over one hundred per cent interest in the form of repurchase of the land, were held to be engaged in a business venture in the state sufficient to permit personal jurisdiction over them as nonresidents.[38]

The term *business venture* is generally applied to one subject matter or undertaking while the term *business* is broader in scope denoting a variety of subjects, transactions or undertakings.[39] A general course of employment and the conduct or carrying on of personal business activity in the state for pecuniary benefit or livelihood is properly classified as carrying on a business.[40]

In *Zirin v. Charles Pfizer & Co.*[41] there was evidence that agents of the defendant, which was a foreign corporation, were employed solely to go into drugstores, doctors' offices, and hospitals, and to talk about the defendant's products. If orders were tendered to the agents they would forward the orders to the defendant's home office. The district court of appeal held that the defendant was not transacting business within the state within the meaning of the statute.[42] Justice Carroll dissented, in a well reasoned opinion which developed all of the evidence and found the decision clearly contrary to the weight of the evidence.[43] The supreme court agreed with Justice Carroll and adopted the dissent as the view of the court.[44] The court pointed out that it is

> quite apparent that the purpose of Section 47.171 . . . is to liberalize the scope of the operation of Section 47.17 and provide for the service of process upon any agent of a foreign corporation doing business for it in this State . . . .[45]

7. LEGISLATION

Only minor legislative changes were made in the statutory provisions regulating service of process during the 1961 session. Provision was made for the designation of persons within state agencies upon whom service of process may be made.[46]

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38. Oxley v. Zmistowski, 128 So.2d 186 (Fla. App. 1961).
39. Matthews v. Matthews, 122 So.2d 571 (Fla. App. 1960).
40. *Id.* at 573.
41. 121 So.2d 694 (Fla. App. 1960), *aff'd*, 128 So.2d 594 (Fla. 1961). The court affirmed the decision below since the plaintiff below failed to make it appear that the cause of action upon which he sued was one which arose out of the activities of the foreign corporation within the state. The court concluded that the reasons assigned by the trial court and the court of appeal were erroneous. 128 So.2d at 600.
42. *Id.* at 695.
43. *Ibid.*
44. 128 So.2d 594 (Fla. 1961).
45. *Id.* at 599.
46. FLA. STAT. § 120.071 (1961). "Each agency shall designate a person within

B. *Venue*

Florida's principal venue statute[47] provides that an action may be commenced in the county where (1) the defendant resides, (2) the cause of action accrued, or (3) where the property in litigation is located. Simple as the statute may seem it nevertheless gives rise to considerable litigation and must be considered in connection with other sections of the statutes governing venue.

1. CONTRACTS CONCERNING REAL PROPERTY

The plaintiff-vendor filed a complaint and good faith affidavit in the Circuit Court of Manatee County, seeking specific performance of a contract for the sale of realty located in Manatee County. The defendant moved to dismiss the complaint on the grounds that the residence of the parties and the transaction giving rise to the action were both situated in Pinellas County. Upon a denial of the motion, an interlocutory appeal was taken. The district court considered the action for specific performance to be in personam and transitory and reversed.[48] Venue here was determined by the nature of the principal relief sought and the court ignored the question as to whether the location of the property in litigation should control and followed the common law rule as to transitory actions.[49]

Lessors entered into a written lease of motel property located in Broward County. The lessee filed suit in Dade County seeking a decree declaring the lease to be breached and terminated. The defendant-lessors moved to dismiss for improper venue, contending for the privilege to be sued in the county of their residence. The motion was supported by an affidavit asserting that defendants were residents of Broward County. The lessee, on appeal, contended that because the defendants were residing in Dade County at the time the cause of action accrued, it was immaterial where they resided at the time the suit was filed. The court rejected the contention and held that the venue statute applies as of the time of the filing of the suit and not as of the time of the accrual of the cause of action.[50] The court commented that the cause of action accrued where the act of default occurred, which was in Broward County. The suit here was also considered to be in personam and the location of the property was not controlling.

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the agency upon whom service of process may be served. The name and address of such person shall be filed with the secretary of state. If the person's name is not so filed, service of process may be had on the agency by serving the secretary of state in the name of the agency concerned."

47. FLA. STAT. § 46.01 (1961).

48. McMullen v. McMullen 122 So.2d 626 (Fla. App. 1960).

49. For criticism of the case see 15 U. MIAMI L. REV. 332 (1961).

50. Gates v. Stucco Corp., 112 So.2d 36 (Fla. App. 1959).

2. DEFENDANTS RESIDING IN DIFFERENT COUNTIES

The plaintiff is afforded a choice of venue in actions against two or more defendants residing in different counties.[51] An accident occurred in St. Lucie County involving two defendants who were residents of that county and a third defendant who was a resident of Broward County. The plaintiff brought his action in Broward County and the trial court dismissed his complaint against the St. Lucie residents, stating that "It would impede the administration of justice to have the case tried here . . . ."[52] In reversing, the district court pointed out that the inconvenience of maintaining the action cannot be used as a vehicle upon which to negate the plaintiff's choice.

3. SUITS AGAINST STATE AGENCIES

A state agency with headquarters at the seat of government, has the privilege of demanding that suit be brought against it there, in any situation primarily involving a construction of the rules or regulations of the agency.[53] While the question is more a matter of historic policy it may have been elevated to a rule of law. The same rule may well apply to appellate proceedings although most of the cases have involved cases of original jurisdiction. The privilege can be waived by the agency.[54] An action against the state comptroller was dismissed since it could only be maintained against him in Leon County "unless he waived the privilege or unless some attempt to seize and sell property . . . has been actually initiated in the county where the suit is brought."[55]

4. VENUE IN CAUSES OF ACTION GROWING OUT OF CONTRACTUAL RELATIONS

A domestic corporation brought suit in Volusia County against a foreign corporation, obtaining jurisdiction by service of process on a resident agent in Lake County. The complaint included two counts, the first for refusal to pay bills for work performed and the second, in the exact amount as in count one, in general assumpsit for labor and materials furnished. The trial court granted the defendant's motion for dismissal on the ground of improper venue. The court of appeal reversed, holding that the cause of action accrued in Volusia County since the contract provided no place of payment and it would be implied that payment was to be made where the payee resided or had an established place of business.[56] In the view of one justice, under the first count it was reasonable to infer that the payments

51. FLA. STAT. § 46.02 (1961).
52. Doonan v. Poole, 114 So.2d 504, 505 (Fla. App. 1959).
53. Star Employment Serv., Inc. v. Florida Industrial Comm'n, 122 So.2d 174 (Fla. 1960).
54. *Id.* at 177.
55. Green v. Bob Lourie Films, Inc., 133 So.2d 431, 432 (Fla. App. 1961).
56. M. A. Kite Co. v. A. C. Samford, Inc., 130 So.2d 99 (Fla. App. 1961).

were to be made in Alabama. The count in general assumpsit did not allege the contract under count one and therefore showed nothing to rebut the inference that payment was to be made where the payee resided.[57]

Plaintiff instituted suit in Dade County on a promissory note executed and payable in Dade County. Defendants filed motions to dismiss alleging that Broward County was the proper venue for the action. After the trial court denied the motion to dismiss, the defendants filed affidavits showing that both were residents of Broward County. The plaintiff had not filed the good faith affidavit called for under the statute.[58] In affirming the trial judge's order, the district court pointed out that the only matters before the court when the order was entered was the plaintiff's complaint and the defendants' motions, none of which affirmatively disclosed that the defendants were residents of Broward County.[59] The court also pointed out that the filing of the good faith affidavit was directory and not jurisdictional and the plaintiff should be allowed a reasonable time within which to comply.

5. CORPORATIONS – DOING BUSINESS

A domestic corporation may be sued in any county where it maintains a branch office for the transaction of any substantial part of its customary business.[60] Plaintiff brought suit in Leon County against a publishing company whose principal place of business was located in Hillsborough County. The defendant maintained a staff representative at the capitol to report news events but did not maintain an office. The reporter utilized office space furnished free of charge by the state. The court held that the transaction of its customary business from a fixed location to such an extent that it is actually present there, and had such a responsible agent as would presumptively bring home to it notice of a summons served upon him, satisfies the venue requirements of the statute.[61]

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57. *Id.* at 102. Sturgis, J. dissented in a well reasoned opinion and viewed the complaint as a whole as demonstrating lack of venue. *Id.* at 102. The importance of considering FLA. STAT. §§ 46.03 and .04 "in pari materia" is demonstrated by the concurring opinion.

58. FLA. STAT. § 46.01 (1961).

59. Superior Elec. Indus. v. Franklin Acceptance Corp., 130 So.2d 116 (Fla. App. 1961).

60. Tribune Co. v. Approved Personnel, Inc., 115 So.2d 170 (Fla. App. 1959). For subsequent history see 121 So.2d 465, 468 (Fla. App. 1960) in which Sturgis, J. dissented with an opinion pointing out the fundamental error permeating this and the former appeal: "The statute governing *service of process* upon corporations (F.S. § 47.17, F.S.A.), which is not involved on these appeals, has been confused and inaccurately intertwined with F.S. § 46.04, F.S.A., governing *venue* in suits against corporations."

61. 115 So.2d 170. Sturgis, J. dissented stating that "I am persuaded that the primary legislative intent, as it relates to domestic corporations, was to narrow the venue of suits brought against them, and thus relieve them of the burdensome expense, inconvenience, annoyance, and—quite likely—prejudicial aspects of defending actions that are arbitrarily filed, as in this case, in a forum where the cause of action did not accrue, in which no property involved is located, and where defendant does not reside—a forum that has no logical connection whatever with the parties or the subject matter of the litigation." *Id.* at 176.

Under the Federal Employers' Liability Act[62] the plaintiff may place the venue where the defendant resides, where the cause of action arose, or where the defendant is doing business at the time the action is commenced.[63] When the action is in a federal court, a defendant may obtain a transfer of the action under the principle of forum non conveniens.[64] Florida courts recognize the principle of forum non conveniens[65] and will decline to exercise jurisdiction when the facts in the case justify. The courts refuse to apply the doctrine where *intrastate* change of venue is sought on a forum non conveniens rationale.[66]

The provision that a foreign corporation doing business within the state may be sued where it has an agent or other representative does not unduly discriminate against the foreign corporation and is constitutional.[67] A nonresident corporation, which does not have an agent in Florida and does not do any business within the state, which is served under the nonresident motorists statute[68] may be sued in any county where the court can secure jurisdiction of the defendant.[69]

6. - LEGISLATION

A statute was enacted during the 1961 session of the legislature providing for change of venue for the guardianship of incompetents whenever the domicile of the incompetent is changed to another county.[70] No other statutory provisions affecting venue were enacted.

C. *Commencement of Action*

1. STATUTE OF LIMITATIONS

A civil action, excepting ancillary proceedings, is commenced when the complaint is filed.[71] Further, the statute of limitations is tolled by the filing of the complaint.[72]

The case of *Dibble v. Jensen*[73] presents an interesting application of the Florida rule. The plaintiff was injured in an automobile accident by

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62. 45 U.S.C. § 56 (1958).
63. Atlantic Coast Line R.R. v. Ganey, 125 So.2d 576 (Fla. App. 1960), 15 U. MIAMI L. REV. 420 (1961).
64. 125 So.2d at 578. The transfer may be made under 28 U.S.C. § 1404(a) (1958).
65. Fidelity & Cas. Co. v. Homan, 116 So.2d 444 (Fla. App. 1959).
66. Atlantic Coast Line R.R. v. Ganey, 125 So.2d 576 (Fla. App. 1960); Hollywood Memorial Park, Inc. v. Rosart, 124 So.2d 712 (Fla. App. 1960); Greyhound Corp. v. Rosart, 124 So.2d 708 (Fla. App. 1960).
67. Greyhound Corp. v. Rosart, 124 So.2d 708 (Fla. App. 1960).
68. FLA. STAT. § 47.29 (1961).
69. Hollywood Memorial Park, Inc. v. Rosart, 124 So.2d 712 (Fla. App. 1960).
70. FLA. STAT. § 744.11(4) (1961).
71. FLA. R. CIV. P. 1.2(a).
72. Klosenski v. Flaherty, 116 So.2d 767, 769 (Fla. 1959).
73. Dibble v. Jensen, 129 So.2d 162 (Fla. App. 1961).

the defendant,[74] then a Florida resident. Subsequently, the defendant became a resident of New Jersey. The plaintiff failed to bring the action during the time the defendant was a resident of Florida and he argued that the defendant's absence from the state tolled the statute of limitations.[75] The defendant argued that the statute was not tolled inasmuch as service could have been obtained during her absence from the state under the Florida nonresident motor vehicle statute. The court in its opinion did not discuss either of these two contentions.[76] The court simply stated that the action was barred because the plaintiff failed to comply with the Florida rules and case law requiring the filing of a complaint to toll the statute of limitations. The plaintiff also contended that the filing of the complaint was not required in this case because service of process could not be had. The court, in affirming the judgment for the defendant, reiterated that you must file the complaint to toll the statute of limitations and that perfecting service of process is not necessary to commence the action and toll the statute.

It is possible that a Florida court may follow the lead of some federal courts[77] in requiring compliance with the rules providing for the filing of the complaint[78] and the forthwith issuance of summons, delivered for service,[79] in order to toll the statute of limitations.

2. FAILURE TO MAKE PROOF OF SERVICE NOT FATAL

A district court of appeal held that the original summons, with the sheriff's notation of service thereon, must be returned to the court of issuance in order to give jurisdiction over the person of the defendant.[80] The supreme court quashed the decision and reiterated that it is the service of the summons and not its filing or that of the sheriff's return which gives the court jurisdiction over the defendant.[81] This principle is incorporated in the Florida rule which provides that "failure to make proof of service shall not affect the validity of service."[82] The better procedure for the plaintiff to follow would be to proceed anew to obtain personal service of a defendant who remains within the jurisdiction of the court, or if the defendant has left the state and is amenable to substituted service to proceed accordingly. In the absence of such a statutory provision for substituted

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74. We are only concerned with the nonresident defendant in this case.
75. *Supra* note 73; FLA. STAT. § 95.07 (1961).
76. FLA. STAT. § 95.07 (1961) appears to be applicable only to residents of the state; for the application of FLA. STAT. § 47.29 (1961) to residents of the state who remove themselves from the state see text at note 17 *supra*.
77. 2 MOORE, FEDERAL PRACTICE ¶ 3.07[4.-3-2], at 785 n.5 (2d ed. 1961).
78. FLA. R. CIV. P. 1.2(a).
79. FLA. R. CIV. P. 1.3(b).
80. Klosenski v. Flaherty, 110 So.2d 685 (Fla. App.), *quashed*, 116 So.2d 767 (Fla. 1959), 14 U. MIAMI L. REV. 238 (1959).
81. Klosenski v. Flaherty, 116 So.2d 767 (Fla. 1959).
82. FLA. R. CIV. P. 1.3(c).

service, the trial judge in his discretion could re-establish the lost summons and return proof thereof.[83] In such a circumstance the proof should be almost conclusive and such as to leave little, if any, doubt as to its authenticity. In addition, it would appear that the statutory provision for re-establishment of process is also available.[84] This is not to say that the court has jurisdiction to proceed in the cause prior to the time the original summons was returned and filed, showing proper service on the defendant.[85]

In reversing a circuit court's post decretal order, which denied the defendant's motion to vacate and set aside a final decree of divorce, it was held that even though the court had jurisdiction over the defendant's person by reason of the personal service of process upon him, a decree pro confesso and a final decree entered prior to the time the original summons was returned and filed were not authorized. The original summons was not filed in the cause until long after entry of final decree.[86]

3. AMENDING RETURN OF SERVICE

The Second District Court of Appeal has held that a chancellor has authority to entertain proceedings to amend a sheriff's return to state the truth as allegedly revealed in the deposition of the deputy sheriff who had served the challenged process seventeen years before.[87]

4. ADDITIONAL SUMMONS

Although Florida Rule 1.3(d)[88] may be modeled after Federal Rule 4(a), it fails to provide that "upon request of the plaintiff separate or *additional summons* shall issue against any defendants."[89] The question thus arises as to the power of the trial court to issue additional summons. In *Marine Transp. Lines, Inc. v. Green*[90] the trial court granted leave to have a second alias (pluries) summons issued, after two previous attempts at service had been unsuccessful because the parties served had no connection with the defendant. Each time the defendant had moved to dismiss the complaint on the grounds of lack of jurisdiction over the person and subject matter and insufficiency of service of process. Each time the court had granted the motion because of lack of service of process and granted leave to the plaintiff to have another summons issued. Judge D. Carroll, speaking for the majority, held that the trial judge did not abuse his discretion in

83. 116 So.2d at 770.
84. FLA. STAT. § 71.13 (1961).
85. 116 So.2d at 769.
86. Wilmott v. Wilmott, 119 So.2d 54, 58 (Fla. App. 1960).
87. Mitchell v. Brown, 128 So.2d 8 (Fla. App.), *cert. denied*, 133 So.2d 321 (Fla. 1961).
88. FLA. R. CIV. P. 1.3(d).
89. FED. R. CIV. P. 4(a). (Emphasis added.)
90. 114 So.2d 710 (Fla. App. 1959).

granting leave of the plaintiff to have an additional summons issued, after two previous attempts at service had been unsuccessful.[91] The defendant must sustain the burden of submitting evidence showing that there was little or no likelihood that the defendant could be served either in the near or distant future.[92] The concurring opinion, which challenged the jurisdiction to entertain the appeal, contended that the matter was not discretionary and the trial court could not have entered a contrary order.[93]

D. *Private Agreements or Consents*

During the survey period, Florida attorneys have demonstrated a disregard for Rule 1.5(d).[94] This rule simply provides that no private agreement or consent between parties or their attorneys in respect to the proceedings in a cause shall be of any force before the court. The rule further provides for two methods of receiving recognition for agreements. Written agreements will be recognized if subscribed by the party or his attorney against whom it is alleged. Parol agreements will be recognized if made before the court, and promptly made a part of the record, or incorporated in the stenographic notes of the proceedings.[95]

The appellate courts have held private agreements not in writing as to venue,[96] settlement figures,[97] and stipulations between parties[98] to be ineffective as not complying with the rule.

E. *Extending Time*

With three exceptions,[99] a court has wide discretion in the granting of time extensions.[100] For example, in *McWhorter v. McWhorter*[101] the court held that the chancellor did not abuse his discretion in refusing to grant an additional stay of the proceedings, due to the disappearance of a party, at the expiration of a prior six months' stay.

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91. *Id.* at 711.

92. *Accord,* Over 30 Ass'n v. Blatt, 118 So.2d 71 (Fla. App. 1960) (defendant sustains the burden of proof). *Contra,* 114 So.2d 710, 714 (dissenting opinion of Wigginton, J.).

93. Sturgis, J., concurring, pointed out that FLA. R. CIV. P. 1.3(d) and 1.11(b) prohibited dismissal of the complaint. 114 So.2d at 712.

94. FLA. R. CIV. P. 1.5(d).

95. Cooke v. Cooke, 126 So.2d 160 (Fla. App. 1961). The trial judge has the additional discretion to require parol agreements to be reduced to writing.

96. Gates v. Stucco Corp., 112 So.2d 36 (Fla. App. 1959).

97. Spencer v. Florida-Georgia Tractor Co., 114 So.2d 466 (Fla. App. 1959).

98. Cooke v. Cooke, *supra* note 95.

99. The exceptions are (1) motion for directed verdict, (2) motion for new trial, and (3) extending the time for taking an appeal.

100. FLA. R. CIV. P. 1.6(b).

101. 122 So.2d 504 (Fla. App. 1960).

F. *Pleadings*

1. PLEADINGS REQUIRED OR ALLOWED

The pleadings which are allowed are a complaint, an answer, a reply if the answer contains a counterclaim denominated as such and an answer to a cross-claim.[102] Averments in a pleading to which no responsive pleading is required or permitted are deemed denied or avoided, and an adverse party may assert at trial any defense thereto.[103] No other pleading is allowed, except that the court may order a reply to an answer.[104]

In *Dickerson v. Orange State Oil Co.*[105] the defendant's answer alleged the affirmative defense of release. Although the plaintiffs sought and obtained "authorization" to file a reply to this defense, no reply was filed. On appeal, the defendant contended that the plaintiff was precluded from questioning the validity of the release by failing to reply. The court held, in this regard

> that when a party is required to reply to an answer, because the answer contains a counterclaim or cross-claim or because he is *ordered* to reply by the court, he must set forth the affirmative defense. If the answer does not contain a counterclaim or cross-claim, however, and the court does not require a reply to the answer, such affirmative defenses are not to be pleaded by the plaintiff and he is entitled to raise and present them at trial without having placed them in a reply or other pleading. The fact that the court authorized the plaintiff to reply did not require that he do so.[106]

The court evidently felt that there was a difference between an order of the court and an authorization of the court.

2. THE COMPLAINT

In an action to foreclose a laborer's lien in which a decree pro confesso and final decree were entered, the defendant sought on appeal to challenge the sufficiency of the complaint.[107] It was held that the sufficiency of the complaint, after a decree pro confesso had been entered, could be tested on appeal from the final decree. It was also held that a portion of the complaint may have been lacking in particulars, but in the absence of a timely attack it was sufficient, after decree pro confesso, to sustain the entry

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102. FLA. R. CIV. P. 1.7(a), as amended by 139 So.2d 129 (Fla. 1962).
103. FLA. R. CIV. P. 1.8(e).
104. FLA. R. CIV. P. 1.11(b); Jarrard v. Associates Discount Corp., 99 So.2d 272, 276 (Fla. 1957).
105. 123 So.2d 562 (Fla. App. 1960).
106. *Id.* at 569.
107. Wallace Bros. v. Yates, 117 So.2d 202 (Fla. App. 1960).

of a final decree. The court found substantial compliance with Rule 1.8(b),[108] the pertinent portion of which reads: "It [the complaint] shall set forth a short and plain statement of the ultimate facts on which the pleader relies, and if it informs the defendant of the nature of the cause against him, it shall be held sufficient."[109]

In an action for specific performance of a contract for the sale of realty, summary decree was granted for the defendants on the ground of laches.[110] The chancellor did not commit harmful error in denying the plaintiff leave to amend his complaint to seek rescission in the alternative. The complaint should have been considered as one praying for general relief and an amendment of the prayer for relief was not necessary to obtain the substantive relief to which the claimant was entitled to plead and to prove. Therefore the cause was remanded and the chancellor directed to determine, without formal amendment, whether the plaintiff was entitled to the return of his deposit.[111]

a. Pleading Special Matters

i. Capacity

The capacity, authority, or legal existence of a party for purposes of suit is not in dispute in the great bulk of cases. The rules[112] simplify pleading and proof thereon by providing that an averment of such matters is not necessary, except to show jurisdiction. Specific negative averment is necessary to raise the issue of capacity and failure to do so results in waiver of the defense.[113]

In a slip and fall case[114] where the plaintiff died prior to trial and the court, upon motion, authorized the substitution of his administratrix as plaintiff, the defendant was not at the close of plaintiff's case entitled to a directed verdict on the ground that the plaintiff failed to introduce documentary proof of her capacity as administratrix. No negative averment as to plaintiff's alleged lack of capacity to sue had been asserted by the defendant and it was presumed, in the absence of a contrary showing, that the court followed the rule and that the order of substitution was made upon a proper showing.[115]

A wrongful death action brought by the executrix was consolidated for trial with another action brought by the dependent mother of the decedent. The trial judge's granting of the defendant's motion for new trial was

108. FLA. R. CIV. P. 1.8(b).
109. *Ibid.*
110. Shirley v. Lake Butler Corp., 123 So.2d 267 (Fla. App. 1960).
111. See 6 MOORE, FEDERAL PRACTICE ¶ 54.62, at 1207 (2d ed. 1953).
112. FLA. R. CIV. P. 1.9.
113. FLA. R. CIV. P. 1.9(a).
114. Shelbourne Enterprises, Inc. v. Last, 129 So.2d 430, 431 (Fla. App. 1961).
115. FLA. R. CIV. P. 1.19.

affirmed on appeal. The order of priority of the Florida Wrongful Death Statute[116] precludes the suit by the executrix in the presence of a suit by the decedent's mother. The defendant's failure to raise lack of capacity by defensive pleading prior to trial and the failure to question the executrix's right to maintain the action until after judgment had been entered did not constitute such waiver of the right to object as would preclude the granting of defendant's motion for new trial. Evidently capacity under the wrongful death statute is jurisdictional, thus non-waiveable.[117]

ii. Fraud

In all averments of fraud or mistake, the circumstances constituting fraud or mistake must be pleaded with particularity.[118] What constitutes sufficient particularity is difficult to define. The answer as to whether the rule has been complied with depends upon the facts of each case.[119]

iii. Special Damages

Items of general damage need not be pleaded with particularity, but items of special damages must be specifically stated.[120] Special damages, as defined by the Florida Supreme Court, are considered to be the natural but not the necessary result of an alleged wrong or breach of contract. Such damages do not follow by implication of law upon proof of breach or wrong.[121] In an action to enjoin an alleged nuisance which plaintiffs claimed was occasioned by the defendant's operation of a supermarket adjacent to their property, damages for personal inconvenience and discomfort were special in nature and had to be specifically stated.[122]

3. DEFENSES

a. Raising Affirmative Defenses by Motion

The Florida courts continue to hold that affirmative defenses must be raised by answer and not by motion to dismiss, unless the complaint clearly shows by its allegation that the relief sought has been barred.[123] Res judicata, estoppel by judgment or equitable estoppel are not defenses available by motion. Such defenses cannot be asserted by allegation of facts stated in motion, nor can they be established by introduction of extrinsic evidence at the hearing thereon.[124]

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116. FLA. STAT. §§ 768.01, .02 (1961).
117. Birdsong v. Hendry, 128 So.2d 404 (Fla. App. 1961).
118. FLA. R. CIV. P. 1.9(b).
119. See generally, Horne v. Sewell, 118 So.2d 643 (Fla. App. 1960); Bouis v. Warren, 112 So.2d 283 (Fla. App. 1959).
120. FLA. R. CIV. P. 1.9(g).
121. Augustine v. Southern Bell Tel. & Tel. Co., 91 So.2d 320 (Fla. 1956).
122 A. & P. Food Stores, Inc. v. Kornstein, 121 So.2d 701 (Fla. App. 1960).
123. FLA. R. CIV. P. 1.8(d); Nunez v. Alford, 117 So.2d 208 (Fla. App. 1960).
124. Nunez v. Alford, *supra* note 123.

b. Affirmative Defenses Deemed Denied or Avoided

Generally pleadings are limited to a complaint, an answer, and a reply only if the answer contains a counterclaim or cross-claim.[125] The court may order or "authorize" a reply to an answer.[126] In an action brought by a Swiss corporation against a Florida resident on a promissory note made by the defendant in France the defendant pleaded the affirmative defense of the French Statute of Limitations.[127] The trial court granted the defendant's motion for judgment on the pleadings. On appeal, the judgment for the defendant was reversed. The majority of the court opined that no responsive pleading (reply) is required to rebut an affirmative defense, and, therefore, any facts which would tend to defeat the affirmative defense are available to the plaintiff at trial.

In a suit to foreclose three mortgages the defendants answered, pleading usury.[128] (The content of the answer was a conclusion of law and not ultimate facts.)[129] The trial judge erroneously held that the answer was a compulsory counterclaim and by the plaintiff's failure to respond he admitted usury. An affirmative defense requires no responsive pleading.

c. Erroneous Designation of an Affirmative Defense

In an action on a note the defendant's answer erroneously asserted the defense of want of consideration in the counterclaim.[130] The rules provide: "When a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court on terms, if justice so require, shall treat the pleading as if there had been a proper designation."[131] Therefore, the defense was entitled to be treated as though it had been properly set forth. The appellate court, in reversing the trial court, held that this defense of want of consideration was adequately pleaded even though the answer was not sworn to, nor did the statute require.[132]

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125. FLA. R. CIV. P. 1.7(a).

126. *Ibid.* See also Dickerson v. Orange State Oil Co., 123 So.2d 562 (Fla. App. 1960).

127. Courtlandt Corp. v. Whitmer, 121 So.2d 57, 58 (Fla. App. 1960).

128. American Nat'l Growers Corp. v. Harris, 120 So.2d 212 (Fla. App. 1960).

129. FLA. R. CIV. P. 1.8(b) requires that a pleader allege "ultimate facts" upon which he relies.

130. Mayflower, Inc. v. Suskind, 112 So.2d 394 (Fla. App.), *cert. denied*, 115 So.2d 416 (Fla. 1959).

131. FLA. R. CIV P. 1.8(d).

132. FLA. STAT. § 52.08 (1961) provides that in a suit on a promissory note the plaintiff need not prove the consideration as part of his affirmative case unless the same is impeached by the defendant under oath. The court held that this did not preclude the defendant from assuming the burden of proof and pleading want of consideration as an affirmative defense, a pleading not under oath.

d. Stricken Defense Waived Where Defendant Did Not Avail Himself of the Right to Amend

The defendants appealed from an adverse final decree in a debtor's action on an alleged usurious contract. One of the points raised on appeal was that the trial court erred in refusing the defendants the right to interpose and prove the defense of unclean hands. The lower court struck the defense "presumably as having been insufficiently set forth"; leave was given to amend the answer. On appeal it was held that since the record showed no such amendment was filed, the issue of unclean hands was waived.[133] True the defendants waived the right to restate this defense, but if the defendants assigned the striking of this defense as error,[134] further amendment to the answer was not necessary. They had the right of review on appeal as to the sufficiency of the defense as they asserted it.

e. Unpleaded Affirmative Defense in Hearing on Summary Judgment

Affirmative defenses not raised in a pleading to a preceding pleading are deemed waived.[135] Notwithstanding a plain reading of the rules, the Florida courts' interpretation of the rule, and the admonition to attorneys in the last *Survey* article, once again a party has attempted to raise and argue an affirmative defense in a hearing on a summary judgment without raising the defense in his answer. The case concerned a claim for a real estate commission wherein the defendant answered denying that the plaintiff's salesman was entitled to the commission. At the summary judgment hearing the defendant raised the unpleaded defense of dual agency. *Held*, that summary judgment for the defendant was improper when based upon an affirmative defense which had not been raised by answer, as it was beyond the scope of the issues raised by pleadings.[136]

f. Unpleaded Affirmative Defenses Supported by Unobjected to Evidence at Trial

The courts have consistently required that affirmative defenses must be raised in the pleadings. The rules provide, in effect, that failure to so plead results in a waiver. In *Garrett v. Oak Hall Club*,[137] the supreme court pointed out that where a defendant had failed to affirmatively plead the

133. Kay v. Amendola, 129 So.2d 170, 172 (Fla. App. 1961).
134. There is no indication in the case as to whether the striking of the defense was or was not assigned as error.
135. FLA. R. CIV. P. 1.8(b), 1.11(h).
136. Lewis v. Tyner, 125 So.2d 328 (Fla. App. 1960).
137. 118 So.2d 633 (Fla. 1960).

defense of laches, it was nevertheless proper for a chancellor to render a decree for a defendant at the final hearing where testimony was offered, and not objected to, proving said defenses. The plaintiffs did not claim surprise or prejudice as a result of the ruling of the trial court which was held to have been based on proof of the issue of laches, or that if afforded an opportunity they could have traversed that issue. Formal amendment, though preferred, is not mandatory.[138]

g. Time When Presented

The defendant's answer and counterclaim in a quiet title suit were filed five years after they were due.[139] Upon plaintiff's failure to reply to the counterclaim the defendant filed a motion for decree pro confesso. Much to the defendant's chagrin, a decree pro confesso for the plaintiff was entered by the clerk because the defendants had failed to file and serve a timely answer. Plaintiff filed a motion to vacate the decree pro confesso — to strike the untimely answer and counterclaim.[140] The defendant then moved to strike this latter motion. On hearing, plaintiff's motion was granted and the court allowed the defendant ten days in which to file a petition to intervene.[141] The interlocutory appeal which was taken by the defendant was dismissed as the defendant could not show harmful error. The appellate court pointed out that after the time provided by the rules[142] for filing of the answer and counterclaim has expired, such pleadings may not thereafter be interposed unless leave of court is first obtained.[143] In the present case, such leave had been neither sought nor obtained, therefore the trial court did not err in striking the answer and counterclaim.

At this stage of the proceedings it would seem appropriate for defendant to motion the court, showing excusable neglect and seek permission to file his answer and counterclaim.[144] The burden of showing that the failure was "the result of excusable neglect" falls upon the defendant. Of course, the court may in its discretion grant or deny this motion.[145]

h. Deferred Hearing on Defenses Raised by Motion

The hearing and determination of defenses, which may be asserted by

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138. FLA. R. CIV. P. 1.15(b) provides for amendments to conform to the evidence.
139. Campbell v. North Fla. Loan Ass'n, 116 So.2d 484 (Fla. App. 1959).
140. It is interesting to note that the plaintiff moved to strike the decree pro confesso entered in his favor. As unusual as it may be, the defendant on appeal argued that the lower court erred in setting aside the decree pro confesso entered against him. Evidently, the opinion does not relate the entire course of the litigation.
141. The appellate court did not discuss the propriety of the lower court's order allowing the defendant 10 days for permission to intervene.
142. FLA. R. CIV. P. 1.11(a).
143. FLA. R. CIV. P. 1.6(b)(2). This rule requires a showing of excusable neglect.
144. *Ibid.*
145. 2 MOORE, FEDERAL PRACTICE ¶ 6.08, at 1481 (2d ed. 1961).

motion,[146] may, in the court's discretion, be deferred until the time of trial.[147] The merits of such defenses, not having been ruled upon below, are not reviewable in an interlocutory appeal taken from an order of court sitting in chancery, which reserves ruling until final hearing.[148]

i. Consolidation and Waiver of Defenses

A defendant may join all defenses available, which may be presented by motion, in one motion.[149] If a defendant does not employ motion practice, he may present his defense along with affirmative defenses in his answer.[150] A defendant who files a motion which questions the jurisdiction of the court over his person does not waive such objection by coupling it with other motions which are addressed to the merits of the cause.[151]

The appellant-plaintiff sought foreclosure of a mechanic's lien. The defendant moved to dismiss for lack of jurisdiction over his person. The chancellor's order found the complaint defective as exhibits recited in the complaint were absent. The plaintiff was given leave to amend and file his exhibits and to make proper service of the amended complaint. The plaintiff complied with the order and the defendant filed a second motion to dismiss, but he did not raise the question of lack of jurisdiction over his person. The motion was denied and the defendant filed an answer and a counterclaim.[152]

Later the chancellor dissolved the mechanic's lien and transferred the cause to the law side of the court. After transfer, the defendant moved to dismiss for lack of jurisdiction over the person. The motion was granted and an appeal followed. *Held*, reversed; the defense was waived by not being raised at the same time as the challenge to the merits was interposed to the second amended complaint. In addition thereto defendant sought affirmative relief via his counterclaim. The transfer gave no new right to object to jurisdiction over the person.

It is to be noted that the defendant, employing motion practice, moved to dismiss for failure to state a cause of action and for lack of jurisdiction

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146. FLA. R. CIV. P. 1.11(b) enumerates seven defenses which may be raised by motion.

147. FLA. R. CIV. P. 1.11(d).

148. Plumbing Indus. Program, Inc. v. McCormick, 115 So.2d 708 (Fla. App. 1959). Whether the holding in this case would be applicable to interlocutory appeals at law relating to venue or jurisdiction over the person is unknown. However, it is submitted that logically the same result should occur.

149. FLA. R. CIV. P. 1.11(g). "May" in this context means "must." See FLA. R. CIV. P. 1.11(h).

150. FLA. R. CIV. P. 1.11(g).

151. FLA. R. CIV. P. 1.11(b), (g); Huffman v. Heagy, 122 So.2d 335 (Fla. App. 1960).

152. Visioneering Concrete Constr. Co. v. Rogers, 120 So.2d 644 (Fla. App. 1960).

over his person. The opinion of the appellate court does not disclose the disposition of the motion to dismiss for lack of jurisdiction over the person. Thus, there are two possible interpretations of the case:

(1) that the lower court ruled on the motion (2) that the lower court failed to dispose of the motion.

It is possible to argue that the court implicitly ruled upon the motion in favor of the defendant. However, if such was the case, then how could the defendant waive this objection when he has had a ruling of the court? Evidently this was not the case.

It must be assumed that the lower court felt no compulsion to rule upon this objection because the complaint was to be dismissed on other grounds (admittedly without prejudice). In all probability this was the case. The problem then presented squarely to the court, was what must an attorney do to maintain his objection to jurisdiction over the person after the court has initially failed, refused or ignored it? The case could well stand for the proposition that a motion directed to a second amended complaint must restate all defenses not expressly ruled upon or found in a motion directed toward the complaint originally dismissed.

It should be noted that the appellate court pointed out that the defendant took additional action not compatible with a motion directed to lack of jurisdiction over the person. This dicta could most certainly be good authority prior to the adoption of the Florida Rules of Civil Procedure. This action of the defendant would then have been considered a common law waiver (general appearance). The action that the appellate court complained of was the request for affirmative relief (a counterclaim). The Florida Rules specifically allow the defense of lack of jurisdiction over the person to be made by motion or answer at the option of the pleader. If indeed the pleader exercises his option, and raises the defense by answer, certainly he can not have waived this objection if he, in addition, asks for affirmative relief as required by the rules.

One possible reconciliation of the case is to assume that the equity court took a third course of action, that they had rejected the defendant's objection to jurisdiction. In such a case, the court would be eminently correct in holding that the objection could not again be raised, merely because the cause was transferred from the equity side of the court to the law side.

One further possibility remains. The defendant in this case was sued twice. It could well be that the objection he now attempted to argue was directed to the service of the second amended complaint. If such was the case, then the appellate court correctly ruled that the defendant waived

his objection by not joining it in his motion to dismiss the second amended complaint.[153]

An indispensable party, the state comptroller, not joined in a suit for an injunction against a sheriff to prevent execution of the collection of delinquent sales taxes due the comptroller, perfected an appeal from an order which refused to vacate the final decree.[154] On remand of the cause an amendment was filed and served on the comptroller as a party defendant, who then moved to dismiss the case for want of jurisdiction over his person since he had not originally been served with process nor with copy of the original complaint. It was held that the comptroller by moving to vacate the initial decree, by requesting further proceeding, and by appealing from the denial thereof, had brought himself within the jurisdiction of the court.[155]

j. Amendment of Answer to State Defense or Counterclaim

Though the rules require that a defense or counterclaim must be asserted by a defendant no later than the answer, the proviso must be read in the light of the rules for amendment.[156] Illustrative is the case of *Chaachou v. Chaachou*.[157] The appellate court, in reversing the lower court, held that the defendant in a divorce action pending nearly seven years should be permitted to amend his answer to assert a counterclaim for divorce, even though the motion was made a month before testimony was set to be taken. After so much past delay, postponement would be no hardship when it is deemed necessary "in the furtherance of justice."[158]

4. COUNTERCLAIMS

A defendant must state in or with his answer any claim that he has against the plaintiff which arises out of the same transaction or occurrence.[159] In addition, a defendant has the right to assert at the time of serving his answer any claim against plaintiff, within the jurisdiction of the court, which does not arise out of the transaction or occurrence that is the subject matter of the plaintiff's claim.

In a suit for an accounting the trial court struck a portion of the defendant's counterclaim which sounded in tort for damages on account of slander. If this part of the counterclaim were compulsory it would have

153. FLA. R. CIV. P. 1.11(b).
154. Green v. Hood, 98 So.2d 488 (Fla. 1957).
155. Green v. Hood, 120 So.2d 223 (Fla. App. 1960).
156. FLA. R. CIV. P. 1.11(h); 2 MOORE, FEDERAL PRACTICE ¶ 12.23, at 2327 (2d ed. 1961).
157. 118 So.2d 73 (Fla. App.), *cert. denied*, 122 So.2d 408 (Fla. 1960).
158. FLA. R. CIV. P. 1.15(c).
159. FLA. R. CIV. P. 1.13(1); Sarkady v. McGuire, 113 So.2d 446 (Fla. App. 1959).

to be pleaded even though the accounting is in chancery and the slander is a legal claim. The appellate court stated that "at the least" the counterclaim was permissive but even so the defendant had an absolute right to assert it.[160]

The defendant was held to have the option of asserting claims against the plaintiff which do not arise out of the same transaction or occurrence and when exercised leave of court is not a prerequisite nor does the court have any discretion to deny the pleading of a permissive counterclaim, save for two situations.[161] In reversing the lower court it was held "that defendant had the right to file his counterclaim for slander, even though same was legal, on the chancery side of the court where the complaint was for an accounting."[162] Since neither party had requested a jury trial as to the legal counterclaim the chancellor in his discretion could try all issues without distinction in one hearing or order separate trials.[163] The accounting phase of the suit had been concluded without error; therefore, on remand a separate trial, held by the chancellor, was to be had and the entry of a final decree should be deferred until the disposition of the counterclaim and the result should be incorporated with the accounting determination.

a. Bringing in Additional Parties to a Counterclaim or Cross-Claim

Where an additional party to a counterclaim or a cross-claim is sought to be brought in[164] the counterclaimant or cross-claimant should serve and file his pleadings and secure an order from the court.[165] If the court cannot acquire jurisdiction over the person of the additional party it should dismiss the cross-action.

In an action wherein certain claims of ownership of a boat were asserted, the defendant answered and counterclaimed against the plaintiff and filed a "cross-claim" against the appellant, an officer of the plaintiff's corporation.[166] The appellate court stated that the defendant also filed a motion to join the appellant and the plaintiff's corporation as co-defendants under the cross-action. The additional party, appellant, a nonresident of Florida, filed a motion to dismiss for lack of jurisdiction over his person. No service had been made or attempted. On hearing the trial court granted defendant's motion to bring in the additional party and denied the addi-

160. Jones-Mahoney Corp. v. C. A. Fielland, Inc., 114 So.2d 18 (Fla. App. 1959); 3 MOORE, FEDERAL PRACTICE ¶ 13.18, at 48 (2d ed. 1948).
161. FLA. R. CIV. P. 1.13(5), (6).
162. 114 So.2d at 20.
163. FLA. R. CIV. P. 1.13(9).
164. FLA. R. CIV. P. 1.13(8).
165. 2 MOORE, FEDERAL PRACTICE ¶ 5.04, at 1333 (2d ed. 1961); 3 MOORE, FEDERAL PRACTICE ¶ 13.39, at 101 (2d ed. 1948).
166. Cournand v. Lucor Corp., 114 So.2d 733 (Fla. App. 1959).

tional party's motion to dismiss for lack of jurisdiction over his person. The trial judge's order reflected that he was well aware that service had not as yet, and in fact, could not be perfected. Before issuing this order the court, in accordance with the rule,[167] should have ascertained whether or not service could have been made. Subsequently the third party appeared and moved to vacate the order, or in the alternative have the court rule whether he would be immune from service of process if he appeared to testify for the plaintiff. The trial court denied the motion to vacate and declined to rule on the immunity question.

On appeal from the two orders, *held*, reversed; and that "upon recognizing the lack of jurisdiction over the appellant . . . the chancellor should have dismissed the cross-bill unless the circumstances justified the chancellor in his discretion to defer ruling on the motion until the trial of the original proceeding."[168]

An interesting situation occurs when one fails as the defendant in a first suit to assert a counterclaim against the plaintiff and bring in an additional party thereto. In *Pesce v. Linaido*[169] a motorist sued the driver and owner of the other vehicle for injuries received in an automobile collision. The defendant's answer set up the affirmative defense that the minor driver, in another action, had sued the plaintiff for negligently causing his injuries and the plaintiff had filed an answer but no counterclaim in this cause as required.[170] The defendants also raised the affirmative defenses of estoppel by judgment and res judicata. In the first suit a confession judgment had been entered for the minor driver and had been satisfied. In this suit the motorist's insurance carrier conducted the defense. The court held that even though it was a friendly suit the rules of compulsory counterclaim controlled and barred this action against the driver. In the instant case summary judgment was also granted for the owner, who though not a party to the first suit could have been made a party.[171] The owner could not be held liable unless the driver were negligent.[172]

5. STRIKING SHAM, IRRELEVANT AND IMMATERIAL PLEADINGS

The court has the power to strike and dismiss a cause where upon

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167. FLA. R. CIV. P. 1.13(8).

168. 114 So.2d at 736 referring to FLA. R. CIV. P. 1.11(d). FLA. R. CIV. P. 1.13(8) provides that when additional parties are sought to be brought in the court shall order them to be brought in as defendants if jurisdiction of them can be obtained. The appellate court's reference to 1.11(d) would appear not to be applicable to 1.13(8) as the jurisdictional determination necessarily precedes the order permitting the additional party.

169. 123 So.2d 747 (Fla. App. 1960), 15 U. MIAMI L. REV. 447 (1961).

170. FLA. R. CIV. P. 1.13(1).

171. FLA. R. CIV. P. 1.13(8).

172. The dissenting judge stated that the civil court of record proceedings pursuant to FLA. STAT. § 45.02 (1961) were in the nature of an approval of a settlement and not subject to the compulsory counterclaim rule. 123 So.2d at 750.

hearing it affirmatively appears by affidavit and testimony[173] that the plaintiff's allegations were a sham.[174] The court also has the power to strike any pleading or part thereof which is scandalous, impertinent, irrelevant or immaterial.[175]

6. AMENDED AND SUPPLEMENTAL PLEADINGS

A party may amend his pleadings once as a matter of course any time before the responsive pleading is served. If no responsive pleading is permitted and the action has not been placed on the trial calendar an amendment may be made within twenty days.[176] After this time leave should be freely given by the court at any time in the furtherance of justice.[177] In the much litigated *Chaachou v. Chaachou*[178] case, the appellate court held that permission should be granted the defendant nearly seven years after the commencement of the divorce action, to amend his answer to assert a defense and a counterclaim.

If upon trial issues not raised by the pleadings are tried by the express or implied consent of the parties, they are treated as if they had been pleaded.[179] An interpretation and discretionary problem arises when counsel objects on trial to issues not pleaded. In *Klein v. Klein*[180] a wife sought to have the court adopt a New York divorce decree, as modified, and to enforce the same. The chancellor on final hearing refused to enforce the decree on the ground of fraud. The defense of fraud had not been raised in the answer and the plaintiff objected to the introduction of testimony. The appellate court found no abuse of discretion on the part of the chancellor under the authority of the rule.[181] However, in a law action the appellate court found an abuse of the trial judge's discretion when the amendment on trial changed the theory of recovery.[182] It is suggested that the better practice is to permit the amendment even though it involves a change in the nature of the cause of action, or the theory of the action, so long as the opposing party has not been prejudiced in presenting his case.[183]

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173. Though testimony is admissible upon a hearing to determine a motion to strike on the grounds of sham, it appears that the Florida position may be that testimony is not admissible in support of or in opposition to a motion for summary judgment. Odgen Trucking Co. v. Heller Bros. & Co., 130 So.2d 295, 297 (Fla. App. 1961); Fish Carburetor Corp. v. Great Am. Ins. Co., 125 So.2d 889, 894 (Fla. App. 1961).

174. Riddle Airline, Inc. v. Mann, 124 So.2d 19 (Fla. App. 1960).

175. FLA. R. CIV. P. 1.14(c); Aitkins v. Atwood, 124 So.2d 31 (Fla. App. 1960).

176. FLA. R. CIV. P. 1.15(a).

177. FLA. R. CIV. P. 1.15(e).

178. 118 So.2d 73 (Fla. App. 1960). See also Riddle Airlines, Inc. v. Mann, 124 So.2d 19 (Fla. App. 1960).

179. Garrett v. Oak Hall Club, 118 So.2d 633 (Fla. 1960). See text at note 137 *supra*.

180. 113 So.2d 855 (Fla. App.), *cert. denied*, 116 So.2d 773 (Fla. 1959).

181. FLA. R. CIV. P. 1.15(b).

182. Tucker v. Daugherty, 122 So.2d 230 (Fla. App.), *cert. denied*, 125 So.2d 878 (Fla. 1960).

183. 3 MOORE, FEDERAL PRACTICE ¶ 15.13, at 843 (2d ed. 1948).

G. *Pretrial Conference - Surveillance Films and Order of Modification*

In a negligence action, in which the alleged injury was permanent in nature, plaintiff's counsel knew that the defense had surveillance films of the injured party. At the pretrial conference counsel moved and was granted an order for production.[184] On appeal, *held*, reversed; the trial judge did not have authority to require production of surveillance movies made of the injured party by the defendant.[185] To require the production of an admitted work product of a party at pretrial would destroy the possible protection afforded such party by provision of Rule 1.28, Florida Rules of Civil Procedure.[186] It is suggested that to protect from honest mistakes that the judge at pretrial, or a party via interrogatories, be able to obtain the names of impeaching witnesses, and if surveillance films have been taken the date of the taking. Then prior to their use at trial the jury may be excused and the films may be viewed by both parties.

In *Sappington v. Town Properties, Inc.*[187] a salesman sought a commission which a broker allegedly owed to him. The defendant denied that the plaintiff had participated in the sale. The pretrial conference order contained admissions made by the defendant, including the fact that the plaintiff partially procured the sale. Counsel for the defense, on the day of trial, moved to modify the pretrial order and to delete the admission.[188] The trial judge granted the motion and gave plaintiff's counsel the option of a continuance. Plaintiff declined the continuance, and on appeal from an adverse judgment assigned as error the modification order. In affirming, the district court of appeal stated:

> Although pretrial orders do control the subsequent course of action of the case, the trial judge at his discretion may modify such pretrial orders, so as not to stultify the purpose of the trial, which is to give justice to all parties before the court.[189]

H. *Parties*

1. NECESSITY OF GUARDIAN IN SUIT AGAINST AN INFANT

The defendant appealed from an adverse judgment in a bastardy proceeding. The defendant, a nineteen-year-old minor, self-supporting and

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184. Plaintiff conceded that movies are not subject to production (FLA. R. CIV. P. 1.28) and that they would not be subject to production at any time if not intended for use at trial.

185. Collier v. McKesson, 121 So.2d 673 (Fla. App. 1960).

186. *Id.* at 675.

187. 126 So.2d 906 (Fla. App. 1961).

188. 3 MOORE, FEDERAL PRACTICE ¶ 16.20, at 1130 (2d ed. 1948).

189. 126 So.2d at 908.

mature, was represented by competent counsel. Neither counsel nor the trial judge considered the necessity of appointing a guardian ad litem. The failure to appoint a guardian ad litem was not assigned as error on appeal and was first injected into the case in the appellant's brief. There was no prejudice or miscarriage of justice as a result of this oversight. Even so, the majority of the court on appeal vacated the judgment holding: "Failure to follow the rule of procedure here invoked[190] is as restrictive upon the power of the trial court to render a decree as where jurisdiction is lacking."[191] The trial court was under a duty to comply with the mandatory language of the rule even though not requested to do so by counsel.

2. DROPPING PARTIES

Plaintiff filed a notice of dismissal as to two of three defendants before an answer or motion for summary judgment were interposed.[192] The remaining defendant answered. Plaintiff then sought dismissal without prejudice[193] which was denied; leave was granted plaintiff to file an amended complaint. The defendant answered the amended complaint, which had named it sole defendant, and asserted a counterclaim against the plaintiff and a cross-claim against the original co-defendants. A decree pro confesso and final decree were entered on the cross-claim and the defendant prevailed on the counterclaim. In reversing the chancellor for failure to set aside the decree pro confesso and final decree against the appealing "co-defendant," the court held that the proper method for dropping parties is by motion.[194] The voluntary dismissal rule is not applicable to multiparty litigation where some but not all defendants are sought to be dropped.[195] Since the plaintiff's amended complaint sought relief against only one defendant the court lacked jurisdiction over the person to entertain the cross-claim.[196]

3. SUBSTITUTION OF PARTIES – TRANSFER OF INTEREST

Death and incompetency and the necessary substitution thereunder are distinguishable from the desirability of substitution following a transfer of interest during the litigation. Substitution under the latter does not affect substantive rights and may under some circumstances be unnecessary; the determination is discretionary. In a contract action testimony during trial revealed that the plaintiff corporation had transferred its interest in the contract claim in litigation. The plaintiff offered to substitute as

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190. FLA. R. CIV. P. 1.17(b).
191. Brown v. Ripley, 119 So.2d 712, 717 (Fla. App. 1960).
192. FLA. R. CIV. P. 1.35(a)(1)(i).
193. FLA. R. CIV. P. 1.35(a)(2).
194. FLA. R. CIV. P. 1.18.
195. FLA. R. CIV. P. 1.35(a)(1)(i); Shannon v. McBride, 105 So.2d 16 (Fla. App. 1958).
196. Scott v. Permacrete, Inc., 124 So.2d 887 (Fla. App. 1960).

party plaintiff the assignee. The trial court rejected the offer and granted the defendant's motion for a directed verdict on the ground that the plaintiff had no interest in the claim sued upon. In reversing the final judgment entered on the directed verdict, the court held that two alternatives are presented where there is a transfer of interest pending trial. "The action may be continued in the name of the original party, or the court may upon application allow substitution of the transferee."[197] The trial court was without discretion to terminate the action and enter adverse judgment on the merits solely because the transfer occurred.

I. *Dismissal of Actions*

1. MULTIDEFENDANTS AND VOLUNTARY DISMISSAL BY PLAINTIFF

Except in actions in replevin or proceedings wherein property has been seized or is in the custody of the court,[198] a plaintiff may abandon his suit at any time without order of the court by filing a notice of dismissal before service by the adverse party of an answer or a motion for summary judgment.[199] The problem arises in cases wherein multidefendants are being sued and the plaintiff wishes to dismiss the lawsuit as to some but not all of the defendants or in the case wherein one or more of the defendants has answered and the plaintiff is now precluded from using notice dismissal under the rule.

In *Scott v. Permacrete, Inc.*[200] the court held that the voluntary dismissal by the plaintiff, notice dismissal, was available only as to an entire action or controversy and the proper method of dropping parties is to move and procure an order of court dismissing a complaint as to the designated defendant or defendants under Rule 1.18. Though notice dismissal as to two of three defendants was not effectual to eliminate them from the lawsuit, the court held that when the plaintiff filed an amended complaint solely against the remaining third defendant the other two were deleted as parties and no longer subject to the court's jurisdiction. Service by mail of the cross-claim was ineffectual and the decree pro confesso and final decree were nullities. The chancellor erred in refusing to vacate and set aside the decree pro confesso and the final decree upon Scott's timely motion seeking same.[201]

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197. Miami Airlines, Inc. v. Webb, 114 So.2d 361, 363 (Fla. App. 1959).

198. FLA. R. CIV. P. 1.35(a)(1), as amended by 139 So.2d 129 (Fla. 1962), effective July 1, 1962.

199. FLA. R. CIV. P. 1.35(a)(1). This right is limited by the "two dismissal rule." See Crump v. Gold House Restaurants, 96 So.2d 215 (Fla. 1957), 14 U. MIAMI L. REV. 262 (1959).

200. 124 So.2d 887 (Fla. App. 1960).

201. *Ibid.* For cases construing comparable Federal Rule 41, see 5 MOORE, FEDERAL PRACTICE ¶ 41.02 (Supp. 1961, at 40 n.a.).

The day before trial of a chancery suit, in which a jury trial was authorized, the plaintiff wired counsel stating she was ill in California and requested a ninety day continuance. Prior to the jury being empaneled the plaintiff's counsel requested a voluntary non-suit[202] and defendant moved for a dismissal with prejudice. The chancellor denied the former and granted the latter, whereupon the plaintiff appealed. On appeal, *held*, affirmed; the non-suit provision is generally applicable to lawsuits but even assuming it to be applicable in this case the case was not "on trial." The court went on to hold that a plaintiff in a chancery proceeding does not have an absolute right to a dismissal of his action after the filing of the defendant's answer or motion for summary judgment, whichever comes first; and, that the chancellor had not abused his discretion in dismissing the case with prejudice.[203]

2. INVOLUNTARY DISMISSAL FOR FAILURE TO PROSECUTE

A dismissal for lack of prosecution under the statute[204] has been held not to constitute an adjudication on the merits under the rules[205] so as to bar a subsequent action. In *Yinger v. Kasow*[206] the trial judge granted a summary judgment upon the theory that the defendant was entitled to judgment as a matter of law as the result of prior dismissal of said action for lack of prosecution; the district court reversed.

This is not to say or imply that the issue is foreclosed or resolved in Florida. To the contrary the issue is questionable as the result of the March 21st, 1962 amendment to the rules.[207] In amending the rule on involuntary dismissal, the court added: "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him."[208] The first sentence of this rule now parallels its federal counterpart.[209] Florida courts look to federal court interpretations in cases of parallel rules.[210] The federal courts bar the bringing of a subsequent action when the initial action was dismissed for failure to prosecute.[211]

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202. FLA. STAT. § 54.09 (1961).

203. Welgoss v. End, 112 So.2d 390 (Fla. App. 1959). The status of the non-suit in Florida is left in doubt by the amending of FLA. R. CIV. P. 1.35(b) by 139 So.2d 129 (Fla. 1962). The phrase "that nothing stated herein shall preclude a non-suit from being taken pursuant to any applicable statute" is omitted from the amended rule.

204. FLA. STAT. § 45.19 (1961).

205. FLA. R. CIV. P. 1.35(b).

206. 123 So.2d 758 (Fla. App. 1960).

207. *In re* Fla. R. Civ. P., 139 So.2d 129 (Fla. 1962), effective July 1, 1962.

208. *Id.* at 130.

209. FED. R. CIV. P. 41(b).

210. Crump v. Gold House Restaurants, Inc., 96 So.2d 215, 218 (Fla. 1957); Hammac v. Windham, 119 So.2d 822, 825 (Fla. App. 1960).

211. 5 MOORE, FEDERAL PRACTICE ¶ 41.11[2], at 1036 (2d ed. 1948).

3. MISUSED NOMENCLATURE NOT REVERSIBLE ERROR

On trial of a suit in the nature of a creditor's bill the defendant moved for a "directed verdict" at the conclusion of the plaintiff's case. The chancellor granted this motion and the appeal was taken from the final decree entered thereon. On appeal it was held that the plaintiffs failed to establish a prima facie case[212] and that the misnamed motion[213] did not afford reversible error. The effect is the same as had the proper motion for the involuntary dismissal been made.[214]

4. RIGHT OF DEFENDANTS TO PRESENT PROOF AFTER MOTION DENIED

In prior equity practice a motion to dismiss at the conclusion of the plaintiff's evidence was not permitted unless the defendant elected to submit the cause for entry of final judgment on the plaintiff's proof only.[215] Under the rules[216] involuntary dismissal procedure is now the same for suits in equity as in actions at law. Therefore a defendant in either equity or law runs no risk of having his proof cut off if he fails on a motion to dismiss at the conclusion of the plaintiff's case.[217]

5. INVOLUNTARY DISMISSAL FOR INSUFFICIENCY OF FACTS – RES JUDICATA

A plaintiff passenger instituted a suit to recover for personal injuries under the guest statute.[218] The trial court granted the defendant operator's motion to dismiss the plaintiff's original and amended complaint for failure to state a cause of action. On appeal the dismissal was affirmed without opinion.[219] Subsequently, the plaintiff instituted a second suit on the same occurrence and alleged facts with respect to the issue of gross negligence which were not presented in either of the complaints filed in the first suit. The defendant moved for, and was granted, a summary judgment based upon the defense of res judicata, as pleaded in his answer.

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212. Nelson v. Cravero Constructors, Inc., 117 So.2d 764 (Fla. App. 1960). The plaintiff attempted to assert a statute in support of his complaint for the first time on appeal. The appellate court refused to consider its application as it was not present at the lower court.

213. FLA. R. CIV. P. 2.7(a) is applicable solely to actions at law. For a comparison of the federal counterpart of 2.7(a) and 1.35(b) see 5 MOORE, FEDERAL PRACTICE ¶ 41.13[3], at 1043 (2d ed. 1948).

214. FLA. R. CIV. P. 1.35(b).

215. *In re* Estate of Mollard v. Austin, 101 So.2d 880 (Fla. App. 1957).

216. FLA. R. CIV. P. 1.35(b).

217. Janczewski v. Janczewski, 114 So.2d 428 (Fla. App. 1959). This decision is in conflict with *In re Estate of Mollard*, *supra* note 215. See also Abernathy v. Gruppo, 119 So.2d 398 (Fla. App. 1960).

218. FLA. STAT. § 320.59 (1961).

219. Hammac v. Windham, 108 So.2d 328 (Fla. App. 1959).

In affirming the court held that under Rule 1.35(b) the final judgment based upon an order granting a motion to dismiss a complaint (or counterclaim) for failure to state a cause of action is a final adjudication on the merits, and will bar a subsequent suit on the same cause of action between the same parties unless it affirmatively appears from the order of dismissal that it is made without prejudice.[220]

The court rejected the reasoning of the *Kautzmann v. James* case[221] on the ground that the supreme court did not consider Rule 1.35(b) in reaching its conclusion. Mr. Justice Sebring speaking for the court in *Kautzmann* stated:

> As to when a final judgment on demurrer is conclusive on the merits, the test is: Does the insufficiency of the complaint relate to the *facts* alleged or to the *allegation* of the facts. If the defect is in the facts affirmatively set forth, the judgment is upon the merits; if there is merely an insufficiency in the allegations, the judgment is not conclusive on the merits.[222]

The Restatement of Judgments is in accord with this position.[223]

J. *Depositions and Discovery*

1. NOTICE OF TAKING DEPOSITIONS

A plaintiff appealed from an adverse decree rendered in his divorce suit. He urged that the defendant's notice of taking of the depositions was defective because the reason for taking was not recited. The notice was for depositions pending the action and the reason for taking is not one of the elements of notice required.[224] If the deposition is one to perpetuate testimony either before action or pending appeal then the notice must recite the reasons therefor.[225]

2. USE OF DEPOSITIONS

One of the two assignments of error, on appeal from an adverse judgment in a personal injury action, was that the trial court erred in refusing to allow rebuttal evidence by the plaintiff in the form of a deposition.

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220. Hammac v. Windham, 119 So.2d 822 (Fla. App.), *cert. denied*, 122 So.2d 408 (Fla. 1960).

221. 66 So.2d 36 (Fla. 1953). See also Prall v. Prall, 58 Fla. 496, 50 So. 867 (1909).

222. 66 So.2d at 38.

223. RESTATEMENT, JUDGMENTS § 50 (1942). See also 2 FREEMAN, JUDGMENTS § 747 (5th ed. 1925).

224. Vecsey v. Vecsey, 115 So.2d 719 (Fla. App. 1959).

225. FLA. R. CIV. P. 1.22. Rule 1.32 had a similar requirement, but depositions de bene esse are abolished. *In re* Amendments to Fla. R. Civ. P., 131 So.2d 475, 476 (Fla. 1961), effective October 1, 1961.

Allegedly, the deposition would have refuted the defendant's testimony that she had stopped for a stop sign at the collision intersection. In affirming,[226] the court held that the evidence should have been part of the plaintiff's case-in-chief. In addition, there was no showing that the deponent, a resident of the county of suit, was unable to appear in person as a witness at the trial.[227]

In a workmen's compensation proceeding, the deputy commissioner requested the New York Compensation Board to take the testimony of a claimant and other witnesses. The appellate court found no authority in the discovery rules for a court to order depositions taken on its own motion. The Workmen's Compensation Law[228] relating to depositions gave no authority to request a New York board to take testimony for use in a Florida proceeding.[229]

3. DISPUTE AS TO WAIVER OF SIGNING

The rules[230] require that when a deposition is transcribed it shall be submitted to the witness for examination and shall be read to or by him unless waived; the deposition shall then be signed by the witness unless by stipulation the signing is waived, or the witness is ill, or cannot be found or refuses to sign. If a dispute arises as to the signing of the deposition the controversy is determined by the judge and not by the jury.[231] It is suggested that errors and irregularities in the manner in which the deposition is signed are waived unless a motion is made with reasonable promptness.[232]

4. SCOPE OF DISCOVERY – "WORK PRODUCT"

a. Adverse Parties' Experts

The decision in *Hickman v. Taylor*,[233] and its Florida prototypes,[234] did not settle the question as to the right of a party to take the deposition of, or inquire into reports prepared by an expert engaged by, or in the employ of, the adverse party. The federal authorities are divided on the question of the extent, type and circumstances wherein pretrial examination of expert witnesses is available.[235]

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226. Driscoll v. Morris, 114 So.2d 314 (Fla. App. 1959).
227. FLA. R. CIV. P. 1.21(d)(3).
228. FLA. STAT. ch. 440 (1961).
229. Paul Smith Constr. Co. v. Pitts, 114 So.2d 417 (Fla. App. 1959).
230. FLA. R. CIV. P. 1.24(e).
231. State Farm Mut. Auto. Ins. Co. v. Ganz, 119 So.2d 319 (Fla. App. 1960).
232. FLA. R. CIV. P. 1.24(e) must be read in conjunction with Rule 1.26(d). 4 MOORE, FEDERAL PRACTICE ¶ 30.20, at 2053, ¶ 32.01, at 2202 (2d ed. 1950). See also FLA. ATT'Y GEN. OP. 060-113 (July 6, 1960).
233. 329 U.S. 495 (1947).
234. Miami Transit Co. v. Hurns, 46 So.2d 390 (Fla. 1950); Atlantic Coast Line R. R. v. Allen, 40 So.2d 115 (Fla. 1949).
235. 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 652, at 118 (1961); 4 MOORE, FEDERAL PRACTICE ¶ 26.24, at 1152 (2d ed. 1950).

Florida district courts of appeal, in this regard, had prohibited a landowner in an eminent domain proceeding from requiring the condemnor to produce for inspection and examination[236] all surveys, appraisals and related matter which reflected the valuation of the defendant's land. The court was of the opinion that the information sought was "work product" and the information was as readily available to the landowner as it was to the condemnor.[237] Subsequently, this reasoning was followed to prohibit a landowner from taking the deposition[238] of three appraisers, two of whom were court appointed. One of the two court appointed appraisers, as well as the third appraiser, was employed as an expert by the condemnor. It was held that the work product doctrine protected the road department in the absence of a showing that the interests of justice would be thwarted by refusal of discovery and that the information sought was not available to the defendant from some other source.[239]

The above-mentioned State Road Department cases were followed in *Ford Motor Co. v. Havee*[240] which held that good cause had not been shown for the production of the defendant's experts' reports. In this personal injury action against the automobile manufacturer it was alleged that the accident occurred because of a defective rod. The defendant's motion for production[241] of the tie rod was granted and after thirty days possession the rod was returned to the plaintiffs. Thereafter, on plaintiff's motion, the trial court ordered production of a copy of a report of the examiners. The appellate court held that the plaintiff did not show that the withholding of the information sought would defeat the interest of justice or that such information sought was not readily available to the plaintiffs; the work product doctrine applied. The result of the case might have been avoided if the trial court had appointed an expert whose findings would have been available to both parties.[242]

Subsequently, and without the intended coverage of this *Survey*, the supreme court quashed the district court of appeal holding which applied the "work product" to eminent domain proceedings.[243] It held that the district court of appeal did not have jurisdiction to review by certiorari the

236. FLA. R. CIV. P. 1.28.

237. The court recognized that a different point from that in *Hickman v. Taylor* was presented but determined that the same logic controlled. State Road Dep't v. Shell, 122 So.2d 215, 217 (Fla. App. 1960), *rev'd*, 135 So.2d 857 (Fla. 1961). See also Friedenthal, *Discovery and Use of An Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

238. FLA. R. CIV. P. 1.24.

239. State Road Dep't v. Cline, 122 So.2d 827 (Fla. App. 1960).

240. 123 So.2d 572 (Fla. App. 1960).

241. There was a question whether the inspection arose under FLA. R. CIV. P. 1.28 or 1.29. The court found it immaterial as the expert was court appointed and the "work product" doctrine applied in this case under either rule.

242. 123 So.2d at 575 n.2, 576 n.4; 4 MOORE, FEDERAL PRACTICE ¶ 26.24, at 1152 (2d ed. 1950).

243. Shell v. State Road Dep't, 135 So.2d 857 (Fla. 1961).

interlocutory order at law which required production of surveys, appraisals, and related matter which reflected the valuation of the defendant's land in that the circuit court order was not a departure from essential requirements of law. As the opinion relates to discovery the court said that the "work product" immunity did not apply in eminent domain proceedings because (1) the constitutional mandate makes it incumbent upon the taker to award "just" compensation for the taking and the awarding of compensation which is "just" should be the care of the condemning authority as well as that of the party whose land is being taken;[244] (2) it is unfair to put the unlimited resources of government against a condemnee-taxpayer who in fact contributes to the government's unlimited resources; and (3) disclosure may lead to the "speedy and inexpensive determination" of the case.[245]

5. MOTION TO PRODUCE

a. Timeliness

After the chancellor entered a decree reducing alimony payments, which had been provided for in a final divorce decree, the former wife was unable to sustain a motion to produce income tax returns as no action was "pending."[246] In addition thereto, the court pointed out that the motion was defective in that it did not contain an allegation of good cause.[247]

b. Relevancy

The plaintiff has a right to inspect the books, records and income tax returns of a defendant corporation so long as they are relevant[248] and material to the counterclaim which has been asserted against him. The order of inspection must limit such inspection to those matters which are relevant to the specific issues raised by the claim.[249]

Plaintiff sued in equity to have a lease, under which it had held an aircraft, declared to be a loan arrangement infected with usury. The defendant had retaken the aircraft for alleged nonpayment of rent. The defendant counterclaimed for unpaid monthly rent and additional rent based on the period of operation of the aircraft[250] and sought delivery of various records, not for discovery, but for the use and operation of the aircraft. It was held that the trial court did not have the power to compel

244. FLA. CONST. DECL. OF RIGHTS § 12.
245. FLA. R. CIV. P. A.
246. FLA. R. CIV. P. 1.28.
247. Mack v. Mack, 115 So.2d 447 (Fla. App. 1959).
248. 4 MOORE, FEDERAL PRACTICE ¶ 34.10, at 2458 (2d ed. 1950).
249. Cooper v. Fulton, 117 So.2d 33 (Fla. App. 1960). In a prior appeal production was held to be premature. Cooper v. Fulton, 107 So.2d 798 (Fla. App. 1959), 14 U. MIAMI L. REV. 260, 261 (1959). See 4 MOORE, FEDERAL PRACTICE ¶ 26.18, at 1071 (2d ed. 1950).
250. Plaintiff's complaint was stricken for sham.

production of records which were not relevant to the defendant's counterclaim for rent.[251]

In a companion case[252] the same provisions were involved relating to a different aircraft. A similar equity complaint was also stricken as a sham, leaving again only a legal counterclaim for rent. A similar motion to require delivery of the records was filed by the defendants and was denied. Thereafter the defendants moved for production of the documents and records[253] involved in this case. The appellate court held that the order of production must be restricted to include only those records and documents which revealed evidence of the period of the use of the aircraft for the purposes of establishing the rental value.

One suing for injuries sustained when an allegedly defective restaurant booth bench collapsed was entitled to production of photographs which were in the possession of defendant's counsel or agent. Good cause was shown since the bench had been repaired and the facts portrayed by the photographs were not otherwise available. The record did not disclose any circumstances which might contradict the alleged basis for disclosure.[254] Although the work product doctrine was held to be applicable the court found an exception to the rule.

6. REFUSAL TO ANSWER QUESTIONS ON ORAL DEPOSITION – WORK PRODUCT OF THE AGENT – CHARGE OF COSTS

The defendant upon oral deposition of the plaintiff's investigator inquired as to photographs which had been taken by the investigator. The deponent refused to answer certain questions on the ground that they called for work product of the plaintiff's counsel and their employed investigator. The questions, which he was subsequently ordered to answer, related to reports and communications and the production of the same. On appeal, *held*, reversed; some questions involved work product but other questions relating to photographs of the scene of the accident were proper questions and should have been answered. Therefore the refusal to answer these latter questions subjected the plaintiffs to payment of reasonable expense.[255]

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251. Riddle Airlines, Inc. v. Mann, 123 So.2d 682 (Fla. App. 1960). "We do not hold or imply that the appellees may not, in replevin or in some other proper action or suit, seek a judgment or decree establishing in them a title or right to possession of the records, relating to the aircraft now in their possesssion. And we express no view on the merits of such an issue . . . ." *Id.* at 685.

252. Riddle Airlines, Inc. v. Mann, 123 So.2d 685 (Fla. App. 1960).

253. FLA. R. CIV. P. 1.28.

254. Pierson v. Seale, 128 So.2d 887 (Fla. App. 1961).

255. Goldstein v. Great Atl. & Pac. Tea Co., 118 So.2d 253 (Fla. App. 1960).

7. DEPOSITIONS DE BENE ESSE

By order of the court, effective October 1st, 1961, depositions de bene esse are abolished.[256]

K. *Judgment on the Pleadings and Summary Judgment*

1. JUDGMENT OR DECREE ON THE PLEADINGS

A motion for judgment or decree on the pleadings is not proper until *after the pleadings are closed,* but within such time as not to delay trial.[257] The pleadings are closed after an answer which contains no counterclaim or cross-claim, unless the court orders a reply.[258] If a counterclaim or cross-claim is pleaded, or if the court orders a reply, the pleadings are not closed until a reply or an answer to the cross-claim is served.[259] A default judgment and not a motion for judgment on the pleadings appears to be the correct procedural remedy after a defendant has failed to file an answer, or a plaintiff has failed to file a reply to a counterclaim.

The Supreme Court of Florida has pointed out that the Florida rule on judgment on the pleadings, unlike the federal rule, does not provide for the interchangeability of a motion for judgment on the pleadings with a motion for a summary judgment.[260] This omission from our Florida rules has been applied by two of our district courts of appeal, wherein it was held to have been improper for the trial court, in ruling on a motion for judgment on the pleadings, to consider matter outside of the pleadings.[261]

2. SUMMARY JUDGMENT

a. Introduction

Summary judgment is a device for terminating litigation short of trial and avoiding a useless trial.[262] Depending upon the facts and proofs it may be granted upon all or part of[263] the controversy in litigation. The

256. 132 So.2d 6 (Fla. 1961).
257. FLA. R. CIV. P. 1.11(c).
258. FLA. R. CIV. P. 1.7(a). See 2 MOORE, FEDERAL PRACTICE ¶ 12.15, at 2268 (2d ed. 1961).
259. *Ibid.*
260. Reinhard v. Bliss, 85 So.2d 131, 133 (Fla. 1956).
261. Davis v. Davis, 123 So.2d 377 (Fla. App. 1960); Storer v. Florida Sportservice, Inc., 115 So.2d 433 (Fla. App. 1959); Castner v. Ziemer, 113 So.2d 263 (Fla. App. 1959).
262. General Truck Sales, Inc. v. American Fire & Cas. Co., 100 So.2d 202 (Fla. App. 1958). The trial judge is without authority to condition the entry or denial of a summary judgment upon the condition that a party pay a mechanic's lien and file a bond. Deauville Operating Corp. v. Town & Beach Plumbing Co., 123 So.2d 353 (Fla. App. 1960).
263. FLA. R. CIV. P. 1.36(c), (d) provide for an interlocutory summary judgment on liability or partial summary judgment upon uncontroverted facts. Whittle v. Ellis, 122 So.2d 237 (Fla. App. 1960); Berry v. Pyrofax Gas Corp., 121 So.2d 447 (Fla. App. 1960).

test for determining its propriety is twofold. First, is there a genuine issue of a material fact? Giving every favorable inference[264] to the opposing party, if it appears from the pleadings, admissions, depositions, affidavits, and/or interrogatories that there is or may be a genuine issue of material fact the motion should be denied. Secondly, if there is no genuine issue of material fact, is the moving party, or the nonmoving party,[265] entitled to judgment as a matter of law? The facts must be so clear that nothing remains but a question of law.[266]

b. Summary Judgment Prior to Answer

A motion for a summary judgment by a claimant may be made after the expiration of twenty days from the commencement of the action or after service of such a motion by the adverse party.[267] A defending party may move for a summary judgment any time after the commencement of the action.[268] In an action by a seller for goods allegedly bargained and sold to the buyers, the buyers, before answering, moved for a summary judgment.[269] The trial court entered a summary judgment for the seller and the buyer appealed. In reversing, the court stated:

> In order to justify the entry of the summary judgment before answer filed, it was necessary for the appellee (seller) to clearly demonstrate that a genuine issue of fact could not be presented. A consideration of the affidavits and pleadings leads to the inference that there are several possible legitimate defenses sufficient to raise a genuine issue of a material fact which the appellants (buyers) could or may interpose.[270]

In *Lehew v. Larsen*[271] suit was brought to quiet title to property which had been conveyed to the plaintiff by a tax deed. Prior to the filing of an answer the defendant motioned to dismiss the complaint for failure to state a cause of action.[272] Both parties moved for a summary final decree and the plaintiff's motion was granted. The court reversed on appeal,

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264. Schneider v. K. S. B. Realty & Inv. Corp., 128 So.2d 398 (Fla. App. 1961); Smith v. City of Daytona Beach, 121 So.2d 440 (Fla. App. 1960); Majeske v. Palm Beach Kennel Club, 117 So.2d 531 (Fla. App. 1959), *cert. denied*, 122 So.2d 408 (Fla. 1960); Groner-Youngerman, Inc. v. Denison, 117 So.2d 210, 215 (Fla. App. 1959).

265. Carpineta v. Shields, 70 So.2d 573 (Fla. 1954), 7 U. FLA. L. REV. 335 (1954).

266. Card v. Commercial Bank, 119 So.2d 404, 408 (Fla. App. 1960).

267. FLA. R. CIV. P. 1.36(a).

268. FLA. R. CIV. P. 1.36(b).

269. The filing of a motion for summary judgment appears not to toll the time for filing the answer in Florida. The federal position may differ. 6 MOORE, FEDERAL PRACTICE ¶ 56.08, at 2048 (2d ed. 1953).

270. Goldstein v. Florida Fisherman's Supply Co., 116 So.2d 453, 454 (Fla. App. 1959). The court found that the affidavits raised issues of fact. *Accord*, Coast Cities Coaches, Inc. v. Whyte, 130 So.2d 121, 125 (Fla. App. 1961).

271. 124 So.2d 872 (Fla. App. 1960).

272. The filing of the motion tolls the time for answer. FLA. R. CIV. P. 1.11(a).

holding that the defendant should have been afforded an opportunity to file an answer as her affidavit showed that she might well have a defense.

The Florida position in this area is that a summary judgment should not be granted before the defendant has answered unless it appears clear that an issue of material fact cannot be presented. This is not to say or imply that under proper circumstances a summary judgment may not be properly granted prior to the filing of an answer.

c. Effect of Affirmative Defenses and Setoff on Plaintiff's Motion for a Summary Judgment

The plaintiff's motion for summary judgment was supported with evidentiary matter relating to matters dealt with in the complaint. The defendant asserted affirmative defenses and setoff by way of answer. The plaintiff was held not to be entitled to a summary judgment, even though the defendant filed no matter in opposition, as it had not submitted materials to show no genuine issue of material fact as against the defenses and the setoff.[273]

d. Competent Evidence

Plaintiff's automobile and trailer turned over and crashed, allegedly caused by the passing of the defendant's trailer-tractor unit. Summary judgment on appeal was reversed; the deposition of the plaintiff raised a genuine issue as to whether or not the passage proximately caused the accident. Plaintiff's testimony was that the defendant's "trailer truck passed me so close and so fast that it created such a suction that I thought that the trailer was going to follow him . . . ."[274]

Though the court noted that only competent testimony may be considered in a ruling on a motion for summary judgment it was of the opinion

> that it is an extremely close question as to whether it is of sufficient competence and substance to justify a lawful inference by a jury that the negligence of the defendant proximately caused the plaintiff's injuries . . . [w]e think it more in the interest of the administration of justice and more in keeping with the rules governing the entry of summary judgment to decline to enter a summary judgment and to let the case go to a jury for its determination in its wisdom of the factual issues.[275]

In an automobile collision case, the plaintiff passenger sued the owner of the other vehicle. Upon deposition and in affidavits the operator of

273. Emile v. First Nat'l Bank, 126 So.2d 305 (Fla. App. 1961), citing 6 MOORE, FEDERAL PRACTICE ¶ 56.17[4], at 2177 (2d ed. 1953).
274. Halavin v. Tamiami Trail Tours, Inc., 124 So.2d 746, 748 (Fla. App. 1960).
275. *Id.* at 749.

the defendant's car stated she was driving properly and that the plaintiff's operator failed to stop at the intersection. The operator of the plaintiff passenger's automobile stated that he obeyed the stop sign. Plaintiff's deposition stated that the operator of the vehicle in which she was a passenger did not stop at the intersection. After these depositions and affidavits were of record in support of and in opposition to a motion for summary judgment, plaintiff obtained permission to file an amended complaint which added as co-defendants the operators of both vehicles. The defendants moved for and were granted a summary judgment. The plaintiff appealed, assigning as error only the entry of the summary judgment in favor of the operator and owner of the other vehicle. The affidavit of her operator, wherein he stated that he obeyed the stop sign, was the only instrument offered by the plaintiff to offset the granting of the motion in the trial court. This affidavit was in direct conflict with the plaintiff's deposition wherein she testified that her operator did not stop at the intersection. In affirming, the court held that a party could not change his testimony on deposition by the use of an affidavit of one defendant against another defendant in order to avoid a summary judgment.[276]

The *Kramer v. Landau* case, discussed above, was distinguished in *Pfeiffer v. Shonfeld*.[277] The Pfeiffers sued for personal injuries which occurred as the result of a double rear end collision. The complaint alleged that Mrs. Pfeiffer was injured when her vehicle was struck in the rear by defendant Shonfeld. In the alternative, the compaint pleaded separate and concurrent negligence of the two defendants. It was alleged that an automobile driven by the defendant Stover struck the rear of the Shonfeld automobile at or about the same time as the Shonfeld automobile struck the plaintiff's automobile. In reversing a summary judgment which had been entered in favor of the defendant Stover, the court rejected his contention that the cause should be treated as consisting of two separate and independent causes of action and that as between the plaintiffs and defendant Stover, the plaintiffs were not entitled to the testimony of the defendant Shonfeld, because it is contrary to plaintiff wife's "impression" of how the accident occurred. The plaintiffs were not barred from recovery by the conclusion of the wife on oral deposition that the defendant Stover was not responsible for the accident, where it did not appear that the wife's testimony established nonliability of the defendant, and that the statement relied upon was not based upon observation but a conclusion.

e. Impropriety of Summary Judgment on Trial

In advance of the trial defendant moved for a summary judgment.

276. Kramer v. Landau, 113 So.2d 756 (Fla. App. 1959).
277. 128 So.2d 6 (Fla. App. 1961).

Upon hearing, the motion was denied, with leave to renew it during the trial if applicable. On trial by jury, at the conclusion of the plaintiff's case, the defendant moved for a directed verdict. The trial court entered an order which recited that the defendant's motion for directed verdict would be considered as a renewal of its motion for summary judgment, that the court found no genuine issue of material fact and that the defendant was entitled to summary judgment as a matter of law. The jury was discharged, the final judgment was entered thereon for the defendant and the plaintiff appealed. The judgment was reversed on appeal because a summary judgment is essentially pretrial in character and it is assumed that the trial court based its decision only upon those matters which may be properly considered in passing upon a summary judgment, *viz.*, the pleadings, depositions, admissions and affidavits. The appellate court noted that had the defendant cross-assigned as error the trial court's failure to grant its directed verdict, the appellate court could then have looked to the merits of the motion.[278]

In a conversion action in which a jury trial was demanded, an interlocutory summary judgment as to liability was entered in favor of the plaintiff.[279] At the hearing after the order granting the interlocutory summary judgment, the plaintiff served and filed a motion "for final judgment." The trial court erroneously heard testimony and entered final judgment in a case where a jury had been demanded. On appeal it was reversed and remanded for jury trial on the issue of damages.[280] The plaintiff contended that its motion was one for summary judgment as to the damages. The appellate court rejected this contention because such procedure is not authorized in a litigated cause and the rules do not permit the taking of testimony in a hearing for a summary judgment.[281]

f. Summary Judgment after Appellate Remand

The judgment for the plaintiff in an action against the railroad was reversed on appeal because of the insufficiency of the evidence to support the verdict and judgment.[282] At pretrial conference upon remand, the plaintiff announced that she had no additional evidence which could be adduced on the second trial of her cause which would tend to establish

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278. Fish Carburetor Corp. v. Great Am. Ins. Co., 125 So.2d 889 (Fla. App. 1961). Judge Barns compares a motion for directed verdict and motion for summary judgment in Warring v. Winn-Dixie Stores, 105 So.2d 915 (Fla. App. 1958).

279. Ogden Trucking Co. v. Heller Bros., 130 So.2d 295, 296 (Fla. App. 1961). The interlocutory summary judgment was not assigned as error and therefore was not reviewable.

280. 130 So.2d at 296.

281. The court, citing to 6 MOORE, FEDERAL PRACTICE ¶ 56.11[8], at 2084 (2d ed. 1953), noted that the Florida position differs from the federal because Florida does not have a rule comparable to FED. R. CIV. P. 43(e).

282. Atlantic Coast Line R.R. v. Walker, 113 So.2d 420 (Fla. App. 1959).

liability, or to establish her entitlement to the relief sought. The defendant renewed its motion for summary judgment which was granted. On the second appeal the trial court was affirmed; the court held that the plaintiff's admission established that there was no genuine issue of a material fact to be determined by a jury and summary final judgment was therefore proper.[283] The crucial factor was the admission by counsel that he had no additional testimony to present upon retrial.[284]

If the court denies the motion for summary judgment the order is not reviewable until entry of a final judgment. In *Riedel v. Driscoll*[285] the appellate court reversed the judgment entered upon a verdict as being contrary to the manifest weight of the evidence and found from the record that the evidence overwhelmingly established contributory negligence on the part of the plaintiff. On remand, the defendant's motion for summary judgment was denied. The defendant sought certiorari. The petition was dismissed because the defendant had an adequate remedy by appeal after final judgment to review the trial court's order denying its motion for summary judgment and the record did not reflect that the plaintiff could not adduce new or additional evidence on the retrial of the case.[286]

g. Rehearing after Entry of Summary Judgment

After entry of summary judgment for the defendant in a malpractice action, plaintiff filed a motion for leave to file a second amended complaint; the trial judge correctly ruled that he was without jurisdiction to consider further amendment to the pleadings. In affirming, the court stated "there appears to be no provision in the rules or any other basis of which we are aware that permits the consideration of a motion in the nature of a rehearing upon the entry of a summary judgment."[287]

Effective July 1st, 1962, Rule 2.8, as amended, changes the principle in law actions[288] that rehearings on summary judgment are not available. The amended rule provides:

> A new trial may be granted to all or any of the parties and on all or a part of the issues. On a motion for a rehearing of a summary

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283. Walker v. Atlantic Coast Line R.R., 121 So.2d 713 (Fla. App. 1960).

284. In Riedel v. Driscoll, 127 So.2d 924 (Fla. App. 1961), the same district court of appeal stated, "Had plaintiff's counsel in the *Walker* case not conceded at the pre-trial conference that he had no further evidence to offer on the issue of liability, he would have been entitled to resubmit his case to a jury at a subsequent trial."

285. 124 So.2d 42 (Fla. App. 1960).

286. Riedel v. Driscoll, 127 So.2d 924 (Fla. App. 1961).

287. Marins v. Stang, 124 So.2d 891 (Fla. App. 1960). *Accord*, Albert v. Carey, 120 So.2d 189 (Fla. App.), *cert. denied*, 125 So.2d 873 (Fla. 1960).

288. Rehearing in suits in equity are controlled by FLA. R. CIV. P. 3.16.

> judgment or of matters heard without a jury, the court may open the judgment if one has been entered, take additional testimony and enter a new judgment.[289]

The rule goes on to provide that motion for rehearing shall be served not later than ten days after the rendition of verdict or the *entry of a summary judgment*.[290]

L. *Relief from Judgment, Decrees or Orders*

1. CLERICAL MISTAKES – CORRECTION

Errors in any part of the record are readily correctible at any time either by the court on its own initiative or by motion and notice by any party and as the court orders. In affirming a final decree which impressed a trust upon certain property, the appellate court directed the chancellor to correct the final decree which had, through oversight, failed to include the granting of a divorce.[291]

2. MISTAKES; INADVERTANCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC.

A sweeping procedural addition has been made to Florida law by the amending of the rule on correction of judgment and decrees[292] to include relief from final judgment, decrees or orders. With the exception of the omission of the residual clause,[293] the Florida amended rule[294] is substantially the same as the federal rule.[295]

The addition reads as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect; (2) newly discovered

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289. FLA. R. CIV. P. 2.8(a), as amended, 139 So.2d 129, 131 (Fla. 1962).

290. FLA. R. CIV. P. 2.8(b), as amended, 139 So.2d 129, 131 (Fla. 1962).

291. King v. King, 113 So.2d 242 (Fla. App.), *cert. denied*, 114 So.2d 5 (Fla. 1959); FLA. R. CIV. P. 1.38, now amended and numbered 1.38(a). This paragraph of amended Rule 1.38 has been changed slightly. The second sentence formerly read: "During the pendency of an appeal, such mistakes may be so corrected before the *appeal is entered* . . . ." (Emphasis added.) The words "record on appeal is docketed" have been substituted in lieu of the italicized phrase. 139 So.2d 129, 130 (Fla. 1962). The federal counterpart is contained in FED. R. CIV. P. 60(a). See 6 MOORE, FEDERAL PRACTICE ¶ 60.05-.08 (2d ed. 1953).

292. FLA. R. CIV. P. 1.38 in 3 FLA. STAT. 3599 (1961).

293. FED. R. CIV. P. 60(b)(6) provides "or (6) any other reason justifying relief from the operation of the judgment." See 7 MOORE, FEDERAL PRACTICE ¶ 60.27[1], at 293 (2d ed. 1955).

294. FLA. R. CIV. 1.38, as amended, 139 So.2d 129, 130-31 (Fla. 1962).

295. FED. R. CIV. P. 60(b). For a comprehensive discussion of the federal rule see 6 & 7 MOORE, FEDERAL PRACTICE ch. 60 (2d ed.).

evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment or decree is void; (5) the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding, or to set aside a judgment or decree for fraud upon the court.

Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, 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.[296]

M. *Transfers of Actions Erroneously Begun*

1. LAW AND EQUITY TRANSFERS

As long as Florida maintains two sides, equity and law, to its trial court of general jurisdiction, the problem of which side of the court has jurisdiction will continue to arise. The rules[297] seek to ameliorate the problems in this area by providing for transfer of an action erroneously begun on either the law or the equity side of the court to the proper side of the court.[298] Transfer is the proper device and not dismissal when the cause is found to be brought on the wrong side of the court.[299]

The plaintiff's complaint in chancery sought to establish an equitable lien on the property, or in the alternative, for the sale of the property. The defendant's motion to dismiss for failure to state a cause of action was

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296. FLA. R. CIV. P. 1.38(b), as amended, 139 So.2d 129, 130-31 (Fla. 1962).

297. FLA. R. CIV. P. 1.39(a).

298. Adjmi v. Pankonin, 126 So.2d 153 (Fla. App.), *cert. denied*, 129 So.2d 141 (Fla. 1961); Jamerson-Lawson Corp. v. Central State Dev. Corp., 121 So.2d 680 (Fla. App. 1960); Dewing v. Nelson & Co., 117 So.2d 744 (Fla. App. 1960); Levene v. Enchanted Lake Homes, Inc., 115 So.2d 89 (Fla. App. 1959); Bailey v. Bailey, 114 So.2d 804 (Fla. App. 1959). In Overstreet v. Lamb, 128 So.2d 897 (Fla. App. 1961) suit had been properly brought in equity; transfer to law side reversed on appeal.

299. Dewing v. Nelson & Co., 117 So.2d 744 (Fla. App. 1960); Levene v. Enchanted Lake Homes, Inc., 115 So.2d 89 (Fla. App. 1959); Cook v. Central & So. Fla. Flood Control Dist., 114 So.2d 691 (Fla. App. 1959). Transfer to the law side is not available where a complete defense to a lien is proven. One could not under such facts find that the plaintiff misconceived his remedy. Westinghouse Elec. Supply Co. v. Levin, 115 So.2d 423 (Fla. App. 1959).

denied on the ground that the plaintiff had an adequate remedy at law and the chancellor transferred the suit to the law side. In reversing the lower court, it was held that the transfer to the law side should not have been granted, without a clear holding that no cause of action in equity existed, and without allowing the plaintiff leave to amend his complaint.[300]

An action to recover money due on the purchase of goods was instituted on the law side of the court. On jury trial the judge, sua sponte, declared a mistrial and transferred the action to the equity docket upon the belief that the action was too complicated for a jury. The appellate court reversed, holding that the pleadings showed no statement of facts which would render equity jurisdiction appropriate. Transfer is applicable only if it appears that the action was commenced on the wrong side. It is not sufficient to deny one his constitutional right to trial by jury because the case is complicated and requires an elementary accounting on the part of the jury.[301]

The plaintiff obtained a final decree permanently enjoining a number of unions from engaging in a secondary boycott. The decree was reversed on appeal because the evidence established that the unfair labor practice had an effect on interstate commerce so as to preclude injunctive relief in a state court and to confer jurisdiction on the National Labor Relations Board. On rehearing the appellate court refused to transfer the tort complaint[302] to the law side and stated that the reversal for want of jurisdiction was without prejudice and would not preclude the plaintiff from maintaining any right it may have to bring an action at law. The court at this time would not rule on the question of jurisdiction of the state court as to damages.[303]

2. TRANSFER TO THE PROPER COURT WITHIN THE SAME COUNTY

A case may be transferred, if brought in the wrong court, to the proper court within that county.[304] A plaintiff, in a personal injury action, recovered judgment for 1,200 dollars and costs. He then filed in the cause an affidavit for writ of garnishment.[305] On trial, at the conclusion of garnishor's case, the trial judge, acting upon oral motion of the garnishee, transferred the cause to the civil court of record because the amount in controversy was less than 5,000 dollars.[306] Certiorari was granted and the

300. Phelps v. Higgins, 120 So.2d 633 (Fla. App. 1960).
301. Rizzo v. Euclid Urbana Co., 118 So.2d 553 (Fla. App. 1960).
302. 29 U.S.C. § 187 (1958).
303. International Hod Carriers' v. Heftler Constr. Co., 116 So.2d 30 (Fla. App. 1959).
304. FLA. R. CIV. P. 1.39(b).
305. FLA. STAT. § 77.03 (1961).
306. The circuit court in Dade County has jurisdiction of law actions wherein the amount in controversy is $5,000. The civil court of record has jurisdiction where the amount is less than $5,000. FLA. CONST. art. V, § 6; FLA. STAT. § 33.02 (1961).

transfer was ordered quashed. The statutes provide for the procurement of a writ of garnishment to be filed "in the court where such judgment has been obtained . . . ."[307] The proceedings in garnishment were ancillary to the final judgment rendered in the cause; therefore, the circuit court had jurisdiction over the subject matter.[308]

II. ACTIONS AT LAW ONLY

A. *Jury Trial – Waiver*

The defendant's answer was stricken and a default entered against him for failure to comply with a discovery order. Both parties had made timely demands for trial by jury. The striking of the answer and the entry of default did not obliterate his demand, nor could the plaintiff's demand be withdrawn without the defendant's consent.[309]

Plaintiff sued his insurer to recover under a jewelry "floater" policy. In a trial without a jury, judgment was rendered for the plaintiff. The appellate court reversed on the ground that the trial judge had erroneously refused to admit into evidence, for impeachment purposes, a prior written statement and testimony on deposition of the plaintiff. The cause was "remanded for trial to the judge unless on motion a trial to a jury is awarded."[310]

B. *Jury Instructions*

A trial court entered an order granting the plaintiff's singular motion for a new trial on the ground that the plaintiff's requested instructions on last clear chance should have been given. The appellate court in affirming held that under the facts of the case the plaintiff was entitled to a last clear chance instruction. The court pointed out that the trial judge has a duty to charge on basic rules. A party desiring additional instructions is under a duty to submit them.[311] If a party fails to object to instructions as given he can not obtain review of the charges on appeal.[312]

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307. *Supra* note 305.

308. Goldenkoff v. General Acc. Fire & Assur. Corp., 116 So.2d 780 (Fla. App. 1960).

309. Grappell v. Lauderdale River Park Estates, 126 So.2d 574 (Fla. App. 1961). "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." FLA. R. CIV. P. 2.1(d).

310. Central Mut. Ins. Co. v. Newman, 117 So.2d 41, 43 (Fla. App. 1960). The federal position generally is that a new trial does not revive the right to demand a jury trial unless the trial court at its discretion grants relief from the waiver pursuant to the FED. R. CIV. P. 39(b). 5 MOORE, FEDERAL PRACTICE ¶ 38.45, at 343-44 (2d ed. 1951).

311. Holdsworth v. Crews, 129 So.2d 153 (Fla. App.), *cert. denied*, 135 So.2d 743 (Fla. 1961).

312. Jones v. Atlantic Coast Line R.R., 117 So.2d 234 (Fla. App. 1960). The applicable sentence of FLA. R. CIV. P. 2.6(b) reads: "No party may assign as error the giving of any charge unless he objects thereto at such time . . . ."

C. *Directed Verdict*

1. RESERVED DIRECTED VERDICT (JUDGMENT N.O.V.) AND THE RECORD

The plaintiffs, husband and wife, sued a city for damages for injury of the wife from a fall in a swimming pool locker room. A verdict was rendered for the plaintiffs, the defendant's post-trial motion for directed verdict[313] was denied and final judgment was entered for the plaintiffs. The defendant transcribed for appeal the testimony of only two witnesses. The appellate court held that the appellant city failed to show that it preserved its right to question the sufficiency of the evidence on appeal. The record on appeal did not show (apparently the appellant city failed to have it transcribed) that a motion for a directed verdict was made at the close of the plaintiff's case and that the ruling was reserved thereon or that a motion for a directed verdict was made at the close of all the evidence.[314] Therefore, the appellant could not support the assignment of error as to the lower court's denial of its motion for directed verdict at the close of all the evidence and post-verdict motion. The court held[315] that the record also failed to show that a motion for a new trial had been made, so the defendant could not question the sufficiency of the evidence under the *Ruth v. Sorensen* case.[316]

2. RESERVED DIRECTED VERDICT ON REMANDED CASE

In a personal injury action wherein the court had directed a verdict for the defendant at the close of the plaintiffs' case, it subsequently granted the plaintiffs' motion for a new trial. The order granting the new trial was affirmed on appeal.[317] Upon new trial the jury returned verdicts for the plaintiffs; whereupon, the court ruled on the defendant's reserved directed verdict motion, the court having reserved ruling on the defendant's motion for a directed verdict which had been made at the close of all the evidence, and directed the jury to find a verdict of not guilty in favor of the defendant. The judgment entered thereon was reversed on appeal with directions to reinstate the jury verdict and enter judgment thereon for the plaintiffs. It was held that having concluded in the first appeal that the trial court was correct in granting a new trial, in that the evidence was sufficient to take the issue of liability to the jury, this is a conclusion in

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313. FLA. R. CIV. P. 2.7(b).

314. 6551 Collins Ave. Corp. v. Millen, 104 So.2d 337 (Fla. 1958), 14 U. MIAMI L. REV. 266-68 (1959).

315. City of Pompano Beach v. Edwards, 129 So.2d 144 (Fla. App. 1961).

316. 104 So.2d 10 (Fla. 1958).

317. 2500 Collins Corp. v. Geller, 104 So.2d 424 (Fla. App. 1958) (per curiam affirmance without opinion).

the second trial where the evidence is substantially the same as that offered at the first trial.[318]

3. MOTIONS FOR A RESERVED DIRECTED VERDICT AND, IN THE ALTERNATIVE, NEW TRIAL

After a jury verdict in favor of the plaintiff, the defendant filed a motion in accordance with its prior motion for directed verdict or, in the alternative, a motion for a new trial.[319] An order was entered granting a motion for judgment for the defendant and that in the event of the judgment being reversed on appeal, the alternative motion for a new trial to be granted. The basis of the order was indicated to be that error had been committed in charging the jury on the doctrine of last clear chance and that the verdict was against the manifest weight of the evidence. The appellate court found that the record supported the application of the last clear chance doctrine and the verdict; it was error to enter judgment for the defendant.

As to the propriety of ruling on both motions in the alternative the court said:

> Although the language of Rule 2.7, Florida Rules of Civil Procedure, 31 F.S.A., indicates that the trial court may set aside a jury verdict by either granting the renewed motion for a directed verdict or granting the motion for new trial, but not both, an examination of Official Form Six which was promulgated by the Florida Supreme Court for use by the Bar in conjunction with Rule 2.7, and the decisions of the Federal Courts under Rule 50, Federal Rules of Civil Procedure, 28 U.S.C.A., which is similar to our Rule 2.7, leads us to the conclusion that the trial court was correct in ruling upon both motions in the alternative manner described above.[320]

Turning then to reviewing the order granting a new trial, the court found no abuse of discretion. The judgment was reversed and the cause remanded for a new trial.[321]

The next question which arises is what results when the trial court does not rule upon an alternative motion for a new trial. In a Federal Employers' Liability Act case the defendant filed a post-trial motion for a reserved directed verdict, seeking a judgment notwithstanding the verdict, and in the alternative a new trial. The trial judge granted the former motion and judgment was entered for the defendant. The trial court did

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318. Geller v. 2500 Collins Corp., 130 So.2d 322 (Fla. App. 1961).
319. FLA. R. CIV. P. 2.7(c).
320. King v. Jacksonville Coach Co., 122 So.2d 480, 481 (Fla. App. 1960).
321. *Ibid.*

not rule on the defendant's alternative motion for a new trial. On appeal the judgment for the defendant was reversed as the evidence supported the jury verdict for the plaintiff. The appellate court remanded the cause for a ruling by the trial court on the defendant's motion for new trial and added: "this court is only saying 'Good Bye,' it is not necessarily 'Forever, fare thee well.' "[322]

D. *New Trial*

1. DISPROPORTIONED VERDICT NOT GROUNDS

The plaintiffs, husband and wife, appealed from an order which granted the defendant's motion for new trial on the issue of damages. The court granted the new trial on the ground that the verdicts were disproportionate. The jury awarded the wife 2,500 dollars and the husband 2,300 dollars. In reversing, the appellate court held that where separate and distinct causes of action could have been maintained separately, the trial court does not have the power to set aside verdicts because in its opinion the verdicts cannot be reconciled.[323]

2. IMPROPER TESTIMONY

In a head-on collision case a patrolman testified that, based upon the debris, oil and dirt on the highway, the collision occurred at a certain point. The defendant objected on the ground that the patrolman was not an expert. The jury rendered a verdict for the plaintiff and the trial court granted the defendant's motion for new trial. The order for new trial was affirmed on appeal.[324] The appellate court found no material conflict between the basis for the objection by the defendant to the evidence and the ground asserted for the new trial. If such a conflict existed it would not be of importance because "a trial court may grant a new trial on its own initiative for any reason for which it might have granted a new trial on a motion of a party."[325]

3. NEW TRIAL MOTION NOT PREREQUISITE FOR REVIEW OF JUDGMENT ON DIRECTED VERDICT

The plaintiffs, husband and wife, sued for injuries allegedly resulting from the negligence of the defendant. The trial judge granted the defendant's motion for directed verdict at the close of all the evidence. On appeal from the judgment entered pursuant to the directed verdict the defendant moved to quash the appeal, contending that the plaintiffs had

322. McCloskey v. Louisville & N.R.R., 122 So.2d 481, 486 (Fla. App. 1960).
323. Carter v. Duval Eng'r & Contracting Co., 128 So.2d 143 (Fla. App. 1961).
324. Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. App. 1961).
325. *Id.* at 457; FLA. R. CIV. P. 2.8(d).

not adequately preserved the question of the sufficiency of the evidence for review because they did not motion for a new trial. The appellate court held:

> [T]he ruling of a trial judge directing a verdict for a defendant on the ground of the legal insufficiency of the evidence presented by the plaintiff is reviewable by the appellate court as a matter of law without the necessity of the presentation and disposition of a motion for a new trial by the offended party.[326]

4. NEW TRIAL ORDER MUST STATE GROUNDS

The rules require that an order for a new trial must state the grounds upon which the motion is granted.[327] In *Fulton v. Poston Bridge & Iron, Inc.*,[328] the court directed a verdict for the defendants. Subsequently the court granted the plaintiffs' motion for a new trial. The defendants assigned as error the failure of the order for new trial to state the grounds. A month after the appeal was taken the trial judge, on plaintiffs' motion, entered an order amending and clarifying the initial order. Though sympathizing with the plaintiffs, the appellate court pointed out that it is the duty of counsel as well as the court to see that the order is in proper form and content and to make timely application to the trial judge, prior to the filing of the notice of appeal, to rectify the deficient order.[329]

Where an order for a new trial does not state the grounds, Florida counsel might be advised to proceed under Rule 1.38(a) and motion the court to correct the oversight. This rule provides for the correction of oversights and omissions "during the pendency of an appeal . . . before the record on appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."[330]

5. NEW TRIAL RULE AMENDED

Substantial changes have been made in the rule granting new trials.[331] Rehearing on summary judgment is now available[332] and it may be that

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326. Furr v. Gulf Exhibition Corp., 114 So.2d 27, 29 (Fla. App. 1959), *aff'd mem.*, 116 So.2d 672 (Fla. 1959).

327. Formerly FLA. R. CIV. P. 2.6(d), now 2.8(f). *In re* Fla. R. Civ. P., 139 So.2d 129, 131 (Fla. 1962). See also FLA. STAT. § 59.07(4) (1961).

328. 122 So.2d 240 (Fla. App. 1960).

329. *Accord*, Gaskill v. Montague, 128 So.2d 420 (Fla. App. 1961); Bach v. Miami Transit Co., 129 So.2d 706 (Fla. App.), *cert. denied*, 133 So.2d 322 (Fla. 1961). The federal practice requires that the order for a new trial state the grounds only if the motion is court initiated. If made by a party, perusal of the motion will show the grounds. 6 MOORE, FEDERAL PRACTICE ¶ 59.11, at 3873 (2d ed. 1953).

330. *In re* Fla. R. Civ. P., 139 So.2d 129, 130 (Fla. 1962).

331. *Id.* at 131.

332. See text *supra* note 289.

rehearing of any judgment is available.[333] The amended rules specifically provide for the mode and time of serving affidavits in support or in opposition to a motion for a new trial.[334] The reader's attention is directed to a careful analysis of the new amendments.

III. Equity Suits Only

A. *Class Actions*

The requirements of a class action[335] were held to have been met in a declaratory decree[336] suit against the City of Miami. The plaintiffs in behalf of themselves and others in like situations who paid fines to the City of Miami for traffic violations after the Metropolitan Courts took over were held to have a common interest and to represent a class so numerous that it would be impracticable to join all complainants.[337]

B. *When Cause At Issue*

In a suit to enjoin the defendants from selling alcoholic beverages on certain properties, the defendants filed motions to dismiss, to strike, and for a more definite statement. The motions were argued but no ruling made thereon. The defendants answered and testimony was taken, after which the chancellor entered a decree for the plaintiffs. The rule provides: "If, however, within such period of 20 days a motion permitted by these rules is served, the cause shall not be deemed at issue until the points of law so presented shall be ruled upon by the court."[338] The appellate court held that the entry of the final decree in favor of the plaintiffs was equivalent to denial of the motions,[339] and upheld the restrictive covenant.[340]

The ruling regulating the time for the taking of testimony[341] was

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333. Fla. R. Civ. P. 2.8(a), as amended by 139 So.2d 129, 131 (Fla. 1962). "On a motion for a rehearing . . . of matters heard without a jury, the court may open the judgment if one has been entered, take additional testimony and enter a new judgment." Fla. R. Civ. P. 2.8(b), as amended by 139 So.2d 129, 131 (Fla. 1962), specifies the time for motion and includes "or rehearing of any motion for judgment provided for by these rules."

334. Fla. R. Civ. P. 2.8(c) (1954), as amended by 139 So.2d 129, 131 (Fla. 1962).

335. Fla. R. Civ. P. 3.6.

336. Fla. Stat. § 87.01 (1961).

337. City of Miami v. Keton, 115 So.2d 547 (Fla. 1959). On the merits the supreme court held that the plaintiffs were barred from recovery.

338. Fla. R. Civ. P. 3.8.

339. See Tropicaire Eng'r Serv. Corp. v. Chrysler Airtemp Sales Corp., 97 So.2d 149 (Fla. App. 1957), discussed in 14 U. Miami L. Rev. 270-71 (1959), as to order postponing a ruling on motion until final hearing.

340. Hevia v. Palm Terrace Fruit Co., 119 So.2d 795 (Fla. App. 1960).

341. Fla. R. Civ. P. 3.13 in 3 Fla. Stat. 3491 (1959). This rule was derived from Rule 69 of Federal Equity Rules of 1842, 17 Peters lxxiii, and was adopted in Florida by the Fla. Equity Rules in 1873. Equity Rule 69 was abolished by adoption of the Federal Equity Rules of 1912, 48 years ago, after 70 years of experience. See Hopkins, Federal Equity Rules 157 (8th ed. 1933).

abolished by court order on June 30, 1961[342] and is no longer applicable to suits commenced on or after October 1st, 1961.[343]

C. *Interpleader*

Interpleader in Florida has been regulated by case law and has suffered by historical technicalities and prerequisites.[344] As of July 1st, 1962 the remedy has been liberated.[345] Henceforth, the Florida practice in this area will be substantially the same as the federal practice.[346] Judicial interpretation of the comparable federal rule will be valuable to the Florida practitioner.[347]

D. *Masters*

In an action for a dissolution of a partnership the plaintiff on appeal assigned certain procedural rulings as error. After the chancellor determined that the plaintiff was entitled to some relief he ordered the cause referred to a special master.[348] The plaintiff made no objection to the form of the order until after the special master filed his report. The appellate court found it apparent that this special master did not proceed in accord with Rule 3.14(f), which provides that it shall be the duty of the master to assign a time and place for proceeding and give notice of same. The court held that the plaintiff's assignment of error to this effect failed as the plaintiff did not avail himself of the Form of Accounts rule,[349] which permits a dissatisfied party to an accounting before a master to examine the accounting party orally, or upon interrogatories, or by deposition, as the master shall direct. The court held, *inter alia*:

> The order of reference did not direct the taking of testimony and because the appellant [plaintiff] did not object to the form of the reference nor avail himself of the proceedings provided by the rules, he cannot now be heard to object to a proceeding in which the special master limited his activity to an examination of the books and records which were presented to him.[350]

After the master has filed his report and given notice of same to

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342. *In re* Amendments to Fla. R. Civ. P., 131 So.2d 475, 476 (Fla. 1961).
343. *In re* Amendments to Fla. R. Civ. P., 132 So.2d 6 (Fla. 1961).
344. Maloney, *Interpleader in Florida*, 29 Fla. B. J. 128 (1955).
345. *In re* Fla. R. Civ. P., 139 So.2d 129, 131-32 (Fla. 1962). Rule 3.13 now covers "Interpleader." This rule number formerly covered "time for taking testimony"; see notes 341 and 342 *supra*.
346. FED. R. CIV. P. 22(1).
347. 3 MOORE, FEDERAL PRACTICE ¶ 22.04, at 3007-13 (2d ed. 1948).
348. Pursuant to FLA. R. CIV. P. 3.14(b).
349. FLA. R. CIV. P. 3.14(h).
350. Obel v. Henshaw, 130 So.2d 892, 894 (Fla. App. 1961).

counsel, the parties have ten days within which to file exceptions thereto. This time may be enlarged by the court for good cause shown. If the hearing is ex parte a recent amendment provides that: *"Any such order entered as a result of an ex parte hearing shall not become effective until it has been served on opposing counsel and proof of service thereof has been filed in the cause."*[351]

E. *Rehearing*

In a divorce action the husband's counterclaim for divorce and child custody prevailed. Alimony was awarded to the wife. Ten days after the entry of the final decree the wife's petition for a rehearing regarding the custody of the children was granted. The rehearing was limited to the custody matter; no new evidence was presented on the issue of alimony. The chancellor entered an amended decree which included a substantially different provision for alimony and the wife appealed. The appellate court found that no error had been committed in altering the alimony provision after the rehearing without reception of additional evidence thereon.[352]

A petition for a rehearing does not stay the proceedings unless so ordered by the court.[353] In *Ginsberg v. Ginsberg*[354] the husband in a divorce suit contended that the contempt order could not be made properly on a rule to show cause which had been entered while his petition for rehearing addressed to the final decree remained on file and undisposed of. It was held that the pendency of the petition for rehearing signifies the continuance of the litigation for certain purposes and that it does not operate as a stay of the decree or order to which it is addressed, unless so ordered by the chancellor. In this suit no such order was made and the pendency of the petition for rehearing did not relieve the defendant of the obligation to make the payments required by the decree.

An undisposed of petition for rehearing does not preclude the movant from appealing from the final decree. An appellant filed a petition for rehearing of the final decree. Prior to a hearing on the petition the appellant appealed. The appellee moved to dismiss the appeal. The appellate court denied the motion to dismiss on the ground that the appellant had voluntarily abandoned his petition to the lower court by filing his notice of appeal.[355]

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351. *In re* Amendments to Fla. R. Civ. P., 131 So.2d 475, 476 (Fla. 1961); *In re* Amendments to Fla. R. Civ. P., 132 So.2d 6 (Fla. 1961).
352. Cole v. Cole, 130 So.2d 126 (Fla. App.), *cert. dismissed per stipulation*, 135 So.2d 714 (Fla. 1961).
353. FLA. R. CIV. P. 3.16(b).
354. 122 So.2d 30 (Fla. App. 1960).
355. Frank v. Pioneer Metals, Inc., 114 So.2d 329 (Fla. App. 1959).

F. *Injunctions*

Generally notice and bond are prerequisites for the granting of an injunction. A county and its appropriate department administrators appealed from the granting of a restraining order which enjoined the defendant Building and Zoning Department and its directing officials from enforcing against the plaintiff, a swimming pool contractor, any pending violation notices and enjoined the enforcement of penalties for future violations. The order was issued without notice and without bond. In reversing,[356] the appellate court found no facts sufficient in the complaint to warrant the dispensing with notice[357] or excusing the posting of a bond.[358]

356. Metropolitan Dade County v. Polk Pools, Inc., 124 So.2d 737 (Fla. App. 1960).
357. FLA. R. CIV. P. 3.19; FLA. STAT. § 64.02 (1961).
358. FLA. STAT. § 64.03 (1961). *Accord*, Belk's Dep't Store, Inc. v. Scherman, 117 So.2d 845 (Fla. App. 1960).