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APPELLATE PROCEDURE

MARTIN J. NASH*

This article reviews the more important decisions of the Florida courts affecting appellate procedure.** The outline follows the Florida Appellate Rules in general; sections on the extraordinary writs are included at the end of the article.***

Application of the Rules

The Florida Appellate Rules govern all appellate proceedings commenced after June 30, 1957.[1] Failure of an appellate tribunal to comply with the appellate rules may be remedied through the use of common law certiorari addressed to a higher appellate court.[2]

Change in the Construction of the Appellate Rules

Generally, judicial construction of an appellate rule or statute will relate back to the time of the enactment of the rule or statute. However, when a rule or statute has received a construction differing from a previous construction, the changed construction does not have a retroactive effect unless the statute or rule is jurisdictional in nature.[3]

In *Aronson v. Congregation Temple De Hirsch*[4] an appeal was taken more than thirty days from the rendition of the judgment in the county court. Prior to the prosecution of the appeal, the district court of appeal indicated that the proper time for appeal in probate matters was sixty days.[5] One day after the rendition of the final judgment in *Aronson*, but prior to the filing of the notice of appeal, the same district court of appeal decided in *In re Wartman's Estate*[6] that the time for appeal was thirty rather than sixty days. The appellate court allowed the appeal by refusing to give the *Wartman* case retroactive effect, reasoning that the bench and bar were entitled to rely and act upon the previously accepted construction of the appellate rule.

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** Includes cases from the period of the last *Survey* through 131 So.2d.

*** Material in this section of the article contributed by Michael J. Osman, Associate Editor, U. MIAMI L. REV.

1. FLORIDA APPELLATE RULES [hereafter cited as F.A.R.] 1.1, 1.4.
2. *In re* Grant's Estate, 117 So.2d 865 (Fla. App. 1960).
3. Aronson v. Congregation Temple De Hirsch, 123 So.2d 408, 411 (Fla. App. 1960), *cert. discharged*, 128 So.2d 585 (Fla. 1961).
4. *Ibid.*
5. *In re* Campbell's Guardianship, 114 So.2d 352 (Fla. App. 1959).
6. 118 So.2d 838 (Fla. App. 1960), *quashed*, 128 So.2d 600 (Fla. 1961).

The issue was certified to the supreme court. The court, in effect, held that the appeal time was jurisdictional in nature and could not be extended by the courts.[7] However, the appeal was not dismissed because the supreme court on the same day had decided that the appeal time in probate matters was sixty days.[8]

When the courts construe a rule, not jurisdictional in nature, and reach a conclusion differing from their prior construction, the reasoning of the district court of appeal in *Aronson* should control.

Repeal of Conflicting Statutes

The appellate rules were intended to supersede all conflicting rules and statutes. Statutes not superseded or in conflict with the appellate rules were to remain in effect as rules promulgated by the supreme court.[9] In every situation, when a statute deals with the same subject matter as an appellate rule, an inquiry must be made as to whether the statute conflicts with the appellate rule, thus being superseded.

The determination of the statutes that have been superseded is occurring in piecemeal fashion. Great difficulty will be presented with regard to chapter 59[10] of the Florida Statutes which deals with appellate proceedings generally. As of this *Survey* there has been little litigation concerning the validity of this statute. The supreme court has indicated in *Ramagli Realty Co. v. Craver*[11] that certain provisions of chapter 59 are continued as rules of court. They are section 59.04 (appeal from an order granting a new trial by the aggrieved party) and section 59.05 (appeal by a plaintiff after suffering a non-suit). Other statutory sections have been declared superseded, for example, sections 59.09[12] and 37.22.[13]

Invalidation of a portion of a statute creates an additional problem. If the invalid portion of the statute is inseverably related with the remaining portion, the entire statute will be stricken under general rules of statutory construction. This result will occur even though the remaining portions are not in conflict with the appellate rules.[14] A great need exists for correlation of the statutes with the appellate rules in order to provide a composite picture of proper appellate procedures.

The correlation of rule 1.4 and rule 3.2b has caused a great deal

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7. See note 3 *supra.*
8. *In re* Wartman's Estate, 128 So.2d 600 (Fla. 1961).
9. F.A.R. 1.4.
10. FLA. STAT. ch. 59 (1961).
11. 121 So.2d 648, 652 n.16 (Fla. 1960).
12. Simmons v. Gainesville Nehi Bottling Co., 119 So.2d 719 (Fla. App.), *appeal dismissed*, 125 So.2d 876 (Fla. 1960).
13. State v. Robinson, 132 So.2d 156 (Fla. 1961).
14. See note 8 *supra.*

of litigation during the survey period.[15] It is to be noted that rule 3.2b provides for a limitation of sixty days for the commencement of an appeal "unless some other period of time for taking an appeal is specifically provided by statute or these rules."[16] The phrase "or these rules" has been held surplusage by the supreme court.[17]

The effect of the savings clause is to preserve statutory appeal time provisions differing from the sixty day appeal time of the appellate rules. Rule 1.4 apparently operates to reinstate these different appeal times as rules promulgated by the supreme court. However, the constitutional power clause enabling the supreme court to enact rules of practice and procedure does not include the power to establish times for appeal. That power is peculiarly legislative.[18] Therefore, all appeal times appearing in statutes should prevail over the judicial pronouncement of rule 3.2b. Notwithstanding this clause, certain appeal time statutes have fallen.[19]

Assignment of Judges

Florida, as does the majority of jurisdictions, holds that when a trial judge is incapacitated and cannot consider a pending motion it is not mandatory that a new trial be granted.[20] The rules provide for the appointment of a successor judge when a circuit judge is unable to perform the duties of his office on account of absence, sickness, disqualification or other disability.[21] As a result, the circuit judges sit without personality and the courts are not the alter ego of an individual judge.

Prior to 1961, a provision similar to that for circuit courts appeared in regard to justice of peace courts.[22] Under the justice of the peace court system there is only one judge for each district. The logical conclusion is that under the appellate rules a justice of the peace of another district is a successor judge within the meaning of the rule. However, such a determination would do violence to the intent of many statutes, particularly criminal procedure statutes.

In *Robinson v. State*[23] a justice of the peace issued a search warrant for a home in an adjoining district. Ordinarily, a search warrant may be issued by a justice of the peace having jurisdiction within the district

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15. See generally Nash, *Florida Appeal Times*, 16 U. MIAMI L. REV. 24 (1961).
16. F.A.R. 3.2b.
17. See note 11 *supra*.
18. *Ibid.*
19. See text at notes 57-74 *infra*.
20. Wohlfiel v. Morris, 122 So.2d 235 (Fla. App. 1960); see also FLA. STAT. § 26.19 (1961).
21. F.A.R. 2.1a(4)(c), as amended, 139 So.2d 139 (Fla. 1962); Robinson v. State, 124 So.2d 714 (Fla. App. 1960), *modified*, 132 So.2d 156 (Fla. 1961).
22. F.A.R. 2.1a(4)(i).
23. 124 So.2d 714 (Fla. App. 1960), *modified*, 132 So.2d 156 (Fla. 1961).

where the place, vehicle or thing to be searched may be. In this case, the justice of the peace was absent on duty with the Air Force. It was contended that the justice of the adjoining district was "another judge . . . of said court available and qualified to act" within the meaning of the rules.

Both the district court of appeal and the supreme court held the search warrant invalid. However, the supreme court amended the rules to remedy the anomalous situation presented by the case.[24] The amendment provides that when a judge of any small claims court, juvenile court or traffic court is unable to perform his duties, the said judge or clerk will advise the chief justice of the supreme court who may then assign judges. When there is more than one judge in a district, the remaining available judge or judges may act as under the prior rule. The chief justice, when called upon to appoint a successor judge, may assign any judge having the same or greater jurisdiction except a judge of the supreme court, district court or circuit court.[25]

Filing Fees

The supreme court is without power to prescribe the filing fees to be charged by clerks of courts of record of the state in appellate proceedings. Consequently, those portions of the rules which prescribe for specific fees have been amended. The effect of the amendment is to provide for the payment of the filing fee "prescribed by law."[26]

An appeal is commenced by the filing of the notice of appeal with the clerk of the lower court and the payment of the filing fee.[27] It is noted that the appellate rule makes the payment of the filing fee a jurisdictional prerequisite. However, the court has held the payment of the filing fee not to be jurisdictional in nature.[28]

Time for Appeal

The rules provide for a sixty day limitation for the commencement of appellate proceedings unless some other period is provided for by statute.[29] The time is jurisdictional in nature, both for appeals[30] and for

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24. State v. Robinson, 132 So.2d 156 (Fla. 1961).
25. F.A.R. 2.1a(4)(i), as amended, 132 So.2d 156 (Fla. 1961).
26. F.A.R. 3.2a, as amended, 120 So.2d 586 (Fla. 1960). This rule was revised again, effective July 1, 1962, 139 So.2d 139 (Fla. 1962). However, the holding of "prescribed by law" was continued.
27. F.A.R. 3.2a.
28. State *ex rel.* Moore v. Murphree, 106 So.2d 430 (Fla. App.), *cert. denied*, 108 So.2d 48 (Fla. 1958).
29. F.A.R. 3.2b. For a more complete discussion see Nash, *Florida Appeal Times*, 16 U. MIAMI L. REV. 24 (1961).
30. Ramagli Realty Co. v. Craver, 121 So.2d 648 (Fla. 1960).

review by certiorari.[31] Being jurisdictional in nature, the appellate time cannot be extended by the courts.[32] Litigants cannot agree to an extension of the time by consent or stipulation.[33] If the time for appeal has elapsed, the court should dismiss the appeal either upon motion of counsel or sua sponte.[34]

It is the rendition of a judgment, decree or order that starts the running of the time within which appellate procedings must be commenced.[35] A litigant is not entitled to judicial review, either by certiorari[36] or direct appeal,[37] unless the judgment or decree has been rendered.[38]

Rendition, within the contemplation of the rules, is the date when the judgment, decree or order is entered of record by the appropriate tribunal,[39] or if recording is not required, when filed.[40] Until such time, the judgment, order or decree is not final and not appealable.

The rules provide that a judgment, order or decree is not deemed rendered until a timely and proper motion or petition for a new trial, rehearing or reconsideration is disposed of by the lower court.[41]

In *Seiferth v. Seiferth*[42] the defendant filed his notice of appeal while a timely and proper petition for rehearing was pending before the lower court. The appellate tribunal dismissed the appeal as not timely because the judgment was not rendered at the time of the filing of the notice of appeal. In this connection, the term "disposed of" was defined in *Seiferth* as "entry of the court's decision upon the record."[43]

The motion for new trial and petition for rehearing or reconsideration must be timely and proper in order to effectively toll the time for appeal.

A motion for new trial is timely filed if served not later than ten days after the rendition of the verdict.[44] A petition for rehearing is timely

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31. Harris v. Condermann, 113 So.2d 235 (Fla. App.), *cert. denied*, 117 So.2d 495 (Fla. 1959).
32. Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961).
33. Salinger v. Salinger, 100 So.2d 393 (Fla. 1958).
34. Braunstein v. Silhouette, Inc., 113 So.2d 436 (Fla. App. 1959).
35. F.A.R. 3.2b.
36. F.A.R. 4.5c(1); Bannister v. Allen, 127 So.2d 907 (Fla. App. 1961); Harris v. Condermann, *supra* note 31.
37. F.A.R. 3.2b.
38. Until such time no judgment is final.
39. F.A.R. 1.3 defines rendition to mean "that it has been reduced to writing, signed and made a matter of record . . . ."
40. F.A.R. 1.3. The most notable situation where filing is determinative rather than recording is in probate.
41. F.A.R. 1.3.
42. 121 So.2d 689 (Fla. App. 1960).
43. *Ibid.*
44. FLA. R. CIV. P. 2.8(b).

filed if the petition is served within ten days after the recording of the decree.[45]

It is important that counsel comply with the time requirement. In the event that a motion or petition is not timely filed and the motion or petition is not disposed of until after the appropriate appellate time has elapsed from the entry of the original judgment, a litigant will find the appellate courts without jurisdiction to hear an appeal on the merits. Further, the opposing litigant could well foreclose any favorable decision on the motion or petition through the use of the extraordinary writs of prohibition, mandamus or common law certiorari, as the lower court is without jurisdiction to hear the motion or petition.

A most troublesome area in the rules has been the problem of determining what is a proper motion. It is to be noted that if the motion is not a proper one, it does not toll the time for appeal. If an improper motion is not disposed of by the lower court until after the time for appeal has elapsed, a litigant may not appeal.

Ramagli Realty Co. v. Craver[46] is a striking illustration of an improper motion. The defendant suffered a default judgment. The court granted the defendant's motion to set aside the default. Subsequently, the default judgment was reinstated more than sixty days from the date of entry of the original default judgment. The supreme court granted certiorari and dismissed the appeal as not timely filed. The court stated that the motion to set aside the default judgment was improper and did not toll the time for prosecuting an appeal. The court reasoned that neither the Florida Rules of Civil Procedure nor any other rule or statute provided for any method or provision relating to the opening of default judgments.[47] There being no provision for rehearing, the only method of review was by direct appeal within sixty days from the entry of the final judgment.

Other notable examples of improper petitions or motions are petitions for rehearing after the granting of a summary judgment[48] and petitions or motions after a decree in probate.[49]

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45. FLA. R. CIV. P. 3.16(a).

46. 121 So.2d 648 (Fla. 1960).

47. *Id.* at 653. The Third District Court of Appeal is apparently taking a position contra to the supreme court by holding that such a motion is proper. See Bursten v. Cooper, 127 So.2d 134 (Fla. App. 1961); White v. Spears, 123 So.2d 689 (Fla. App. 1960).

48. Counne v. Saffan, 87 So.2d 586 (Fla. 1956); Weisberg v. Perl, 73 So.2d 56 (Fla. 1954); Aurremma v. B-Thrifty Super Market, Inc., 127 So.2d 682 (Fla. App.), *appeal dismissed*, 133 So.2d 644 (Fla. 1961); Marans v. Stang, 124 So.2d 891 (Fla. App. 1960); Albert v. Carey, 120 So.2d 189 (Fla. App.), *cert. denied*, 125 So.2d 873 (Fla. 1960); La Joie v. General Motors Acceptance Corp., 108 So.2d 497 (Fla. App. 1959). See also Mathis v. Butler, 128 So.2d 142, 143 (Fla. App. 1961), where the court held that a petition for a rehearing on the amount of a remittitur was an improper motion in a law action.

49. *In re* Estate of Lee, 90 So.2d 290 (Fla. 1956).

One might speculate as to the meaning of the petition for rehearing or *reconsideration* as used in the rules.[50] Our statutes contain procedural devices unknown at the common law, for example, transfer of the cause for improper venue or for improvidently taken appeals. Certainly, the lower court should have a device available to correct its own errors. The absence of a definite method of reconsideration in the appellate rules for each procedural device should not foreclose the opportunity for reconsideration, particularly in view of the phrase "reconsideration" in the appellate rules.

Would the judiciary abdicate from its time-honored responsibility of interpretation and interpolation in the interest of justice? Certainly the judiciary would not require the inclusion of all possibilities in every enactment of every rule. Such a result would make the rules so unwieldy and cumbersome as to abrogate their utility.

Consider the case of *Cannington v. Faroy*.[51] After certain testimony had been taken, the circuit court judge concluded that no factual basis for a claim in excess of 5,000 dollars existed. Accordingly, an order was entered March 2, 1959, transferring the cause from the circuit court to the civil court of record. A motion to vacate the order transferring the cause to the civil court of record was made March 9, 1959, and denied April 9, 1959. A petition for certiorari was filed May 7, 1959. The petition was denied as untimely because the motion to vacate the transfer order was not proper and thus did not toll the time to petition for certiorari. The district court stated:

> We are unaware of any rule that permits or provides for a motion of the character herein filed by the petitioner after the entry of the order of transfer. Consequently, the time for application for writ of certiorari . . . had expired at the time the petition was lodged in this court.[52]

The result reached by the appellate tribunals of the state has indicated a need for reform. The adoption of the rule[53] similar to rule 60(b) of the Federal Rules[54] should change the result reached under prior interpretations.

When a litigant, after filing a timely and proper motion for a new trial or petition for rehearing, files his notice of appeal prior to the disposition of the petition or motion, the petition or motion is deemed

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50. F.A.R. 1.3.
51. 113 So.2d 882 (Fla. App. 1959).
52. *Id.* at 883.
53. FLA. R. CIV. P. 1.38(b), effective July 1, 1962, *In re* Fla. R. Civ. P., 139 So.2d 129 (Fla. 1962).
54. FED. R. CIV. P. 60(b).

abandoned.[55] As a result the judgment becomes final and the appeal is considered proper if timely filed. However, the nonmoving party cannot foreclose a disposition of the motion or petition by filing a notice of appeal. Until the motion or petition is disposed of, the appeal is not timely and must be dismissed.[56]

The rules[57] provide for a time limitation of sixty days unless otherwise provided for by statute. The effect of this savings clause is to preserve as inviolate the preexisting statutory appeal times. This savings clause was apparently based upon the principle that only the legislature may enact appeal times. Notwithstanding this determination certain appeal times provided for by statute have fallen.[58]

Prior to 1957, the Constitution of Florida provided for final appellate jurisdiction in the circuit courts as to certain specified matters and "such other matters as the legislature may provide."[59] Pursuant to this power source, the legislature enacted statutes providing for appeals to be taken to the circuit court and in addition provided for the appellate procedures to be used, including times for appeal. This constitutional power source was removed by the 1957 constitutional amendment.[60] As a result the circuit court was no longer to be used as the main appellate tribunal. The general effect of the amendment was to substitute the district courts of appeal for the circuit courts. However, in situations where the entire appellate procedures were inseverably interwoven with the designation of the proper appellate tribunals, the entire statute fell.[61]

In the leading case of *In re Wartman's Estate*,[62] the supreme court was presented with the problem of the constitutional basis of the appellate procedure of the probate statutes. The appellate procedures prescribed for probate proceedings provided for a double right of appeal, first to the circuit court, and second to the supreme court. Of course the times in which to prosecute these appeals were designated.

The supreme court held that the appellate jurisdiction of the circuit courts and the double right of appeal provided for and implemented by the statute no longer exists. In addition, all statutory sections referring to this appellate avenue, including shorter appeal times, must fall under the principles of statutory construction. The test is evidently this:

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55. Frank v. Pioneer Metals, Inc., 114 So.2d 329 (Fla. App. 1959).
56. Seiferth v. Seiferth, 121 So.2d 689 (Fla. App. 1960).
57. F.A.R. 3.2b.
58. See generally Nash, *Florida Appeal Times*, 16 U. MIAMI L. REV. 24 (1961).
59. FLA. CONST. art. V, § 11 (1885) (repealed).
60. See, *e.g.*, Codomo v. Shaw, 99 So.2d 849 (Fla. 1958).
61. *In re* Wartman's Estate, 128 So.2d 600 (Fla. 1961), *quashing* 118 So.2d 838 (Fla. App. 1960).
62. *Ibid.*

> Where the objectionable provision is an integral part of the statute and cannot be separated from it without doing violence to the legislative intent, the entire statute will be held invalid.[63]

The *Wartman* decision received some explanation in *Whittaker v. Jacksonville Expressway Authority*.[64] The question before the district court was whether or not the thirty day time limitation provided for by statute prevailed over the sixty day time limit of the appellate rule. The court held that the provisions of the statute did not fall. As opposed to the *Wartman* case, which concerned probate, the eminent domain statutes did not contain a double right of appeal. Thus, the appellate procedures were not so interrelated with the designation of the appellate tribunal as to also fall.

Evidently, the existence of a double right of appeal is determinative of the issue of severability. In *Ed Lane Auto Sales, Inc. v. Weinstein*,[65] the district court of appeal invalidated the appellate procedures, including the time for appeal, of the civil court of record on the authority of *Wartman*. The statutes dealing with the civil courts of record contain a double right of appeal.[66]

As of this date, the following is a partial list of times for appeal:

From the juvenile court—ten days;[67]

In guardianship matters—sixty days;[68]

Probate matters, interests of minors—sixty days;[69]

Restoration of the status of competency—fifteen days;[70]

Eminent domain—thirty days;[71]

From the civil court of record—sixty days;[72]

Removal of tenant—civil court of record—two days;[73]

Removal of tenant—county courts—ten days.[74]

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63. *Id.* at 604 n.12.
64. 129 So.2d 188, 189-93 (Fla. App.), *motion to certify dismissed*, 131 So.2d 22 (Fla. App.), *cert. denied*, 133 So.2d 319 (Fla. 1961).
65. 132 So.2d 218 (Fla. App. 1961).
66. FLA. STAT. ch. 33 (1961).
67. *In re* Evans, 116 So.2d 783 (Fla. App. 1960).
68. See Nash, *Florida Appeal Times*, 16 U. MIAMI L. REV. 24 n.13, Appendix A (1961).
69. See note 61 *supra*.
70. *In re* Campbell's Guardianship, 114 So.2d 352 (Fla. App. 1959).
71. See note 64 *supra*.
72. Ed Lane Auto Sales, Inc. v. Weinstein, 132 So.2d 218 (Fla. App. 1961).
73. Placid York Co. v. Calvert Hotel Co., 109 So.2d 604 (Fla. App.), *cert. denied*, 114 So.2d 3 (Fla. 1959).
74. FLA. STAT. § 83.38 (1961).

Payment of Costs

The rules prohibit the original plaintiff from taking an appeal until he shall have first paid all costs that have accrued in the suit and which have been specifically taxed against him. This rule may be avoided by assigning as error the taxation of costs and superseding the order specifically taxing the same.[75] The rule is not jurisdictional in nature and the defendant may waive the rule or be estopped to insist upon it.[76]

The taxation of costs assigned as error is certain to present future litigation. In the only case decided in the survey period, *Simmons v. Gainesville Nehi Bottling Co.*,[77] a preview of the coming full length feature is apparent. The plaintiff secured a supersedeas of the order taxing costs after filing of the notice of appeal. The parties stipulated to permit both litigants extension of time in which to file briefs. The brief of the plaintiff-appellant failed to allege the critical assignment of error involving the taxation of costs. The defendant-appellee promptly moved to dismiss the appeal. The court granted the motion for two reasons. First, the court held that the defendant did not waive his objection by agreeing to an extension. Secondly, the plaintiff-appellant, by not arguing the taxation of costs in his brief, was held to have waived that assignment of error. As a result, the plaintiff-appellant had not complied with the rules, neither paying the costs as a prerequisite to his right of appeal nor by assigning the taxation of costs and superseding the specific order taxing the same.

This case opens the door for future controversy. In the event the assignment of error and the arguments in the brief are solely for the purpose of avoiding the payment of costs until a final determination, has not the plaintiff subverted the spirit of the rule? What would the result be if after the plaintiff in oral argument fails to deal with the question of taxation of costs, the defendant moves to dismiss the appeal as frivolous? He may argue the spirit and purpose of the rule has been violated, *viz.*, to preserve to the original plaintiff a reasonable basis by which he can protect his rights pending the event of an appeal presenting for review a bona fide question involving the imposition of costs.

Basis of Hearing and Determination

An appeal is heard and determined on assignments of error and properly filed briefs and appendices. The record-on-appeal will be referred to only if necessary to settle material conflicts between the parties. The appellate court will consider only that which is properly based upon

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75. F.A.R. 3.2f.

76. Simmons v. Gainesville Nehi Bottling Co., 119 So.2d 719, 721 (Fla. App. 1960).

77. *Ibid.*

the record-on-appeal. In *Anderson v. Town of Groveland,*[78] a fourth amended complaint was dismissed with prejudice by the lower court. It was apparent to the court that the circuit court judge's ultimate judgment was influenced by the disclosures at previous hearings concerning the three previous complaints. The district court determined that the fourth amended complaint stated a cause of action. As to the three previous complaints, the district court indicated that it was not authorized to consider the allegations of the former complaints or other portions of the record.

Assignments of Error

An appellate court will not consider on appeal questions that have not been raised before the trial court nor properly presented by assignments of error. The failure of an appellant to file assignments of error is grounds for the dismissal of the appeal.[79] Illustrative of this proposition is *Kramer v. Landau.*[80] The plaintiff, passenger in Landau's automobile, was injured in a collision with another automobile. The plaintiff brought an action against both drivers. Summary judgments were granted both defendants. The plaintiff, in his assignments of error, failed to allege error in granting a summary judgment for Landau. The court held that there being no proper assignment of error as to the judgment for Landau, the decision must be affirmed.[81] The court then reviewed the summary judgment for the co-defendant and held it to be proper in that the exhibits, affidavits and depositions compelled recognition that the defendant was without fault.

Assignments of error must point out clearly and distinctly any alleged errors. An assignment of error to the effect that "the trial court erred in entering judgment" was considered to be too general to be effective.[82] Alleged errors argued in the brief but not pointed out in the assignments of error cannot be considered by the appellate court. In *Rank v. Sullivan,*[83] the appellant raised the issue of the admissibility of evidence as violative of the dead man's statute for the first time in his brief, but failed to allege it as error in the assignments of error. The court refused to consider the issue.[84]

Record-On-Appeal

It is incumbent upon complaining counsel to support his assignments

78. 113 So.2d 569 (Fla. App. 1959); F.A.R. 3.3.
79. Bailey v. Bailey, 114 So.2d 804 (Fla. App. 1959); Forro v. Five Sky, Inc., 114 So.2d 512 (Fla. App. 1959).
80. 113 So.2d 756 (Fla. App. 1959).
81. *Id.* at 757.
82. Municipal Court v. Giblin, 126 So.2d 285 (Fla. App. 1961); F.A.R. 3.5c.
83. 132 So.2d 32 (Fla. App. 1961).
84. *Id.* at 36-37.

of error by a sufficient record-on-appeal. In *Moyer v. Moyer*,[85] a husband appealed the propriety of a lump sum alimony award in a divorce decree. The record-on-appeal consisted only of the pleadings. The court affirmed the lump sum decree because the error assigned was unsupported by any evidence in the record-on-appeal. The husband attempted to excuse the fact that the record-on-appeal did not contain material other than the pleadings on the ground that there was no court reporter at the hearing. The court took this opportunity to illustrate the methods whereby a record-on-appeal can be created in the absence of a stenographic report. The court first pointed out that a stenographic report is not necessary. A narrative statement can be obtained which can be stipulated to by the parties. If this cannot be done, then the procedure authorized by Florida Statute § 59.14(4)[86] can be used. This statute provides for recitals in orders, judgments or decrees of the trial court, or the judge thereof, or by a stipulation of the interested parties. The court further pointed out that rule 3.61 can be used for a settlement of the record when material portions have been omitted by error or accident. This can be done by stipulation or by the trial court judge directing that the omission be repaired.[87]

Briefs—Form and Contents

Failure of a party to serve and file his brief within the time allowed by the rules,[88] in the absence of an extension of time and without good cause shown, is grounds for dismissal. This rule is relaxed in a proper case, especially in criminal appeals. A mere oversight on the part of counsel, for example a clerical error in his office, is not good cause.[89]

Both the official and unofficial citations should be included in all citations of authority.[90] In *Keith v. Keith*,[91] the First District Court of Appeal lamented the fact that they did not have the West System of Southern Reporters prior to 1948, due to lack of legislative appropriations.

The failure of the appellant to comply with the procedural requirements of the brief,[92] other than filing and serving, is grounds for a motion to strike the brief, not the dismissal of the appeal. This was the ruling

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85. 114 So.2d 638 (Fla. App. 1959).
86. FLA. STAT. § 59.15(4) (1961).
87. It should be noted that F.A.R. 3.6a, as amended, provides that the record-on-appeal shall consist of an original record, a transcript of record, or a stipulated statement prepared in accordance with these rules.
88. F.A.R. 3.7a (40 days).
89. Parada Holding Co. v. Sulkin, 126 So.2d 601 (Fla. App.), *cert. denied*, 131 So.2d 201 (Fla. 1961); Monroe-Jackson Hosp., Inc. v. Scarane, 117 So.2d 6 (Fla. App. 1960).
90. F.A.R. 3.7f(1).
91. 120 So.2d 50, 51 (Fla. App. 1960).
92. F.A.R. 3.7f(4).

in *Local 1248, Int'l Ass'n of Machinists v. St. Regis Paper Co.*,[93] in which the appellant failed to state the assignments of error in his brief on which each point on appeal was predicated.

The court, in *State Farm Mut. Auto. Ins. Co. v. Ganz*,[94] denied a motion to strike when the appendix accompanying the brief did not refer to the pages of the transcript. The court held that when testimony is bound and paged separately, a reference to the pages of the transcript but not the appendix was sufficient compliance with the rules.[95] The courts have been extremely liberal with this procedural rule. In one case the brief of the appellant did not include the applicable testimony as part of the appendix and the brief was without a page number reference to the record. Nevertheless, the court considered the testimony instead of treating the point as having been abandoned.[96]

Errors assigned in the assignment of error but not argued in the brief are abandoned.[97] This rule is relaxed in criminal appeals and also when there is substantial and highly prejudicial error.[98]

In *Pait v. State*,[99] a criminal prosecution for first degree murder, remarks not objected to at trial were considered on appeal to be grounds for reversal because of their highly prejudicial character.

When there is a jurisdictional or other "fundamental" error it may be noticed initially by an appellate court. This is true whether or not it has been argued in the briefs or made the subject of an assignment of error or of an objection or exception in the court below. Illustrative is the case of *Florio v. State ex rel. Epperson*.[100] Injunctive relief was sought against an unincorporated association sued in the association name. No personal type service was perfected upon any of the members. On appeal the defendants raised this defect in service. The court considered the objection, although not raised in the court below, and dismissed the appeal.[101]

A perplexing problem is presented in situations wherein an excessive number of assignments of error are alleged and only one, two or three general points are argued in the brief. The question presented is whether the appellant has waived his assignments of error by not arguing them

93. 125 So.2d 337 (Fla. App. 1960).
94. 112 So.2d 591 (Fla. App. 1959).
95. F.A.R. 3.7f(5).
96. Stoudenmire v. Florida Loan Co., 117 So.2d 500 (Fla. App. 1960).
97. Simon v. Simon, 123 So.2d 41 (Fla. App. 1960); Pittman v. Roberts, 122 So.2d 333 (Fla. App. 1960).
98. State v. Town of Sweetwater, 112 So.2d 852 (Fla. 1959); Pait v. State, 112 So.2d 380 (Fla. 1959).
99. *Supra* note 98.
100. 119 So.2d 305 (Fla. App. 1960).
101. *Id.* at 309.

or whether the assignments initially could be struck as not complying with the requirements of the rule.[102] In one case,[103] the appellant alleged thirty-eight different assignments of error. Twenty-two were directed toward the charge to the jury, eight to the refusal of the court to direct a verdict, six to the testimony and two to the ruling of the court as to the existence of a cause of action. The brief argued two main points: first, whether there could be implied warranty where the vendee has an opportunity to inspect, there is no fraud and the defendant is not a manufacturer; and second, whether there could be implied warranty in the absence of privity. The appellant contended that the two questions were preserved for appellate review by all the assignments of error. The court held that such procedure violates rule 3.7f(4).

The court, however, held that the appellee's objection came too late. The appellee should have made a motion to require the appellant to file a brief in conformity with the rules or suffer a dismissal prior to the time the appellee filed his own brief. Thus, this objection to the form and contents of the brief may be waived.

Power of Lower Court

The rules provide the lower court with the power of supervision of the things to be done and objections thereto, including extensions of the time during the period after the filing of the notice of appeal, but before the record-on-appeal is filed in the appellate court.[104] This jurisdiction and control over the record relates to corrections of the record, and of the history of the proceedings before the appeal. The rules do not permit the making of orders after appeal to change the legal effect of the orders or judgments from which the appeal has been taken, or to change the status of the case so as to interfere with the rights of the appellant as he may have asserted them on appeal. In *Fulton & Cooper, Inc. v. Poston Bridge & Iron Co.*,[105] the defendant appealed an order granting a new trial for the plaintiff. Contrary to the requirements of the statute,[106] the order granting the new trial failed to indicate the grounds for the order. The sole point assigned as error on appeal was the failure of the court to state the grounds for the order granting the new trial. One month after the notice of appeal, and two weeks after the filing of the assignments of error, the plaintiff upon motion secured an order of the lower court indicating the grounds for granting a new trial. A certified copy of the order

102. F.A.R. 3.7f(4).
103. Hector Supply Co. v. Carter, 122 So.2d 22 (Fla. App. 1960), *cert. discharged*, 128 So.2d 390 (Fla. 1961).
104. F.A.R. 3.8.
105. 122 So.2d 240 (Fla. App.), *cert. denied*, 125 So.2d 879 (Fla. 1960).
106. FLA. STAT. § 59.07(4) (1961).

was filed with the appellate court. The court reversed the order granting the new trial because of failure to comply with the mandatory requirements of the rule. The court further indicated that the provisions of rules 1.38 of the Florida Rules of Civil Procedure and 3.8 of the Florida Appellate Rules deal only with the correction of clerical mistakes, and do not allow an order which interferes with the rights of the litigants. By dicta the court indicated that the lower court could cure the omission or the failure to state the grounds for the granting of the new trial order prior to the filing of the notice of appeal and thus eliminate the necessity therefor, but not subsequent to the time of the filing of the notice of appeal.[107]

Motions

The rules provide that if no other procedure or pleading is specifically provided, requests to the court for an order or ruling should be made by way of motion filed with the lower court.[108] For example, a motion to affirm the lower court is improper in that another procedure exists for that purpose.[109]

Frivolous Appeals

A procedure is provided for quashing an appeal on the grounds that it is frivolous and taken only for delay.[110] The court, of course, may at any time sua sponte dismiss an appeal when a party has failed to prosecute the appeal in accordance with the provisions of the rules. In *Karlin v. City of Miami Beach*,[111] a petition for certiorari completely failed to suggest any constitutional basis for the excercise of jurisdiction by the supreme court. The court in *Karlin* admonished the bar that henceforth in such situations, where there is obviously no grounds for the excercise of jurisdiction, the petitioner may subject himself to penalties and damages as fixed by the supreme court or district courts as provided in rule 4.5c(6).

The First District Court of Appeal has announced that henceforth it would quash certain types of appeals as frivolous. The situation concerns individual tort liability interwoven with the liability of an insurance company. In this fact pattern a plaintiff sues a defendant for negligence (ordinarily an automobile injury case) and the insurance company defends the case. After an adverse determination, the insurance company prosecutes an appeal on the defendant's behalf. During the pendency of the appeal, the plaintiff, now a judgment creditor, attempts to garnish the insurance company, and in the absence of a supersedeas of the first judgment is

107. See note 105 *supra*.
108. F.A.R. 3.9a.
109. Evans v. Lawrence, 113 So.2d 602 (Fla. App.), *appeal dismissed*, 114 So.2d 7 (Fla. 1959).
110. F.A.R. 3.9b.
111. 113 So.2d 551 (Fla. 1959).

successful. The insurance company appeals the second adverse determination, and then moves for the two appeals to be consolidated or the second appeal postponed until there has been a determination of the tort liability in the first case. Henceforth, a motion to quash the second appeal will be granted. The insurance company will no longer be able to use the second appeal to supersede the effect of the first judgment. If it expects to avoid the consequences of garnishment, the insurance company must secure a supersedeas of the first judgment.[112]

Oral Arguments

The rules[113] have been amended[114] to include those situations wherein the supreme court will hear oral arguments en banc. In case after case in the survey period, attorneys failed to comply with the rules to the detriment of their clients. The courts have taken unusual pains to explain the procedures to be followed. The patience of the courts is waxing thin. For example, in *Haines v. State*,[115] the last four words of the brief requested oral argument. The rule dealing with oral argument specifies that the application for an oral argument shall not be incorporated in the briefs or other bound papers, but shall be filed on separate paper.[116]

Parties

The meaning of rule 3.11a[117] is difficult to comprehend. It provides that all parties to the cause not named as parties appellant shall automatically become parties appellee. The spirit of the rule is to provide for an appeal by any party aggrieved without the necessity of securing the consent of the other parties to the litigation. Illustrative is *City of Miami v. Albro*.[118] The plaintiff brought an action against the defendant city and defendant police officers Clark and O'Brien. Clark and the city jointly appealed the adverse determination of the trial court. The plaintiff argued that inasmuch as O'Brien did not appeal the court could not reverse upon the sufficiency of the evidence. The court held the position untenable and that the city and Clark had a right of appeal, as does any party who feels aggrieved by a final judgment. This introduces a more difficult question. If the non-appealing defendant under the rule is a party appellee, then is

112. American So. Ins. Co. v. Driscoll, 125 So.2d 105 (Fla. App. 1960), followed in American Fire & Cas. Co. v. Williams, 125 So.2d 107 (Fla. App. 1960).
113. F.A.R. 3.10.
114. *In re* Amendment of Rule 3.10 Florida Appellate Rules, 113 So.2d 707 (Fla. 1959).
115. 113 So.2d 601 (Fla. App. 1959).
116. F.A.R. 3.10a.
117. F.A.R. 3.11a.
118. 120 So.2d 23 (Fla. App. 1960).

the determination of the appellate court as effective to his personal liability as though he had appealed? Or perhaps, is the failure to appeal within the prescribed time res judicata?

Joinder of Appeal

The rules[119] provide for a joinder of appeal by one of the cross parties. In *Jacobi v. Claude Nolan, Inc.*,[120] the plaintiff appealed a summary judgment for Nolan. A co-defendant, Charett, joined in the appeal with the plaintiff for the dismissal by the court of the cross-claim against Nolan.

Rehearings on the Appellate Level

The most important factor to be considered in rehearing is that no new grounds or position from those taken in the original argument can be set forth.[121] For example, in *Williams v. Noel*,[122] petition for ceritorari was denied on the grounds that no jurisdiction was had in the supreme court. The petitioner cited one supreme court case as being in conflict with the decision appealed from. In the petition for rehearing, five new cases were cited showing the conflict of decisions. These cases were not argued in the prior hearing. The supreme court took this opportunity to once again explain its position in regard to the rule. The petition must point out the areas of conflict with specific reference to illustrative prior decisions of the courts which establish the conflict. Additional authorities may be presented and discussed in supporting briefs. The petition is not to be the compendium of all persuasive authorities; that is the function of the brief. The alleged omission, oversight, causes or grounds should be set forth succinctly and concisely. Compliance with the rules will prevent repetition of the judicial criticism that "the petition is to be distinguished more in the breach than in the observance of the rules."[123]

Taxation of Costs

It should be noted that all costs, including appellate costs, are taxed in the lower court.[124] The rules provide for the procedure to be followed, reviewable upon petition filed within twenty days after the entry of the judgment for costs. In *Manganeilli v. Covington*[125] the party aggrieved attempted to seek review of the judgment of costs by filing an amended assignment of error. The court held that this was an improper method of

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119. F.A.R. 3.11b.
120. 122 So.2d 783 (Fla. App. 1960).
121. F.A.R. 3.14.
122. 112 So.2d 5, 7 (Fla. 1959).
123. Ossinsky v. Nance, 118 So.2d 47, 48 (Fla. App. 1960).
124. F.A.R. 3.16b; Conner v. Butler, 116 So.2d 454 (Fla. App. 1959).
125. 114 So.2d 320, 322 (Fla. App. 1959).

raising the question and refused to hear the argument because the appellate court was without jurisdiction of the question.

A judgment for costs in and of itself is not an appealable order.[126] An appeal, as opposed to a petition, is improper. However, the court will treat the notice of appeal as a petition for certiorari under rule 3.16c.[127]

Evidently this rule encompasses post trial orders and judgments for costs. One should be able to avoid the payment of costs by assigning the taxation of costs as error. This should be the procedure when the judgment for costs is rendered at the same time as the final judgment appealed from. However, the procedure under rule 3.16c should be followed when the judgment of costs is post trial in character.

Appellate Review of the Administrative Agencies

Rule 4.1 provides that all appellate review of the rulings of any commission or board shall be by certiorari as provided by the appellate rules.[128] The rule is plain enough. The problem is to determine in what situations the rule requires certiorari to be taken as opposed to some other method of appellate review.

Perhaps the best guide is to be found in the negative. The rule does not have reference to appellate review by appeal. However, if a right of appeal is provided for by statute, it is a substantive right and must be afforded to litigants.[129] Thus appeal, rather than certiorari, is the correct procedural device to secure appellate review in such situations.

The rule does not have reference to original proceedings. The scope of the review is only to ascertain whether the findings and decisions of the administrative tribunal were supported by substantial evidence. This presupposes that there was evidence taken before the administrative tribunal in some type of hearing. Herein lies the vexatious problem, *viz.*, when does the case first appear in the judicial stream? The courts have adopted the character of test which is dependent upon the distinction of judicial, or quasi judicial action, from action purely administrative in nature. If the action is judicial or quasi judicial, certiorari is the proper appellate method. If the act is purely administrative, an original proceeding is proper. As may be expected with the use of a quasi judicial test, the modern practitioner repeatedly finds himself confused as to the exact method to be used to question the action of the administrative body. The cases which have appeared in the survey period not only illustrate increasing uncer-

126. *In re* Carol Fla. Corp., 118 So.2d 837, 838 (Fla. App. 1960).
127. *Ibid.*
128. F.A.R. 4.1.
129. State v. Furen, 118 So.2d 6 (Fla. 1960).

tainty in this area, but point up the importance of a uniform administrative procedure act.[129a]

In *Alianell v. Fossey*,[130] an appeal was sought from an order dismissing an injunction brought against the county commissioners of Dade County as individuals alleging that the board, when passing a resolution concerning a zoning question, was acting as an administrative body. Alianell sought to review the actions of the board, further alleging that the county building and zoning director was about to take action against him pursuant to the resolution. The court held that the county commissioners must be sued in the name of the county, as provided for by statute, and further that the commission was not an administrative body within the meaning of rule 4.1. (They characterized zoning as legislative in nature.) The cause was dismissed without prejudice to the right to use appropriate proceedings under the statutes (appeal de novo).[131]

O'Brien v. Campbell[132] illustrates how a court applies the judicial character test. The petitioner was dismissed from the Department of Public Safety for cause. An appeal was taken to the Personnel Advisory Board of Dade County which gave the petitioner a hearing. The board found that the charges against the petitioner were not sustained by the evidence. The county manager then reviewed the findings of the board and reversed them in part. The petitioner sought a writ of mandamus against the county manager. The writ was quashed and an appeal was taken. The court pointed out that this was a judicial type of proceeding. What the petitioner wanted was an examination of the quality of the evidence. This type of review is of judicial character afforded under rule 4.1 by certiorari and not by an original proceeding.

Bloomfield v. Mayo[133] illustrates the other side of the coin. The petitioner brought an action for declaratory and injunctive relief against the Commissioner of Agriculture for his failure to register a product (pesticide) as required by law. The commissioner attacked this suit on the grounds that review could only be had by certiorari under rule 4.1. The court held that the action of the board was quasi judicial in character and the petition for declaratory relief was to be treated as a petition for certiorari. The court then held that the petitioner did not demonstrate that the action of the "technical" committee was arbitrary and that it had abused its discretion. Petitioner then brought ceritorari to question the holding of the lower court.

129a. For Florida's Administrative Procedure Act see FLA. STAT. ch. 120 (1961), enacted 1961.
130. 114 So.2d 372 (Fla. App. 1959).
131. FLA. STAT. § 176.16 (1961).
132. 118 So.2d 672 (Fla. App. 1959).
133. 119 So.2d 417 (Fla. App. 1960).

The major procedural issue was whether ceritorari or an original proceeding was the proper device. The court stated the test to be whether the statutory tribunal had exercised the statutory power given it to make a decision having a judicial character, consequent upon some notice or hearing to be had before it as a condition for the rendition of a particular decision made. The court further indicated that even acts quasi legislative or quasi executive in character may be considered to be quasi judicial, if as a condition precedent to the commission's or board's exercise of the quasi legislative or quasi executive power, "a notice and hearing, judicial in nature, is required by law to be observed."[134] The court of appeal then enumerated the following elements which would indicate to it whether or not the action of the board was administrative or quasi judicial in character: (1) due notice of a hearing to be held on the question to be considered; (2) fair opportunity to be heard in a proceeding in which the party affected is afforded the basic requirements of due process of law.[135] In short, the court requires that some record be established by due process of law which a court may review. The court, in holding that injunctive original relief was proper, pointed out that due notice of a hearing was not required in the present situation. Accordingly, it characterized the act as administrative in nature.

In a similar case, *Lyles v. Dade County*,[136] the court characterized the function of the county commissioner in denying or granting gun permits as administrative in nature and held that original relief and not review by certiorari was proper.

Larson v. Warren[137] cast some doubts on the efficacy of the *Bloomfield* test. In *Larson* the constitutionality of the Florida Financial Responsibility Law[138] was questioned, with particular reference to the provision for revocation of a driving license, to be followed by a hearing. The act of revocation is purely ministerial in character. When this action is taken, there is no hearing, no evidence taken and no finding of fact. On this basis certiorari would not be available to review the action of the administrative body following the *Bloomfield* decision. However, an act purely administrative in character may become quasi judicial in nature, if as a statutory requirement, notice and hearing thereafter was provided for. In the *Larson* case the statute provided for such procedural requirements subsequent to initial revocation. Thus, the entire proceeding became susceptible to appellate review by certiorari. Accordingly, the statute was held to be constitutional as providing for due process of law, to wit, appellate review. It is interesting to note that in *Bloomfield*, the court looked

134. *Id.* at 421.
135. *Ibid.*
136. 123 So.2d 466 (Fla. App. 1960).
137. 132 So.2d 177 (Fla. 1961).
138. FLA. STAT. ch. 324 (1961).

to see if due process, notice and hearing were afforded to the litigant in order to determine whether certiorari was available. In *Larson*, the court attempted to see if certiorari was available in order to ascertain if due process requirements of the law were met.

Judicial Review-Final Judgments

Review in law or equity is had by appeal, except where review by certiorari is provided by law or by the rules. If the litigant desires to have appellate review of a judicial decree, he must first ascertain if the decree is "final in nature," for an appeal will only lie from final judgments. If the order is not final in nature, a litigant may still have judicial review at law by an interlocutory order at law if it relates to jurisdiction or venue, or by common law certiorari in certain circumstances. Judicial review of equitable proceedings is had in the same fashion except that an interlocutory order is reviewable, if of the type reviewable prior to the adoption of the rules.

A judgment must be final both procedurally and inherently, that is to say by its very nature. In many instances a litigant seeks review of a judgment which is not final procedurally. For example, in *Chastain v. Embry*,[139] the court, in granting defendant's motion for summary judgment, stated "It is ordered and adjudged that defendant's motion, filed February 25, 1959, for summary judgment, is granted."[140] The court held that the traditional words used to form a final judgment at law were not employed in this order. All that the lower court did was to grant the motion, and did not go beyond this by entering a judgment. The order was nothing more than the basis to authorize an entry of final judgment, and did not itself constitute a final judgment.

Stone v. Buckley[141] illustrates that when an order is not final, the court may dismiss the appeal sua sponte.

In *Gali v. Zamora Jewish Center*,[142] the decretal part of the order read "the Motion to Dismiss Plaintiff's Amended Complaint as to the Defendant . . . is hereby granted."[143] The order was not considered to be a final judgment, and thus not appealable.

Some motions, by their very nature, cannot be considered final in character. The decisive factor in the determination of finality in a judgment should be whether or not the motion, judgment, order or decree effectively terminates the litigation. The following have not been con-

139. 118 So.2d 33 (Fla. App. 1960). See also State *ex rel.* Mott v. Scofield, 120 So.2d 825 (Fla. App. 1960).
140. 118 So.2d at 33.
141. 119 So.2d 298 (Fla. App. 1960).
142. 128 So.2d 403 (Fla. App. 1961).
143. *Ibid.*

sidered final: motion to tax costs after a dismissal of plaintiff's complaint with leave to amend;[144] a post trial motion non obstante veredicto, or for a new trial;[145] an order of a court transferring a cause to a lower court due to defects in the jurisdictional amount;[146] and civil contempt.[147]

Interlocutory appeals at law may be taken only as to questions of venue or jurisdiction over the person. Other interlocutory orders at law may be reviewed by common law certiorari when a trial court acts beyond its jurisdiction, or when its order does not conform to essential requirements of law and may cause material injury through the subsequent proceedings and the remedy by appeal would be inadequate.[148]

It is to be noted that the appellate tribunal may treat an improvidently taken appeal as a petition for common law certiorari,[149] but may not treat a petition for common law certiorari as an appeal.[150] In *Mapoles v. Wilson*,[151] the defendant petitioned the district court of appeal to review the denial of a motion to dismiss a complaint based upon improper venue. The court had no jurisdiction and dismissed the petition for certiorari, as there was a full and adequate remedy through an interlocutory appeal. A litigant can only seek review through an interlocutory appeal of the specific order described in the notice of appeal, and the appellate court is precluded from considering the correctness of any other order or ruling not described or designated in the notice of appeal.[152]

Lower Courts Acting in Violation of an Appellate Court's Order

In *In re Guze's Estate*,[153] an interlocutory appeal was taken from an order of the county judge setting aside a portion of the prior order as purportedly directed by a mandate of the appellate court. The order of the county judge was thought to violate the appellate court's mandate. The district court treated the interlocutory appeal as a petition for common law certiorari, and concluded that the order of the lower court was in violation of its mandate. It should be noted that a court acting in excess of its jurisdiction is one of the grounds for the granting of a petition for common law certiorari.

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144. Strazzulla v. Hinson, 113 So.2d 419 (Fla. App. 1959).
145. Whigam v. Bornstein, 118 So.2d 252 (Fla. App. 1960).
146. Easley v. Garden Sanctuary, Inc., 120 So.2d 59, 62 (Fla. App. 1960) (Sharmon, J., concurring in part and dissenting in part, would consider this to be a final judgment).
147. Local 1248, Int'l Ass'n of Machinists v. St. Regis Paper Co., 125 So.2d 337 (Fla. App. 1960).
148. Brooks v. Owens, 97 So.2d 693 (Fla. 1957); see also Taylor v. Board of Pub. Instruction, 131 So.2d 504 (Fla. App. 1961); United Life Ins. Co. v. Jowers, 118 So.2d 85 (Fla. App. 1960).
149. Republic of Cuba v. Ritter, 130 So.2d 98 (Fla. App.), *cert. denied*, 135 So.2d 740 (Fla. 1961).
150. Fort v. Fort, 104 So.2d 69 (Fla. App. 1958).
151. 122 So.2d 249 (Fla. App. 1960).
152. 125 So.2d at 343.
153. 114 So.2d 212 (Fla. App. 1959).

Reinstatement of a Cause after Dismissal

The case of *United Life Ins. Co. v. Jowers*[154] illustrates the proposition that neither common law certiorari nor interlocutory appeal is available to review the lower court's discretion to reinstate the cause after it has been properly dismissed for a failure to prosecute within a period of one year. The court indicated that the aggrieved party would have a chance to review the order of the lower court by an appeal after the complete termination of the litigation. The court expressly indicated that the fact that the petitioner must consume time and substantial sums of money in defense of the litigation, all of which could be obviated by a consideration of the merits, is insufficient grounds for certiorari.

Transfer of an Action

In *Kautzman v. Bandler*,[155] review was sought of an order of a circuit court transferring the cause to the civil court of record, upon a determination by the trial judge of lack of jurisdictional amount. The court treated the interlocutory appeal taken from this order as a petition for certiorari, and then denied the petition. The case stands for the position that certiorari is available to review an order of this character.

The case of *Easley v. Garden Sanctuary, Inc.*,[156] which holds the same as *Kautzman*, is interesting because of the dissent. Judge Sharmon would consider such an order reviewable by appeal on the grounds that the order is final and "no further judicial labor"[157] remains. The dissent further argued that the case of *Tantillo v. Miliman*,[158] which approved of certiorari as the method of review, was no longer efficacious. At the time the decision in *Tantillo* was rendered, an appeal after a transfer in such a situation as *Easley* would have been to the circuit court, the very court that ordered the transfer in the first place. The constitutional amendment[159] changed this result, and so the rationale of *Tantillo* is no longer cogent.[160]

Civil Contempt

In *Local 1248, Int'l Ass'n of Machinists v. Saint Regis Paper Co.*,[161] the court held that civil contempt can only be reviewed by interlocutory appeal, while criminal contempt is reviewable under Part VI of the rules.[162]

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154. 118 So.2d 85 (Fla. App. 1960).
155. 118 So.2d 256 (Fla. App. 1960); see also Easley v. Garden Sanctuary, Inc., 120 So.2d 59 (Fla. App. 1960).
156. 120 So.2d at 62-64.
157. *Id.* at 62.
158. 87 So.2d 413 (Fla. 1956).
159. FLA. CONST. art. V, adopted 1956.
160. 120 So.2d at 63.
161. 125 So.2d 337 (Fla. App. 1960).
162. F.A.R. Part VI.

The court held in this case that the order was of a criminal contempt type, and dismissed the interlocutory appeal.

It should be clear that the use of certiorari to accomplish that which is unavailable by appeal at law is not readily granted. In one case, the trial court granted a motion to strike part of an averment in a counterclaim, setting up ownership of an adjacent parcel of land by revocation of an offer of dedication in an eminent domain proceeding.[163] The court held that this was a law action and could not be reviewed by interlocutory appeal as it did not relate to jurisdiction or venue. Further, certiorari will not be available, as one cannot do indirectly that which one could not do directly.[164]

Interlocutory Appeals in Equitable Proceedings

As a general proposition, interlocutory appeals in equity are taken from those interlocutory orders or motions which one could review even though not final prior to the adoption of the Florida Appellate Rules. For example, courts have held that the denial of a motion to dissolve a temporary injunction is properly reviewable by interlocutory appeal.[165]

In *Hilson v. Hilson*,[166] the defendant husband sought a modification of a prior modified decree. He took an interlocutory appeal questioning the action of the lower court in allowing attorneys' fees and costs without notice and hearing, and the abuse of discretion in the failure of the lower court to modify the separation agreement. The appellate court held both orders of the lower court reviewable by interlocutory appeal.

Interlocutory Appeals — Record-on-Appeal

No record-on-appeal is required except certified copies of the judgment or order appealed from. However, appendices are required to contain other parts of the record needed for determination of the appeal.[167] In *Best v. Barnette*,[168] an interlocutory appeal was taken to review the granting of a temporary injunction, predicated upon a restrictive covenant, restraining the appellants from the operation of a business. Although testimony was taken before the chancellor, no testimony was presented in the appendices, although referred to in the brief. The court was forced to affirm the order of the chancellor, for it is the duty of the appellant to make clear the errors complained of by availing the court of a proper record, which

163. Taylor v. Board of Pub. Instruction, 131 So.2d 504 (Fla. App. 1961).
164. *Id.* at 506.
165. See note 161 *supra*.
166. 127 So.2d 126 (Fla. App. 1961).
167. F.A.R. 4.2.
168. 130 So.2d 90 (Fla. App. 1961). See also Coggan v. Coggan, 130 So.2d 131 (Fla. App. 1961).

was not done. Where copies of pleadings are required to determine the appeal, they must be included in order to allow the court to make a determination of the error complained of.[169]

Certiorari from District Courts of Appeal to the Supreme Court

The Florida Constitution[170] provides the supreme court with jurisdiction to entertain a petition for certiorari when a decision of a district court affects a class of constitutional or state officers, or one that decides a question which the district court certifies to be of great public interest, or one that is in direct conflict with a decision of another district court or with the supreme court on the same point of law. The overwhelming majority of certiorari cases before the supreme court during this survey period have fallen under the conflict of decisions category. Note that the constitution provides for a *direct* conflict on the same point of law. If the conflict is not present under any interpretation the court must deny the petition.[171]

Certiorari will not be employed discriminately as an added escape route to reach the objective of a second appeal.[172] The petition must be denied when it is brought on the ground that

> The decision . . . is in conflict with the public policy of the State . . . and is a matter of importance to the people . . . and of great public interest.[173]

When a question is certified by a district court as being of great public interest,[174] a contention by the respondent that the question is not one of great public interest and hence should not have been certified is erroneous. Whether a district court does or does not certify a question is completely within their own discretion and the supreme court will not determine whether the district court has properly certified the question.[175]

Before the supreme court will review a lower court decision by way of certiorari, the lower court must conclusively dispose of the question

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169. Gross v. Gross, 131 So.2d 487 (Fla. App. 1961).
170. FLA. CONST. art. V, § 3.
171. "[T]he record having been inspected and the Court finding that said decision is not in direct conflict with any decision of this Court or with any other District Court of Appeal, it is ordered that said petition for certiorari be . . . denied." City of Miami Beach v. State *ex rel.* Fontainbleau Hotel Corp., 111 So.2d 437 (Fla. 1959). See also Cypen, Salmon & Cypen v. Chaachou, 130 So.2d 885 (Fla. 1961); Butler v. Gay, 122 So.2d 189 (Fla. 1960); City of Tampa v. Banks, 120 So.2d 788 (Fla. 1960).
172. Karlin v. City of Miami Beach, 113 So.2d 551, 553 (Fla. 1959).
173. *Id.* at 552.
174. FLA. CONST. art V, § 4.
175. Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961).

sought to be reviewed.[176] If more than one question is presented for review on a petition for certiorari the supreme court is limited to a review of only that point of law passed upon in the decision under consideration.[177]

The rules[178] provide for an automatic stay of proceedings upon filing a petition of certiorari within fifteen days from the rendition of the decision, order or judgment sought to be reviewed. The filing of a petition for certiorari after the fifteen day period operates as a stay upon order of the supreme court after due notice to the adverse party. However, in order to obtain a stay under the latter situation, good cause must be shown. If neither the petition, brief nor anything brought to the supreme court's attention in oral argument discloses good cause why the action in the lower court should be stayed, stay will be denied.[179]

Appeals from Interlocutory Orders

The general rule is that certiorari will ordinarily not be allowed by an appellate court to review an interlocutory order in an action at law since such an order may be corrected through appeal.[180] This rule is subject to the exception that where the order does not constitute a final adjudication so as to support an appeal, leaving appellants without any right of review unless common law certiorari may be utilized, the appellate court will treat the notice of appeal together with the record as a petition for common law certiorari.[181] However, a petition for certiorari cannot be treated as an appeal. In *Engel v. City of North Miami*,[182] petitioner sought to review by certiorari a district court's opinion construing article V, section 6(3) of the Florida Constitution. Although inherent in the district court's decision was a constitutional question which

176. City of Miami v. Green, 114 So.2d 617 (Fla. 1959). The petition was denied without prejudice to the petitioners so they could secure, upon remand of the case, a specific determination of the question.

177. In Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960) a review was sought by way of a petition for certiorari of a district court decision which stated "there is a total lack of certain evidence to provide proximate cause even if it might be said that there was some evidence of negligence." The supreme court stated "we must assume the presence of negligence, and limit our consideration to the rule regarding proximate cause."

178. F.A.R. 4.5c(6).

179. Kuhn v. Telford, 116 So.2d 239 (Fla. 1959).

180. Turner v. Turner, 132 So.2d 345 (Fla. App. 1961); Taylor v. Board of Pub. Instruction, 131 So.2d 504 (Fla. App. 1961); Republic of Cuba v. Ritter, 130 So.2d 98 (Fla. App. 1961); Riedel v. Driscoll, 127 So.2d 924 (Fla. App. 1961); Welsh v. Tropical Roofing Co., 127 So.2d 894 (Fla. App. 1961); White v. Spears, 123 So.2d 689 (Fla. App. 1960).

181. *In re* Estate of Dahl, 125 So.2d 332 (Fla. App. 1960); Collier v. McKesson, 121 So.2d 673 (Fla. App. 1960). In *Collier* certiorari was available to test the validity of an order entered as a result of a pre-trial conference. See also Easley v. Garden Sanctuary, Inc., 120 So.2d 59 (Fla. App. 1960); Kautzman v. Bandler, 118 So.2d 256 (Fla. App. 1960); Beck v. Barnett Nat'l Bank, 117 So.2d 45 (Fla. App. 1960); Gottlieb v. Town of Surfside, 115 So.2d 25 (Fla. App. 1959); Everett v. Mann, 113 So.2d 758 (Fla. App. 1959).

182. 115 So.2d 1 (Fla. 1959).

potentially falls within the supreme court's jurisdiction, the proper method of review was by appeal and the petition for certiorari was dismissed.[183]

Extensions of Time

Rule 4.5c(1)[184] requires the filing of applications for writs of certiorari within sixty days from the rendition of the decision, order, judgment or decree sought to be reviewed.[185] Rendition is defined by rule 1.3[186] as being the date of recordation of the judgment, order or decree where recordation is required, unless there has been filed a timely and proper motion for new trial or a petition for rehearing or reconsideration by the lower court, in which event, the judgment, order or decree shall not be deemed rendered until such motion or petition is disposed of.[187] The requirement of the rule cannot be extended by order of court.[188]

Mandamus

The purpose of mandamus is not to *establish* a legal right. Its function is to enforce a right which has already been clearly established.[189] When a right which is given under a particular statute has been denied, mandamus proceedings are proper to enforce that right.[190]

A judgment granting a peremptory writ of mandamus is appealable

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183. See also Pavey v. Pavey, 112 So.2d 589 (Fla. App. 1959) wherein a wife filed a motion in a divorce suit for further modification of the decree to increase alimony and an order was entered denying the increase. Two days before the end of the 60-day period allowed for appeal, the wife filed a petition for certiorari to review the order. The petition was dismissed as the order was only reviewable by appeal and the petition for certiorari could not be treated as an appeal.

184. F.A.R. 4.5c(1).

185. Cannington v. Faroy, 113 So.2d 882 (Fla. App. 1959).

186. F.A.R. 1.3.

187. See text at notes 35-45 *supra*.

188. In Harris v. Condermann, 113 So.2d 235, *rehearing denied*, 113 So.2d 236 (Fla. App. 1959), petitioners contended that no time limit can be imposed on the filing of a petition for a writ of certiorari; and alternatively that the 60-day limitation can be extended by the court which entered the judgment sought to be reviewed. The district court held: the supreme court is vested with the power to adopt rules limiting the time within which petitions for certiorari may be filed. This it had done. It was never contemplated that the power, right, authority, or jurisdiction to consider a petition for certiorari could exist for an indefinite period, or in perpetuity. Nor can the requirement of the rule be extended by order of court.

189. In State *ex rel.* Glynn v. McNayr, 133 So.2d 312 (Fla. 1961) mandamus proceedings were instituted to direct the county manager and the chief deputy county tax assessor to submit to the county commissioners a tax roll predicated upon reassessment of property at full cash value. The court held that the petitioners had not demonstrated that they had a legal right to compel the preparation and submission of a particular tax roll and therefore could not establish that right in mandamus proceedings. See also State *ex rel.* Eichenbaum v. Cochran, 114 So.2d 797 (Fla. 1959); City of Miami v. Rezeau, 129 So.2d 432 (Fla. App. 1961); Dance v. City of Dania, 114 So.2d 697 (Fla. App. 1959).

190. State *ex rel.* Village of North Palm Beach v. Cochran, 112 So.2d 1 (Fla. 1959); Broward County v. Bouldin, 114 So.2d 737 (Fla. App. 1959); Florida Tel. Corp. v. State *ex rel.* Peninsular Tel. Co., 111 So.2d 677 (Fla. App. 1959).

as it is considered a final order.[191] However, an order granting a motion to quash an alternative writ of mandamus is not a final judgment and therefore is not appealable without a provision that the petition be dismissed.[192]

Mandamus is not the proper method with which to review an order of an administrative agency.[193] However, when administrative remedies are exhausted, mandamus is proper to enforce those rights which have been denied by the agency.[194]

Although generally, administrative remedies must be exhausted before mandamus is available "the law does not require one to exhaust his administrative remedies where such remedy would be of no avail."[195]

Prohibition

Prohibition involves an original proceeding[196] and like mandamus is not available to seek review of an order. In *State ex rel. Hartford Acc. & Indem. Co. v. Johnson*,[197] the supreme court had granted the respondent's motion for the allowance of a reasonable fee for the services of his attorney after the court had denied the petitioner's writ of prohibition. On rehearing, the court receded from its order taking into consideration the Florida statute providing that a fee will be allowed in any proceedings "had for review of any claim."[198] The court concluded that prohibition proceedings are original and not appellate in nature and therefore do not fall under the category of proceedings contemplated by the legislature under the statute.

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191. City of Miami Beach v. State *ex rel.* Pickin' Chicken of Lincoln Road, Inc., 129 So.2d 696 (Fla. App. 1961).

192. State *ex rel.* Mott v. Scofield, 120 So.2d 825 (Fla. App. 1960).

193. City of Miami v. State *ex rel.* Houston, 120 So.2d 459 (Fla. App. 1960) wherein the petitioner sought to review an order of the Civil Service Board. See also O'Brien v. Campbell, 118 So.2d 672 (Fla. App. 1960).

194. State *ex rel.* Florida Indus. Comm'n v. Willis, 124 So.2d 48 (Fla. App. 1960). Note that in this case had the legislature provided for a hearing to be held by the Industrial Commission in which a record could have been made, then the method for review would be certiorari. However, no hearing being available, there is nothing to review and hence only the original proceedings of mandamus are available to enforce the denied right in this case.

195. City of Holly Hill v. State *ex rel.* Gem Enterprises, Inc., 132 So.2d 29 (Fla. App. 1961). The failure of an applicant for the transfer of an alcoholic beverage package store license to apply first to the planning board and next to the board of appeals did not preclude him from bringing a mandamus action. The planning board could only have recommended zoning classification to the city council, and the council had already acted contrary to the applicant's contention. An appeal to the board of appeals for variance was also unnecessary since bars selling alcoholic package goods were already permitted in the zone to which the transfer was sought.

196. State *ex rel.* Florida Indus. Comm'n v. Willis, 124 So.2d 48 (Fla. App. 1960).

197. 118 So.2d 223 (Fla. 1960).

198. FLA. STAT. § 440.34(1) (1961).

Where an adequate remedy by appeal exists there is no error in discharging a rule nisi and dismissing a suggestion for a writ of prohibition.[199]

Quo Warranto

Quo warranto is the exclusive remedy to seek relief where a municipality has undertaken to excercise jurisdiction or control over land.[200] In *State ex rel. Winton v. Town of Davie*,[201] the mayor and town council brought quo warranto proceedings to attack the validity of the incorporation of the Town of Davie in Broward County. The supreme court concluded that it did not have jurisdiction under article V, section 4(2) of the Florida Constitution as neither the mayor nor the town council was a "state officer, board, commission, or other agency authorized to represent the public generally."[202]

199. *Supra* note 197. See also State *ex rel.* Frates v. Bishop, 117 So.2d 25 (Fla. App. 1960).
200. City of North Miami Beach v. Bernay, 117 So.2d 863 (Fla. App. 1960).
201. 127 So.2d 671 (Fla. 1961).
202. FLA. CONST. art. V, § 4 (2).