

12-1-1959

Civil Procedure and Appellate Review

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Recommended Citation

Ronald E. Kay, *Civil Procedure and Appellate Review*, 14 U. Miami L. Rev. 235 (1959)

Available at: <https://repository.law.miami.edu/umlr/vol14/iss2/8>

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PROCEDURAL LAW

CIVIL PROCEDURE AND APPELLATE REVIEW*

RONALD E. KAY**

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PART I

CIVIL PROCEDURE BEFORE, DURING AND AFTER TRIAL

PROCESS AND NOTICE

Process

Service Upon Non-Resident Motor Vehicle Owners

The Florida Statutes provide a procedure for substituted service of process upon non-resident motor vehicle owners in actions arising from the *operation* of their motor vehicle within the state. The act of turning

* The material in this survey includes the cases reported in 96 So.2d (Fla. 1957) through 111 So.2d (Fla. 1959) inclusive and related enactments of the 1959 Florida legislature.

** Editor-in-Chief, University of Miami Law Review.

on the ignition and pressing the starter of an automobile constitutes "operating" a motor vehicle within the state of Florida, for the purpose of service of process on non-resident motor vehicle operators or owners.¹

Service of process upon non resident engaging in business in state: Method

The Florida Statutes provide for substituted service of process upon the Secretary of State in lieu of personal service upon non residents carrying on a business or business venture in Florida. This statute is strictly construed and the plaintiff must bring himself clearly within its provisions in order to render an effective substituted service of process against a non resident defendant.² The supreme court recently held that the purchase by defendant of Florida land and the entering into a construction contract with the intent to convert it into rental income producing property for its benefit constituted the first substantial steps towards a business venture in Florida.³ "The trend is clearly discernable towards expanding the permissible scope of state jurisdiction over foreign corporations and over non residents. In part this is attributable to the fundamental transformation of our natural economy over the years."⁴

In an action brought in New York on a Florida judgment the federal court of appeals held that a foreign corporation is not "doing business" within Florida solely because it owns or holds stock of a subsidiary corporation that is "doing business" within the state.⁵ The federal court paid lip service to the recognition of the fact that under the Florida statute the term "business venture" would appear to encompass fact situations which would not constitute "doing business" in Florida. The majority of the court argued that the Florida legislature by the use of the term "business venture" did not intend to overrule the *Cannon* rule and extend its jurisdiction to foreign corporations merely because it owns and controls a subsidiary doing business in Florida. However, as the dissent points out the *Cannon* rule would appear to be an attempted extension of jurisdiction over a foreign corporation based on activities of its subsidiary within the state and not, as in the instant case, apply to

1. *Hurte v. Lane*, 166 F. Supp. 413 (N.D. Fla. 1958). FLA. STAT. § 47.29 (1957).

2. FLA. STAT. § 47.16, 47.30 (1957). The Supreme Court of Florida has upheld the constitutionality of the statute, *State ex rel Weber v. Register*, 67 So.2d 619 (Fla. 1953); and New York has held that maintenance in Florida of suits against non-residents with the contacts with Florida as required by the statute does not offend traditional notions of fair play and substantial justice, *Bieck v. Radmin*, 14 Misc.2d 416, 178 N.Y.S.2d 983, *aff'd*, 181 N.Y.S.2d 160 (1958). The Florida statute is substantially the same as the N.Y. CIV. PRAC. ACT § 229(b).

3. FLA. STAT. §§ 47.16, 47.30 (1957). *Strasser Constr. Corp. v. Linn*, 97 So.2d 458 (Fla. App. 1957). See also *Continental Copper & Steel Indus., Inc. v. Cornelius, Inc.*, 104 So.2d 40 (Fla. App. 1958); *State ex rel Guardian Credit Indem. Corp. v. Harrison*, 74 So.2d 371 (Fla. 1954); *Rorick v. Stilwell*, 101 Fla. 4, 133 So. 609 (1931).

4. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957).

5. *Berkman v. Ann Lewis Shops, Inc.*, 246 F.2d 44 (2d Cir. 1957), *affirming*, 142 F. Supp. 417 (S.D. N.Y. 1956). The rule stated is known as the "Cannon rule," *Cannon Mfg. Co. v. Cudahy Packing*, 267 U.S. 333 (1925) (the two corporations had separate identities and all activities within the state were actually carried on by the subsidiary).

situations where the plaintiff contends that the activities of the foreign defendant corporation in reference to the establishment, control and support of its local subsidiary constituted a "business venture" within Florida as per its non-resident service statute. It appears questionable that a Florida court, in considering the following established facts of the instant case would conclude that the non-resident defendant corporation was *not* carrying on a business venture in Florida irrespective of defendant's stock ownership in the subsidiary: the facts; (1) the defendant corporation did own all the stock of the local subsidiary, (2) the officers of both corporations were the same, (3) the defendant operated a central buying service for its subsidiary, (4) the defendant corporation was organized for the sole purpose of establishing subsidiary retail stores in various states, (5) the defendant corporation negotiated eight months for a lease for its subsidiary and then guaranteed it.⁶ It seems that the actual question presented by the facts of the case and not answered by the court is, "does the promotion, organizing and establishment of a profit-making corporation (or any business) within a state by a foreign corporation (or individual) for its benefit constitute a "business venture" within that state by the non-resident?"

Process: Interstate extradition of witnesses

The Supreme Court of Florida has held the Florida Statute authorizing the state to seize non-residents visiting the state and compel their appearance as a witness in another state unconstitutional as an abridgement of the privileges and immunities of citizens of the United States; the state is without power to issue process effective beyond its borders. The court also decided that proceedings for the interstate extradition of witnesses are civil and not criminal in nature and appeal is the proper method to review such proceedings.⁷ The right is not absolute and the Florida court indicates that the result would be different if the defendant were a fugitive from justice.⁸

Process—Substituted Service in Alimony Action Unconnected with Divorce

The statutory provision for service of process by publication in a divorce action does not include actions for alimony unconnected with divorce and service by publication is not available in such an action.⁹

6. *Berkman v. Ann Lewis Shops, Inc.*, 246 F.2d 44, 51 (2d Cir. 1957) (dissent). Compare *Crockin v. Boston Store of Ft. Myers, Inc.* 137 Fla. 853, 855, 188 So. 853, 858 (1939); *State ex rel Weber v. Register*, 67 So.2d 619, 620 (Fla. 1953) (the court recognized a vast difference between the words "a business" and a "business venture" as used in section 47.16 of the Florida Statutes).

7. *Application of the People of New York*, 100 So.2d 149 (Fla. 1958), declaring unconstitutional FLA. STAT. § 942.02 (1957), *rev'd sub. nom.*, *People v. O'Neill*, 79 Sup. Ct. 564 (1959).

8. *Application of the People of New York*, 100 So.2d 149, 154 (Fla. 1958), *rev'd sub. nom.*, *People v. O'Neill*, 79 Sup. Ct. 564 (1959).

9. *Greenberg v. Greenberg*, 101 So.2d 608 (Fla. App. 1958); FLA. STAT. §§ 48.01, 48.07, 65.09 (1957); FLA. R. Civ. P. 1.11(b); FED. R.C.P. 12.

Return of Service—False Return

The burden is upon the defendant to prove by substantial evidence that a return of process showing personal service is false. But where an alleged service of process is made upon co-defendants and the evidence establishes the falsity of the sheriff's return as to one defendant, it logically follows that in the absence of distinguishing circumstances the validity of the companion return is likewise overcome; otherwise the burden upon a party seeking to prove non performance of an official act, particularly within the knowledge of the public officer, would be too great.¹⁰

Return of Service—Executed and Non-Executed—Necessary for Effective Service

An original summons was never returned to the issuing court, but subsequently an affidavit was filed by the serving officer that he had served defendant and executed a return and mailed it to plaintiff's attorney who apparently never received it. The district court of appeal granted defendant's motion to dismiss, holding that the *return* of the writ or summons to the court that issued it is necessary for an effectual service on defendant and that *proof of service* is insufficient for that purpose.¹¹

Statutory Note: Service of Process

Service of Process upon Non-Resident Operator of Water Craft. This new section of the Florida Statutes provides for the service of process upon non-residents operating water craft in the state. It provides that the operation of a water craft by a non-resident is an appointment of the secretary of state as his agent for service of process, and provides the method for such service of process. It in effect makes the provisions in relation to service of process upon non-resident operators of motor vehicles applicable to non-resident operators of water craft.¹²

Service of Process on non-residents doing business in state. This act provides for the service of summons and other process on non-resident natural persons and partnerships doing business in this state by service upon certain agents of such persons or partnerships in this state. Includible in this list of serviceable agents are those soliciting orders for goods or services on behalf of the principal sought to be served.¹³

Service of process on non-resident. This is an amendment to Section 47.30 of the 1957 Statutes and provides that the plaintiff or his

10. *McIntosh v. Wibbeler*, 106 So.2d 195 (Fla. 1958) (three dissenters felt that the trial judge ruled on the evidence against defendant and upper court should not overrule his findings). FLA. STAT. § 47.13 (1957).

11. *Klosenski v. Flaherty*, 110 So.2d 685 (Fla. App. 1959). See FLA. STAT. §§ 47.48, 47.49 (1957); FLA. R. CIV. P. 1.3(c) (d); 42 AM. JUR. PROCESS § 117 at 104 (1942).

12. Fla. Laws 1959, ch. 59-148; FLA. STAT. § 47.161 (1959).

13. Fla. Laws 1959, ch. 59-280.

attorney may personally or by mail serve the secretary of state in attempting to effectuate a proper service on a non-resident. The act further provides that "proof of service of process on the secretary of state shall be by a copy of notice of said secretary accepting such process."¹⁴

Service of process on corporations. The 1959 legislature has re-enacted Section 47.17 of the 1955 Florida Statutes which provided for the service of process on private corporations. The act details upon whom process may be served in relation to service of process on private corporations and specifically states that the act will not apply to service of process upon insurance companies.¹⁵

Notice

The notice of suit: Form

The notice of suit is required to describe the real property if any is to be proceeded against and if not done, the court is without power to award to plaintiff the defendant's interest in real property located in the state in lieu of a lump sum of alimony.¹⁶

Effect of Notice of Lis Pendens

The purchaser of the subject matter of pending litigation takes subject to the decree subsequently rendered when a notice of lis pendens has been filed. However, the doctrine of equitable estoppel may be applied to protect an innocent purchaser and bar the effect of the filing of lis pendens.¹⁷

VENUE

Good Faith affidavit not jurisdictional

Suits may be brought against resident defendants only in the county where he resides or the cause of action accrued, or where the property in litigation is located. If suit is begun in a county where the defendant does not reside the complaint must be filed with an affidavit that the suit is being brought in good faith and with no intention to annoy the defendant. This affidavit of good faith is directory and not jurisdictional and thus the failure to actually file it with the complaint but subsequent thereto will not per se necessitate a dismissal of the cause.¹⁸

Defendant cannot elect Venue

The statute gives to a natural person in a personal injury action the privilege of being sued either in the county of his residence or where the

14. Fla. Laws 1959, ch. 59-382; FLA. STAT. § 47.30 (1959).

15. Fla. Laws 1959, ch. 59-46; FLA. STAT. § 47.17 (1959).

16. *Torchiana v. Torchiana*, 111 So.2d 103 (Fla. App. 1959); FLA. STAT. §§ 48.04, 48.08 (1957).

17. *Doyle v. Tutan*, 110 So.2d 42 (Fla. App. 1959); FLA. STAT. § 47.49 (1957).

18. FLA. STAT. § 46.01 (1957); *Peterson v. Kirk*, 103 So.2d 656 (Fla. App. 1958).

action accrued, but this does not give the defendant the right to elect where he shall be sued. However, the right to sue the defendant in personal injury actions in a county other than his residence is exceptional, and to do so the plaintiff must meet the requirements of the statute.¹⁹

Suits against municipalities for damages and injunction

The statute does not give an absolute right to sue in any of the three venues mentioned. It is subject to limitations imposed by various other statutes and common law rules. The word "only" contained therein indicates a limitation on possible proper venues and does not express, either directly or indirectly, an intent to change the common law rule that actions against municipalities must be brought in the county where the municipality is located. Thus, an action against a municipality for an injunction and damages arising from the pumping of water from land located in a county other than that in which the municipality was situated was held maintainable only in the county where the municipality was located.²⁰

Suits against state agencies to quiet title

But where a suit against a state agency to quiet title to land claimed by plaintiff was brought in the county where the land was situated and not where the agency was located, the court held venue to be proper even though the complaint also sought to enjoin the defendants from conveying or otherwise encumbering such land. Apparently in this instance the court felt that the statute dictating that suits to quiet title are maintainable in the circuit court of the county wherein the land lies governed over the rule that a state agency is suable only in the county where its central office is located or wherever else the legislature may provide as long as the suit to quiet title is brought in good faith and not as a mere subterfuge.²¹

Suits against defendants residing in different counties

Suits against defendants residing in different counties may be brought in any county in which any defendant resides. However, in a personal injury suit where an individual defendant is joined with a foreign corporation defendant and the latter resides in two or more counties, including that in which the individual defendant resides, the defendants do not reside "in different counties" within the meaning of the statute. In such a situation the individual defendant does not lose his privilege of being

19. FLA. STAT. § 46.01 (1957) (requirement of the affidavit of good faith and proper intentions as stated above in text). *Peterson v. Kirk*, 103 So.2d 656 (Fla. App. 1958); *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957).

20. *City of St. Petersburg v. Earle*, 109 So.2d 388 (Fla. App. 1959).

21. *Paxson v. Collins*, 100 So.2d 672 (Fla. App. 1958). FLA. STAT. § 66.41 (1957).

sued in the county of his residence unless the plaintiff is able to meet the statutory requirements creating the exception to this privilege.²²

Statutory Note—Venue—Transfer of cases

This is an act which provides for the transfer of any case laid in the wrong venue to the proper court in any district or county where the case might have been laid in accordance with the venue statutes of this state. If timely objection is not made, the court may proceed to a final disposition that is binding upon the parties. Criminal prosecutions are excepted from this statute.²³

PARTIES AND ABATEMENT

Parties

Actions surviving death of party—Punitive damages

In an action under the survival statute some substantial actual or compensatory damages must be shown before any punitive damages will be allowed. The question of whether punitive damages are in fact recoverable at all under the survival statute has not been answered.²⁴

Actions by husband and wife

The joinder by a husband with his wife to recover damages arising from the same incident is permissive, but if he does join he must claim all his damages; those arising from the damage to his wife and those personal to himself. "[A]ll damages sustained or accruing to one as the result of a single wrongful act must be claimed or recovered in one action or not at all."²⁵

Abatement

Reinstatement of action: Good cause necessary

The purpose of the abatement statute is to expedite litigation and to keep the court dockets as current as possible. An order denying a proper motion to dismiss under this statute which does not state any basis for the denial is erroneous. The cause may be reinstated after

22. *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957) (in the instant case the plaintiff did not file an affidavit and the individual defendant resided in the county where the cause of action had also accrued, thus there was no way in which the plaintiff could bring himself within the so-called exceptions to the privilege of a defendant being sued in the county where he resides). FLA. STAT. §§ 46.01, 46.02, 46.04 (1957).

23. Fla. Laws 1959, ch. 59-30.

24. FLA. STAT. § 45.11 (1957). *Fowlkes v. Sinnamon*, 97 So.2d 626 (Fla. App. 1957), cert. denied, 101 So.2d 375 (Fla. 1958).

25. FLA. STAT. § 46.09 (1957). *Goldman v. Kent Cleaners & Laundry, Inc.*, 110 So.2d 50 (Fla. App. 1959). The quote is from the supreme court's opinion in *Mims v. Reid*, 98 So.2d 498, 500 (Fla. 1957).

dismissal upon timely motion as prescribed in the statute, but the party seeking reinstatement has the burden to show that good cause exists for the granting of his motion.²⁶ The fact that a party was a non-resident or was absent from the state for long periods and that his attorney was busy with other clients and neglected his action (or cause) does not constitute the "good cause" necessary for the reinstatement of a cause dismissed for lack of prosecution.²⁷

The statute applies to all actions in law or equity but is not applicable to criminal prosecutions.²⁸

Failure to prosecute—Statute not self-executing

The Florida Statute providing for the abatement of an action if no affirmative prosecution of the cause has taken place in over one year is not self-executing. It requires the moving party to seek dismissal subsequent to the period for abatement, but prior to any affirmative action in the prosecution of the cause which may have been taken after the expiration of the statutory period which in effect would revive the running of the statute.²⁹

Statutory Note: Abatement

Abatement of an action upon motion of the court. This statute has been amended to authorize a dismissal of an action for non-prosecution upon the court's own motion as well as upon the motion of any interested party.³⁰

PROCEDURE: ACTIONS AT LAW AND EQUITY

Scope and application of the rules

The Rules of Civil Procedure are to be used as tools for obtaining the just as well as the speedy determination of causes.^{30a} The appellate court will not disturb the trial court in its authorized exercise of discretion in procedural matters except in a clear case of mistake or hardship or unless an abuse of discretion is plainly made to appear.^{30b} The rules of civil procedure do not control in criminal cases.^{30c}

26. *May v. State ex rel Ervin*, 96 So.2d 126 (Fla. 1957).

27. *Miller v. Hartley's, Inc.* 97 So.2d 211 (Fla. App. 1957). *Schreyer v. Liniado*, 100 So.2d 199 (Fla. App. 1958), the fact that party was a resident of State of California, that she had not been present in the state for five years and that she was a housewife without means to come to Florida, all to the knowledge of the defendant, failed to show "good cause" for re-instatement; FLA. STAT. § 45.19 (1957).

28. *Loy v. Grayson*, 99 So.2d 555 (Fla. 1957).

29. *Pollock v. Pollock*, 110 So.2d 474 (Fla. App. 1959); FLA. STAT. § 45.19 (1957).

30. FLA. STAT. § 45.19 (1957).

30a. *Glassman v. Deauville Enterprises, Inc.*, 99 So.2d 641 (Fla. App. 1958). FLA. R. CIV. P. A.

30b. *Robins v. Jones*, 101 Fla. 1086, 132 So. 840 (1931); *Demos v. Walker*, 99 Fla. 302, 126 So. 305 (1930); *O'Gara v. Hancock*, 76 Fla. 1, 79 So. 167 (1918).

30c. *Long v. State*, 96 So.2d 897 (Fla. 1957).

*When Action is Commenced: Docket**When action commenced—for purposes of limitations*

The plaintiff's complaint for usury did not allege that it was wilfully charged as required by the applicable statute.³¹ Subsequently, the court permitted an amendment instanter to add the word "willful." On appeal the defendant urged that in determining whether the period of limitation had run³² the court should consider that the action was begun on the date the amended complaint was filed since the original complaint failed to state a cause of action until amended.³³ *Held*, for the purpose of limitations that the cause of action is considered commenced on the date of the filing of the original pleading setting forth the claim of the party initiating the action.³⁴

Docket—Equity suits for Declaratory Decrees

Rule 1.2(c) of the 1954 Florida Rules of Civil Procedure which provides that "unless otherwise specifically provided by statute, special statutory proceedings shall be entered in the common law docket"³⁵ does not prevent the filing in equity of suits for declaratory decree under chapter 87 of the Florida Statutes.³⁶ The references in the statute to decrees as well as judgments and the express provisions concerning equitable rights and relief³⁷ indicate that proceedings under the statute may be either legal or equitable.³⁸

31. *Wenck v. Insurance Agents Fin. Corp.*, 99 So.2d 883 (Fla. App. 1958). FLA. STAT. ch. 687 (1957).

32. See FLA. STAT. § 95.11(6) (1957). The statute provides a two year statute of limitations for actions upon a statute for penalty or forfeiture.

33. See FLA. STAT. § 687.04 (1957). The statute applies to forfeitures and penalties in cases of excessive interest charges.

34. FLA. R. CIV. P. 1.2(a). "Every suit of a civil nature shall be deemed as commenced when the complaint is filed . . . Rule 1.15(c). Whenever the claim or defense asserted in the amended pleading arose out of the conduct transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading."

35. This follows Rule 1.2(b) which directs the clerk to keep both a common law docket and an equity docket and says, "he shall enter all cases as they are commenced in the appropriate docket."

36. *City of Miami v. Miami Transit Co.*, 96 So.2d 799 (Fla. App. 1957).

37. See FLA. STAT. § 87.01 (1957) which expressly authorizes "decrees, judgments or orders." Section 87.08 permits submission to a jury of "issues of fact triable by a jury" and is followed by a provision that it shall not be "construed as requiring a jury to determine issues of fact in equity cases." Section 87.11 states that the purpose of the chapter is to afford "relief from insecurity and uncertainty with respect to rights status and other equitable or legal relations." Section 87.12 states: "when a suit for declaratory decree is filed as provided in this chapter the court shall have power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as a suit in equity."

38. For examples of suits brought under Chapter 87 on the equity side of the court see *Taylor v. Cooper*, 60 So.2d 534 (Fla. 1952); *Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So.2d 445 (Fla. 1952); *Lockleer v. City of West Palm Beach*, 51 So.2d 291 (Fla. 1951).

*Service and Filing of Pleadings and Papers: Notice**Service of Pleadings and Papers—Failure to serve a basis for default*

In *Pan American World Airways, Inc. v. Gregory*⁴⁰ defendant filed notice of filing a petition for removal of plaintiff's complaint for personal injuries to the federal court. Defendant's answer and plaintiff's reply thereto were served and filed in the federal court. Upon plaintiff's motion the court remanded the cause to the state court on April 13, 1956. In accordance with the federal practice the clerk did not transmit the answer or reply to the state court. The defendant did not file his answer in the state court. Subsequently, plaintiff's counsel filed a praecipe for default which certified that defendant had not *filed* any pleading directed to plaintiff's complaint. The clerk entered default and without further proceedings the cause was tried before a jury on the single issue of damages which were assessed at \$50,000. Defendant appealed from the final judgment which was based upon the default and the failure to file an answer. The court of appeal held that the rules clearly designate the failure to *serve* a pleading as the basis for a default⁴¹ and that the clerk was without authority⁴² to enter a default where an answer had been served but not filed in a court in which he was a clerk. The court noted that the mere service of pleading would not be enough to present the pleading to the court and that under Rule 1.4(d) the pleading should be filed with the court to bring it to the court's attention. However, the court did not elect to discuss the results of a failure to comply with this rule. On the issue of whether or not defendant was entitled to notice of the trial on the issue of damages, the court held that although Rule 2.9(b)⁴³ does modify, it does not abrogate the long established rule that after default in a tort action the defendant has a right to put in proof and be heard upon the question of damages.⁴⁴ The court thus concluded that even in a

40. 96 So.2d 669 (Fla. App. 1957).

41. FLA. R. CIV. P. 2.9(a). "If a party fails to serve a pleading at any time provided by these rules, or fixed by the court, an adverse party may cause a default to be entered by the court or by the clerk on a day subsequent to the day on which such default occurs . . ." (Emphasis added.) FLA. R. CIV. P. 1.4(d). "All original papers, copies of which are required to be served upon parties, shall be filed with the court either before service or immediately thereafter." Rule 1.4(a). "Every pleading subsequent to the initial pleadings, unless the court otherwise orders . . . shall be served on each party affected thereby . . ."

42. The clerk is an officer of the court whose duties are ministerial and as such he does not exercise any discretion. *State v. Almand*, 75 So.2d 905 (Fla. 1954).

43. FLA. R. CIV. P. 2.9(b).

44. Judgments, final, consequent upon the entry of default, for want of proper pleading, may be entered on the same day that the default is entered as well as any subsequent day. *Wilhelm v. South Indian River Co.*, 19 Fla. 54, 124 So. 729 (1929); *Watson v. Seat & Crawford*, 8 Fla. 446 (1859).

default case the defendant is entitled to be heard upon the amount of damages even if not upon the merits of the claim.⁴⁵

Effect of timely objections to improper filing

Defendant's motion for summary judgment and supporting affidavits were served on plaintiff more than ten days prior to the hearing, but the originals were not filed with the court until the morning of the hearing.⁴⁶ The Florida Rules of Civil Procedure require that all original papers served after the complaint "shall be filed with the court either before service or immediately thereafter."⁴⁷ The plaintiff did not object on this point to the trial court but on appeal challenged its authority to recognize the subject pleadings on the ground that they were not filed in compliance with the rule quoted above. The district court of appeal held that plaintiff's contention was without merit in that any advantage sought for violation of the rule must be presented by timely objection to the trial court. Moreover, the court declared it would not concern itself with an assignment of error, the nature of which is not shown to be harmful. This decision apparently indicates that the results of partial or complete non-compliance with Rule 1.4(d) is nil and within the judicial discretion of the court. For example, in *Gilmer v. Rubin*,⁴⁸ the clerk entered a default against two of several defendants for "failure to file answer or other pleadings" since more than twenty days had passed since the defendants had been served.⁴⁹ The defendants filed an answer to the complaint on the following day to which there was attached an affidavit that a copy of the answer had been sent to plaintiff's counsel on the day that the default was entered. The court of appeal held that the defendants were not in default under the rule penalizing failure to serve a pleading⁵⁰ inasmuch as the answer was served before a proper request for default was made and the trial court did not abuse its discretion in setting aside the default.

Notice of Hearing on a Single Issue

It is error and a denial of due process of law for a trial court to set a cause down for trial on the single issue of unclean hands without giving

45. In *Moore v. Boyd*, 62 So.2d 427, 430 (Fla. 1952) the Supreme Court of Florida stated the right of a defendant to contest the issue of damages after default: "if a plaintiff desires to try an unliquidated claim before the Court, such plaintiff must await the calling of the docket at the next term or give the defendant notice of the assessment of damages before the Court, so that defendant may be given an opportunity to be heard upon the amount of damages." See also *Security Fin. Co. v. Gentry*, 91 Fla. 1015, 109 So. 220 (1926).

46. *Crovella v. Cochrane*, 102 So.2d 307 (Fla. App. 1958).

47. FLA. R. CIV. P. 1.4(d).

48. 98 So.2d 367 (Fla. App. 1957).

49. FLA. R. CIV. P. 1.11(a). "A defendant shall serve his answer within twenty days after service of the summons and complaint upon him, or not later than the date fixed in a notice by publication . . ."

50. FLA. R. CIV. P. 2.9(a). The court cites as authority for its conclusions *Pan Am. World Airways, Inc. v. Gregory*, 96 So.2d 669 (Fla. App. 1957) which is reported on pages _____ of the text *supra*.

notice to opposing counsel of the hearing on the motion to sever the issue.⁵¹

Extending the time to file pleadings

The Florida Rules of Civil Procedure vest wide discretion in the trial court in granting extensions of time or enlarging the time for the filing of pleadings or the doing of required acts. The only prohibition upon the exercise of the court's discretion is in the extending of the time for making motions for a new trial or directed verdict or for taking an appeal.⁵² Thus the chancellor upon stipulation of the parties can set aside a decree pro confesso and permit the filing of defensive pleadings.⁵³ However, once the chancellor has exercised his discretion and allowed the pleadings it is error, in the absence of a subsequent default, for the court of its own motion to strike the pleadings on the ground they are untimely and to proceed *ex parte* in the matter.⁵⁴

Pleadings

Pleadings allowed

In Florida, the only pleadings allowed are a complaint, an answer, and a reply if the answer contains a counterclaim or crossclaim. "No additional pleadings other than motions provided by these rules shall be allowed, except that the court may order a reply to an answer."⁵⁵

The Complaint

Uncertainty of type of relief not grounds for dismissal. The complaint in a statutory action for rescission, accounting and *other equitable relief* against a corporation and individuals thereof⁵⁶ was replete with conclusions and was without allegations of ultimate facts which made it uncertain as to what relief, if any, the plaintiff might ultimately be entitled. The trial court dismissed the action as to the individual defendants as being wholly without equity.⁵⁷ On appeal, reversed. Facts which lie more within the

51. *Brooker v. Smith*, 101 So.2d 607 (Fla. App. 1958). See also *Town of Lake Hamilton v. Hughes*, 160 Fla. 646, 36 So.2d 260 (1948); *Mayflower Investment Co. v. Brill*, 137 Fla. 287, 188 So. 205 (1939), Fla. R. Civ. P. 1.4(d).

52. Fla. R. Civ. P. 1.6(b).

53. *Schroeder v. Schroeder*, 102 So.2d 729 (Fla. App. 1958).

54. *Id.* at 730. Generally, "the opening of judgments is a matter of judicial discretion and 'in a case of reasonable doubt, where there has been no trial upon the merits, this discretion is usually exercised in favor of granting the application so as to permit a determination of the controversy upon the merits.' 31 Am. Jur. Judgments, Section 717" For a similar pronouncement see *Pan Am. World Airways v. Gregory*, 96 So.2d 669, 671 (Fla. App. 1957); *Coggin v. Baffield*, 150 Fla. 551, 552, 8 So.2d 9, 11 (1942). Fla. R. Civ. P. 3.10 provides for the setting aside of a judgment entered on a decree pro confesso "upon such conditions as to the court may seem equitable and just"

55. Fla. R. Civ. P. 1.7(a).

56. Fla. Stat. § 608.55 (1957).

57. *Williams v. Ahrenholz*, 108 So.2d 304 (Fla. App. 1959).

knowledge of an opponent may be averred generally⁵⁸ and "every complaint [is] . . . considered to pray for general relief,"⁵⁹ wherein the useless shall not vitiate the useful. Therefore, even though the plaintiffs were not entitled to relief under the statute, it was not certain that they would not be entitled to have other applicable law applied to the facts as they may have been established under the allegations of the complaint, especially where it appeared that they might be entitled to have the law of constructive trust applied. However, where an amended complaint in equity was dismissed because it failed to allege facts sufficient to justify the specific relief prayed, only those categories consonant with the allegations were considered as a basis for possible equitable relief, and any other basis of possible equitable jurisdiction could not be considered.⁶⁰

Demand for relief—Jurisdictional amount. A claim for relief must contain allegations of facts sufficient to show the jurisdiction of the court.⁶¹ The amount involved for jurisdictional purposes is the amount claimed in good faith and put in controversy and not the amount claimed or actually recoverable.⁶² Attorneys' fees are not includible in the computation of the jurisdictional amount as an item of damages unless there is liability therefor under a contract or statute.⁶³

Deficiency decree against non-party. A complaint is considered to pray for general relief and a deficiency decree may be granted under a prayer for general relief; but this does not authorize a deficiency decree as against one not a party to the suit, especially where it is a dissolved corporation.⁶⁴

The answer

General denial requires good faith in defendant. General denials are not favored and should be used only when defendant in *good faith* attempts to controvert each averment in the complaint including the basis of the court's jurisdiction.⁶⁵

A general denial in the defendant's answer put in issue every fact upon which the plaintiff sought to recover and the fallacy of this answer was demonstrated by subsequent sworn admissions which virtually admitted all of the material allegations of the complaint.⁶⁶ The answer was controverted and the allegations of the complaint were considered established without denial.

58. *Adelman v. M & S Welding Shop, Inc.*, 105 So.2d 802 (Fla. App. 1958).
41 *AM. JUR. Pleading* § 32 (1942).

59. *FLA. R. Civ. P.* 1.8(b).

60. *Revell v. Crews*, 97 So.2d 336 (Fla. App. 1957). *FLA. R. Civ. P.* 1.8(b).

61. *FLA. R. Civ. P.* 1.8(b).

62. *Richter Jewelry Co. v. Harrison*, 147 Fla. 732, 3 So.2d 387 (1941).

63. *Gannett v. King*, 108 So.2d 299, 302 (Fla. App. 1959).

64. *Rubin v. Kapell*, 105 So.2d 28 (Fla. App. 1958). *FLA. R. Civ. P.* 1.8(b).

65. *FLA. R. Civ. P.* 1.8(c). See *United States v. Long*, 10 F.R.D. 443, 444 (D.Neb. 1950).

66. *Fink v. Powsner*, 108 So.2d 324 (Fla. App. 1958).

Answer standing over to amended complaint. Plaintiff voluntarily filed a second amended complaint after defendant had filed his answer to the first amended complaint.⁶⁷ Defendant failed to plead to the second amended complaint within ten days after his motion to dismiss was denied.⁶⁸ The court rendered a final default judgment against defendant for his failure to so plead. The district court of appeal held that the present rules did not abrogate the common law rule that an answer may stand over to an amended complaint⁶⁹ and therefore the defendant's answer to the first amended complaint which was on file at the time the default was entered was responsive to the claim as reworded and was sufficient to prevent a default for failure to answer the second amended complaint.

Admissions in answer—effect. An admission in an answer does not extend beyond the scope of the allegations in the complaint and the complainant may not base his claim for relief on an admission contained in an answer unless the fact admitted was substantially alleged in the complaint.⁷⁰

The Reply: Equitable Plea Allowed in Action at Law

In a personal injury action, defendant's answer alleged that the plaintiff had executed a release of all claims arising out of an automobile accident.⁷¹ The circuit court allowed the plaintiff to reply but struck it as insufficient and refused to allow plaintiff to amend his reply to present an equitable plea. *Held*, reversed, the plaintiff should have been allowed to file the amended reply and have been given an opportunity to prove its allegations. Section 52.21 of the Florida Statutes permits a plaintiff by reply to set out facts "which would avoid such answer upon equitable grounds." The rules recognize defenses on equitable grounds in law actions.⁷² An equitable reply to an alleged release is allowable in a law action regardless of whether the alleged fraud is fraud in the execution or in the inducement; the plaintiff is not required first to seek relief in equity merely because the plea charges fraud in the inducement.⁷³

67. *Craver v. Ramagli Realty Co.*, 109 So.2d 187 (Fla. App. 1959).

68. This is required by FLA. R. Civ. P. 1.11(a).

69. The rule that an answer may stand over to an amended complaint was recognized in Florida well before the present rules were adopted. *Jordan v. John Ryan Co.*, 35 Fla. 259, 17 So. 73 (1895); *Butler v. Thompson*, 2 Fla. 9 (1848). See also cases collected in 41 AM. JUR. Pleading § 312 (1942); 71 C.J.S. Pleading § 314(c) (1951).

70. *Meadows So. Constr. Co. v. Pezzanti*, 108 So.2d 499 (Fla. App. 1959). See also 19 AM. JUR. Equity § 275 at 205 (1939); 30 C.J.S. Equity § 347 at 763 (1942).

71. *McGill v. Henderson*, 98 So.2d 791 (Fla. 1957).

72. FLA. R. Civ. P. 1.8(g). "A party may also state as many . . . defenses as he has . . . whether based on legal or on equitable grounds, or both."

73. *McGill v. Henderson*, 98 So.2d 791, 794 (Fla. 1957).

*Motion to Dismiss and Affirmative Defenses**Motion to dismiss must specify grounds*

The rule provides that "an application to the court for an order shall be by motion and shall state with *particularity* the grounds therefor."^{73a} Therefore, a general motion to dismiss "for failure to state a cause of action" is not sufficient to challenge the equity court's jurisdiction over the subject matter as affected by the proofs.^{73b} On the contrary, it tends to admit that the subject matter is within the court's jurisdiction. Once failing to interpose a timely challenge to the chancellor's jurisdiction, a party cannot attack the decree affording the relief sought on the ground of adequacy of the remedy at law.^{73c}

Motion to dismiss cannot raise affirmative defenses

The trial court dismissed a complaint with prejudice in a divorce action upon a motion to dismiss which raised the affirmative defense of res judicata and/or estoppel by judgment.^{73d} The court of appeal held that the lower court was in error. The primary purpose of a motion to dismiss is to test the legal sufficiency of an adversary's pleading prior to the required responsive pleading; it accepts as true those matters well pleaded in the complaint and points out wherein the complaint is legally deficient or has failed to state a cause of action.⁷⁴ The specific grounds upon which a motion to dismiss will lie are enumerated in the rules.⁷⁵ Estoppel by judgment and res judicata are not included but may be affirmatively set forth in a pleading to a preceding pleading.⁷⁶ In effect, the defendant in the instant case sought to render the complaint legally insufficient by supplementing it with additional facts by way of a motion to dismiss; this practice is not authorized by the rules. Such a motion also may be a denial of due process in that it fails to put a party on notice that he will be called upon at the hearing on said motion to defend against the introduction of evidence establishing an affirmative defense.⁷⁷

73a. FLA. R. CIV. P. 1.7(b). See *Stone v. Stone*, 97 So.2d 352 (Fla. App. 1957); *Connolly v. Sebaco*, 89 So.2d 482 (Fla. 1956).

73b. *Ganaway v. Henderson*, 103 So.2d 693 (Fla. App. 1958).

73c. *Id.* at 696, 697. See also dissent at 697-704.

73d. *Stone v. Stone*, 97 So.2d 352 (Fla. App. 1957).

74. *Id.* at 354.

75. FLA. R. CIV. P. 1.11(b); (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, (7) failure to join indispensable parties.

76. FLA. R. CIV. P. 1.8(d)(g). See *Olin's, Inc. v. Avis Rental Car, Inc.*, 104 So.2d 508 at 510 (Fla. 1958).

77. *Stone v. Stone*, 97 So.2d 352 at 354 (Fla. App. 1957). The court indicates that the motion to dismiss could not operate in this instance as a substitute for a motion for summary decree because to do so would deny the opposing party the benefit of notice and opportunity to reply provided for by the summary decree rule. See FLA. R. CIV. P. 1.36.

Effect of the Admissions Contained in a Motion to Dismiss

The admissions contained in a motion to dismiss which is overruled for substantive or for merely formal reasons cannot be relied on as a basis for holding that no cause of action has been stated for declaratory relief. Such admissions are deemed to drop out of the case upon the overruling of the motion as in the case of any pleading which is successfully attacked by an adversary. When this happens, the record is left in the same condition as if no such pleading or motion had ever been offered.⁷⁸

Motion to dismiss—complaint stating cause other than that relied on. Where facts set forth in a complaint were insufficient in an action of defamation but stated a cause of action on another ground, a motion to dismiss which admits the well-pleaded allegations of a complaint should be overruled.⁷⁹

Effect of Filing motion to dismiss—Jurisdiction of the Person

The filing of a motion to dismiss an alimony action by a non-resident defendant upon the grounds of lack of jurisdiction over the person, insufficiency of process and the service thereof, does not constitute a general appearance and thus a waiver of errors.⁸⁰ Nor did the filing of the above motion require a special appearance by the defendant as a protective measure. This is a result of the clear intent of the Florida rule which seeks to abolish the former distinction between general and special appearances.⁸¹

Affirmative Defenses

Affirmative defenses in hearing on summary judgment. Under the rules, affirmative defenses must be raised in a pleading to a preceding pleading and if not so raised, are deemed waived.⁸² Thus, where the defendant made no request to amend his answer the trial court properly rejected his attempt to assert an affirmative defense into the hearing on motion for summary judgment, as it was beyond the scope of the issues raised by pleadings.⁸³

78. *Olin's, Inc. v. Avis Rental Car, Inc.*, 104 So.2d 508 (Fla. 1958).

79. *Regan v. Davis*, 97 So.2d 324 (Fla. App. 1957). FLA. R. CIV. P. 1.8(b), 1.11(b)(6).

80. *Greenberg v. Greenberg*, 101 So.2d 608 (Fla. App. 1958).

81. FLA. R. CIV. P. 1.11(d) "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." Florida rule is taken from FED. R. CIV. P. 12; the intent of both rules being the same. See *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871 (3d Cir. 1944), cert. denied, 322 U.S. 740 (1944). See also 2 MOORE, FEDERAL PRACTICE 2260-2264 (2d ed. 1948).

82. FLA. R. CIV. P. 1.8(c)(d).

83. *Fink v. Powsner*, 108 So.2d 324 (Fla. App. 1959). See FED. R. CIV. P. 8(d); *Carroll v. Paramount Pictures*, 3 F.R.D. 47 (D.D.C. 1943); *Dicks v. Colonial Finance Corp.*, 85 So.2d 874 (Fla. 1956).

Raising affirmative defense by motion. Affirmative defenses not indicated on the face of the complaint must be plead by the defendant in answer and cannot properly be raised on a motion to dismiss.⁸⁴ These defenses cannot be raised by motion because the plaintiff should not have the burden of anticipating a defense and then also overcoming it in his initial pleading.

Affirmative defenses presented as question of fact. Ratification and waiver is also an affirmative defense generally required to be set up in the answer and not available upon a motion to dismiss for failure to state a cause of action. However, where this defense is submitted to the court as a question of fact by the consent of the parties, the appellant cannot complain on appeal from an order dismissing the complaint that the court erred in deciding the defense of ratification and waiver since it belonged in the answer and was not available on a motion to dismiss.⁸⁵

Affirmative defenses by plaintiff—reply. An action was brought to recover possession of an automobile.⁸⁶ Defendant contended, in a supplemental brief, that since plaintiff did not specifically plead the doctrine of estoppel or reply to defendant's answer which alleged superior title and right to possession, the plaintiff cannot enjoy the benefits of that doctrine and the court erred in applying it against the defendant. The supreme court affirmed the trial court. Generally, estoppel is an affirmative defense which is waived if not specifically pleaded.⁸⁷ However, the rule is only applicable where the *defendant* seeks to avail himself of the defense of estoppel, but fails to plead it in his answer. This factual distinction is material.⁸⁸ In the instant case, defendant's answer contained nothing which

84. *Binz v. Helvetia Fla. Enterprises, Inc.*, 104 So.2d 124 (Fla. App. 1958); *Hough v. Menses*, 95 So.2d 410 (Fla. 1957); FLA. R. CIV. P. 1.8(d), 1.11(b). See also *Flye v. Jeffords*, 106 So.2d 229 (Fla. App. 1958), case involves affirmative defense of laches. Such defense must be incorporated in the answer rather than in a motion to dismiss subject to the exception of when complaint shows the defense on its face. In considering a motion to dismiss the complaint the court is restricted to the four corners of the complaint. For purposes of passing upon a motion to dismiss complaint, court must assume all facts alleged in the complaint to be true and motion must be decided on questions of law only. Generally, affirmative defenses such as laches, res judicata, etc., under FLA. R. CIV. P. 1.8(d) are required to be incorporated in an answer rather than in a motion to dismiss. *Chambers v. Chambers*, 102 So.2d 171 (Fla. App. 1958), husband's complaint for divorce on grounds of extreme cruelty and constructive desertion contained no allegations affirmatively showing, either directly or by inference, that grounds for divorce sued upon had been formerly adjudicated in any other jurisdiction, defense of res judicata could not be raised by motion to dismiss. *Braz v. Professional Corp.*, 101 So.2d 594, 595 (Fla. App. 1958); *Gelb v. Aronovitz*, 98 So.2d 375 (Fla. App. 1957), facts alleged in the complaint did not show on their face accord and satisfaction and this was the grounds upon which amended complaint was granted. Accord and satisfaction is an affirmative defense which, under the rules, must be affirmatively pleaded; Rule 1.8(d). Therefore the court reversed the lower court's granting of the motion to dismiss. *Stone v. Stone*, 97 So.2d 352 (Fla. App. 1957).

85. *Toffel v. Baugher*, 111 So.2d 290 (Fla. App. 1959). FLA. R. CIV. P. 1.8(d).

86. *Jarrard v. Associates Disc. Corp.*, 99 So.2d 272 (Fla. 1957).

87. *Dicks v. Colonial Fin. Corp.*, 85 So.2d 874 (Fla. 1956).

88. *Jarrard v. Associates Disc. Corp.*, 99 So.2d 272, 275 (Fla. 1957).

could have been construed as a claim for relief and under the rules the plaintiff was not allowed to file a further pleading and the court did not order the filing of a reply. The court concluded:

[T]herefore under Rule 1.11(b) the plaintiff could "assert at the trial any defense in law or fact to that claim for relief." While Rule 1.11(h) provides that a party shall be deemed to have waived any defense which he does not present by motion, or in his answer or reply, when construed with Rules 1.7(a) and 1.11(b) we do not feel this should be held to preclude a party from asserting at the trial a defense not raised in the pleadings, when such defense was not required to be so pleaded. To hold otherwise would require, in a situation such as now before us, that the plaintiff anticipate the defense of the defendant and plead estoppel in his complaint.⁸⁹

Although finding no procedural error, the court advised that it would be the better practice for plaintiffs who wish to assert an affirmative defense against matter contained in an answer to request leave of court to file a reply to the answer.

Res judicata and estoppel by judgment. The claims of several automobile passengers against defendant taxi cab driver and company for injuries arising out of a single accident were consolidated for trial. Two of the plaintiffs took a non suit, the other passenger continued the litigation and suffered an adverse final judgment. This final judgment was held not to constitute an estoppel by judgment, nor was it res judicata as to the non-suited passenger in a subsequent suit by them against the same defendants on the same claim.⁹⁰

The court enumerated the following essential requirements for the application of the doctrine of res judicata; identity in the thing sued for; identity of the cause of action; identity of the persons and the parties to the action; identity of the quality in the person for or against whom the claim is made.⁹¹ In the situation being discussed the identity of the persons and the parties was different in the various actions; this element of identity of parties is also required to invoke the defense of estoppel by judgment.^{91a}

89. *Jarrard v. Associates Disc. Corp.*, 99 So.2d 272 at 276 (Fla. 1957). It should be noted that the court points out that the case of *Gulf Life Ins. Co. v. Ferguson*, 59 So.2d 371 (Fla. 1952) is directly opposite to the view expressed in the instant case, but that case was decided under the Florida common law rules and since then the Florida Rules of Civil Procedure have been adopted and thus under the rules mentioned *supra*, the decision in the *Gulf Life Ins. Co.* case is not applicable.

90. *Martin v. Arrow Cabs, Inc.*, 107 So.2d 394 (Fla. App. 1958).

91. *Id.* at 396.

91a. *Martin v. Arrow Cabs, Inc.*, 107 So.2d 394, 396 (Fla. App. 1958); *Youngblood v. Taylor*, 89 So.2d 503, 505 (Fla. 1956); *Shearn v. Orlando Funeral Home*, 88 So.2d 591 (Fla. 1956).

Incidentally, it should be noted that the party who evokes and relies on the defense that a former adjudication was *res judicata* by issues raised has the burden of proof to establish the former adjudication.⁹²

Alternative Pleading

Joinder of causes of action—alternative pleading of liability

The rules specifically provide for allegations of liability in the alternative.⁹³ Thus, a complaint by a jitney passenger involved in an intersectional collision with an automobile was sufficient, notwithstanding that it alleged alternatively negligence of motorist, of jitney driver, or of both as joint tort-feasors. It was proper to submit the cause to the jury to determine which one was negligent or whether both were negligent.⁹⁴

Personal injuries and property damage—single act—single cause of action

Plaintiff sued for personal injuries and property damages arising from an automobile accident.⁹⁵ The parties by consent dismissed the claim for property damage and thereupon a settlement as to the personal injuries was reached, judgment was entered and promptly satisfied. Prior to the entry of the consent judgment, plaintiff instituted a separate action against defendant for the use and benefit of his insurer to recover property damages arising from the same accident. Defendant answered that the suit was barred because it violated the rule against splitting a cause of action and was *res judicata*. Plaintiff replied that the insurance company had reimbursed him for the property damage sustained and that he had delivered to the insurance company a loan receipt as per the provisions of his insurance policy. Plaintiff further alleged that by virtue of the loan receipt the insurance company had a separate cause of action in itself which it could maintain despite plaintiff's previous action. *Held*: The Supreme Court of Florida aligned itself with the majority rule, *i.e.*; if the wrongful act is single, the cause of action is single and different injuries occasioned by it are merely items of damage resulting from the same wrong and must be claimed and recovered in one action or not at all.⁹⁶

Pleading special matters

Pleading special matters—Special damages

Special losses or injuries which do not naturally or ordinarily result from the negligent act alleged may be shown only when the defendant

92. *Shirley v. Shirley*, 100 So.2d 450 (Fla. App. 1958).

93. FLA. R. Civ. P. 1.8(g). "A party may . . . state as many separate claims . . . as he has regardless of consistency. . . ."

94. *Ringler v. McVeigh*, 109 So.2d 606 (Fla. App. 1959).

95. *Mims v. Reid*, 98 So.2d 498 (Fla. 1957).

96. *Id.* at 500, 501. See also *Gaynon v. Statum*, 151 Fla. 793, 795, 10 So.2d 432, 433 (1942).

has been advised thereof by specific allegations in the complaint.⁹⁷ In *Ephrem v. Phillips*,⁹⁸ plaintiff sued for pain and suffering resulting from injuries sustained by her in an automobile accident. Liability was admitted and the cause was tried solely on the issue of damages. At the trial plaintiff was allowed to show that her pain and suffering resulted in and was aggravated by a miscarriage or abortion. The complaint contained no specific allegations as to her pregnant condition at the time of the accident or her subsequent miscarriage. Judgment was for the plaintiff. Defendant on appeal contended that a claim for damages resulting from an abortion arising out of injuries occasioned by the negligent act of another is an item of special damages which must be specifically alleged in the complaint to permit recovery. *Held*, contrary to what appears to be the prevailing view,⁹⁹ that damages resulting from an abortion or miscarriage arising from the injuries alleged in the complaint are *not* special damages and need not be specifically alleged.

Pleading special matters—foreign judgment or decree

When an action is brought on a foreign judgment, it is sufficient to aver the judgment¹⁰⁰ of the court without showing its jurisdiction to render it. The lack of jurisdiction of the foreign court is a defense which should be invoked by the answer. However, if the complaint alleges jurisdictional facts upon which the foreign judgment was obtained, then the sufficiency of the jurisdictional allegations may be attacked by a motion to dismiss.¹⁰¹

Attaching copy of cause of action and exhibits

"The intent and purpose of this rule¹⁰² is to avoid unnecessary recitals of documents not particularly germane to right of action but to require attachment of those documents upon which cause of action rests or is dependent; and where contract upon which the action was brought was attached to complaint. The other documents related solely to the repre-

97. FLA. R. CIV. P. 1.9(g). See *Warfield v. Hepburn*, 62 Fla. 409, 57 So. 618 (1912).

98. 99 So.2d 257 (Fla. App. 1957).

99. *Id.* at 262, Chief Judge Sturges concurring specially: "I wish to emphasize, however, that in my opinion the result so reached is in light of the facts producing a reasonable and proper exception to what I take to be the prevailing and sound line of authority holding that an abortion must be specially pleaded if the claim for damages is in any manner dependent thereon or related thereto. Both the letter and the spirit of Rule 1.9(g) . . . compels this conclusion." See also *Town of Florence v. Snook*, 20 Colo. App. 356, 78 Pac. 994 (1904); *Louisville & N.R. Co. v. Roney*, 2 Ky. L. Rep. 1326, 108 S.W. 343 (1908); *Walquist v. Kansas City Ry.*, 292 Mo. 34, 237 S.W. 493 (1922).

100. FLA. R. CIV. P. 1.9(e).

101. *Futterman v. Cerber*, 109 So.2d 575 (Fla. App. 1959); *Milligan v. Wilson*, 107 So.2d 773 (Fla. App. 1958). See also *Pacific Mills v. Hillman Garment, Inc.*, 87 So.2d 599 (Fla. 1956). FLA. STAT. § 92.031 (1957) governs judicial notice of foreign laws.

102. FLA. R. CIV. P. 1.10.

sentative right of the appellant to bring the action. We therefore conclude on this point there has been a substantial compliance with the rule."¹⁰³ (Footnote added.)

Motion for judgment or decree on the pleadings—generally

A motion for judgment or decree on the pleadings is contemplated as a pre-trial step.¹⁰⁴ For the purposes of this motion, all material well pleaded allegations of the opposing party are taken as true and those of the movant which have been denied are taken as false and conclusions of law are not deemed admitted. Since under Florida Rule 1.8(e) the allegations in an answer are deemed denied where no reply is *required*, a defendant may not obtain a judgment on the pleading based on allegations in his answer; thus he may not move on the basis of an insufficient denial in the plaintiff's reply of the allegations of his answer where the reply was not ordered or required by the court. The motion should be granted only if on the facts as so admitted and supplemented by any facts of which the court takes judicial notice, the moving party is clearly entitled to judgment.¹⁰⁵

Counterclaims

No third party actions in Florida court

The court was without jurisdiction to entertain a so-called cross-action against a surety where he was not a party to the original suit and the action was not connected with a counterclaim against the original plaintiff or a cross-claim against any co-party in the original action.¹⁰⁶ The Florida rules¹⁰⁷ relating to this situation contain no provision similar to the federal rule¹⁰⁸ which permits bringing in additional parties without need for a counterclaim or cross-claim against the then existing parties (third party practice).

Rule 1.13(8) 1954 Florida Rules of Civil Procedure . . . makes provision for joining additional parties in connection with the counterclaim (against a plaintiff) or on a crossclaim (against

103. *Braz v. Professional Ins. Corp.*, 101 So.2d 594, 595 (Fla. App. 1958).

104. *Nystrom v. Nystrom*, 105 So.2d 605 (Fla. App. 1958); *City of Miami v. Miami Transit Co.*, 96 So.2d 799 (Fla. App. 1957). FLA. R. CIV. P. 1.11(c). "After the pleadings are closed, but within such time as not to delay the trial any party may move for judgment or decree on the pleadings." Rule 1.11(d) "Motion for judgment or decree . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof shall be deferred until the trial."

105. *Paradise Pools, Inc. v. Genauer*, 104 So.2d 860 (Fla. App. 1958). The court adopts the comment found in 2 MOORE PRACTICE 2269 (2d ed. 1948) which comment was addressed to FED. R. CIV. P. 12(c) and 8(b) which correspond to Florida Rules of Civil Procedure 1.11(c) and 1.8(e) respectively.

106. *Pan Am. Sur. Co. v. Jefferson Constr. Co.*, 99 So.2d 726 (Fla. App. 1958).

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

108. FED. R. CIV. P. 14. See also *Florida Fuel Oil, Inc. v. Springs Villas, Inc.* 95 So.2d 581 (Fla. 1957).

a co-party in the case). The Florida rule is similar to Rule 13(h) of the Federal Rules of Civil Procedure Federal Rule 14 permits bringing in additional parties without need for counterclaim or crossclaim against existing parties, which it designates as 'Third Party Practice'. That rule would have permitted what was done here. But the Florida Rules of Civil Procedure contained no provision equivalent to Federal Rule 14 for such Third Party Practice. Therefore, the court was without jurisdiction in the case then pending before it, to entertain the third party proceeding which resulted in the judgment appealed from¹⁰⁹

Dismissal of attempted third party action not res judicata. It was error to enter an order of summary judgment in favor of defendant on the ground of res judicata and to construe "such dismissal as being with prejudice and an adjudication . . . pursuant to rule 1.35(b). . . ." where the prior action of the plaintiff against the defendant was dismissed because the court was without jurisdiction to entertain plaintiff's attempted third party action against the defendant.^{109a}

Pending compulsory counterclaims allowed by amendment to answer

The original defendant in a civil action could not circumvent the rule requiring compulsory counterclaims¹¹⁰ to be stated when the answer is filed by a motion for an order amending the pleadings to include the claim where the claim was *not* put in issue and tried by the express or implied consent of the parties.¹¹¹ However, the court noted that had the claim been put in issue and tried by the express or implied consent of the parties although not pleaded, justice would have required the allowance of the amendment irrespective of the rule regarding the pleading of compulsory counterclaims.¹¹²

Amended and supplemental pleadings—allegata et probata

Allegata et probata need not coincide—necessity of express or implied consent

It is generally within the sound discretion of the trial court to permit an amendment of the pleadings to conform to the proof where evidence has been introduced without objection as to facts not presented or insufficiently presented by the pleadings.¹¹³ The rule that the *allegata et*

109. *Pan. Am. Sur. Co. v. Jefferson Constr. Co.*, 99 So.2d 726, 727 (Fla. App. 1958).

109a. *City of Boca Raton v. Sharp*, 107 So.2d 271 (Fla. App. 1958).

110. FLA. R. CIV. P. 1.13(i) Compulsory counterclaim. "The defendant, at the time of the filing of his answer, shall state as a counterclaim, any claim, . . . which he has against the plaintiff. . . ."

111. *Fearing v. De Lugar Nuevo*, 106 So.2d 873 (Fla. App. 1958).

112. *Id.* at 874. FLA. R. CIV. P. 1.15(b). "Amendments to conform with the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings." See *Edwards v. Young*, 107 So.2d 244 (Fla. App. 1958) (lack of consent).

113. *Fearing v. De Lugar Nuevo*, 106 So.2d 873 (Fla. App. 1958). Amendments are authorized and encouraged when in the discretion of the court justice so requires. *Dworkis v. Dworkis*, 111 So.2d 70 (Fla. App. 1959). FLA. R. CIV. P. 1.15(a)(e).

probata was required to coincide was abolished by the 1954 Florida Rules of Civil Procedure.¹¹⁴ If evidence is objected to *at the trial* on grounds that it is not within the issues made by the pleadings, the court *may* allow the pleadings to be amended. In the absence of such objection where the cause is tried as if the issue had been raised, an amendment is not imperative. If the proofs actually made present a meritorious claim the failure to prove the cause stated in the complaint will not necessarily defeat recovery by the plaintiff.¹¹⁵ But this exception to the general rule of *allegata et probata* was not applicable where defendants in a personal injury action could not tell until the conclusion of all of the plaintiff's evidence that they were not proceeding on the basis of the acts of negligence alleged in their amended complaint.¹¹⁶ The fact that the defendants at the first opportunity moved for a directed verdict on the ground that the plaintiffs had failed to prove the grounds of their amended complaint indicated that they had not consented expressly or impliedly to a different ground for the action being proven or attempted to be proved by the plaintiffs.

Amendment may only raise issues supported by evidence

It is error to allow the plaintiff to amend his complaint where he has not presented sufficient evidence which would, *prima facie*, support an affirmative finding on the issues suggested by the motion to amend.¹¹⁷ Thus, where a proposed amendment of plaintiff's answer to defendants counterclaim sought to interpose several affirmative defenses in the nature of confession and avoidance, it was not error for the trial court after the taking of evidence had been closed, to deny plaintiff's motion to amend as there did not appear to be substantial competent evidence in the record to support the issues sought to be raised by plaintiff's amendments.¹¹⁸

Amendability of insufficient complaint—existence of possible cause of action

The allegations of negligence contained in a complaint sounding in tort were clearly insufficient and the trial court denied the plaintiff the privilege to amend and dismissed the cause with prejudice. *Held*, reversed; although insufficient, the allegations did not preclude the existence of a cause of action. Leave to amend should be freely granted and all doubts should be resolved in favor of following amendments unless and until it

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

115. *Robbins v. Grace*, 103 So.2d 658 (Fla. App. 1958). The federal rules are similar in effect to Section 1.15(b). It has been held that the plaintiff was not bound by his pleadings, but could offer his proof on the presentation that the merits of the action would be subserved thereby. *Newman v. Zinn*, 164 F.2d 558 (3d Cir. 1947). See also *Shirley v. Shirley*, 100 So.2d 450 (Fla. App. 1958).

116. *Edwards v. Young*, 107 So.2d 244 (Fla. App. 1958).

117. *Food Fair Stores of Fla., Inc. v. Sommer*, 111 So.2d 743 (Fla. App. 1959). FLA. R. CIV. P. 1.15(b).

118. *Parker v. Parker*, 109 So.2d 893 (Fla. App. 1959).

appears that the privilege to amend will be abused. This is true even though the court is of the opinion that the amendments would not result in the statement of a cause of action, but this rule does not preclude a dismissal where the complaint is clearly not amendable.¹¹⁹

Amendments supersede original pleadings—imperfect dropping of parties—correct proceeding

An original pleading is generally superseded by an amendment which does not express an intention to save any portion of the original pleading.¹²⁰ Thus an amended complaint addressed to only one of three defendants named in the original complaint is considered an imperfect dropping of the unnamed defendants as of the date of the amended complaint. Since the action is deemed terminated, the only proper judgment that can be entered as to the unnamed defendants is to drop them from the action *without prejudice* to plaintiff's claim.¹²¹ In such a situation if the plaintiff's claim against the defendants has not been considered on the merits, its dismissal with prejudice would not be "on such terms as are just" and would be error.¹²² There are two courses open in the trial court to a plaintiff when it is not clear whether his amended complaint intends to drop a defendant named in the original complaint.¹²³ If he did intend to drop the defendant, he can complete the deletion by moving for an order of the court "on such terms as are just." If such a "dropping" was not intended, the proper action would be to place in the amended complaint a re-assertion of the proper allegations of the original complaint as to the particular defendant so that the action can proceed to a determination on the merits. If a severance of claims is desired, it can be effected by motion.¹²⁴ Where neither of these procedures is followed, the filing of the amended complaint will be considered an improper dropping of the unnamed defendant or defendants.¹²⁵

Amendment of complaint allowed after verdict

The trial court properly exercised its discretion after verdict was rendered in permitting an amendment to a complaint in order to conform

119. *Fouts v. Margules*, 98 So.2d 394 (Fla. App. 1957). *FLA. R. CIV. P.* 1.15. *Richards v. West*, 110 So.2d 698 (Fla. App. 1959). The advent of modern rules of procedure has brought with it the policy of allowing litigants to amend pleadings freely in order that causes may be tried on their merits. Granting leave to amend rests on the sound discretion of the trial court. See also *Wenck v. Insurance Agents Fin. Corp.*, 99 So.2d 883 (Fla. App. 1958); *Jacksonville Coach Co. v. Early*, 78 So.2d 369, 371 (Fla. 1955); *Golden v. Morris*, 55 So.2d 714 (Fla. 1951).

120. *Watkins v. Sims*, 81 Fla. 780, 88 So. 764 (1921). See 41 *AM. JUR. Pleading* § 313 (1942).

121. *Shannon v. McBride*, 105 So.2d 16 (Fla. App. 1958).

122. *Ibid.*, *FLA. R. CIV. P.* 1.18.

123. *Shannon v. McBride*, 105 So.2d 16 (Fla. App. 1958).

124. Procedures suggested are authorized by *FLA. R. CIV. P.* 1.18.

125. *Shannon v. McBride*, 105 So.2d 16 (Fla. App. 1958).

to the established evidence, which evidence although outside the issues raised by the pleadings was not beyond the scope of the issues as established by pre-trial discovery proceedings and stated in the pre-trial order which was to govern the conduct of the trial.¹²⁶

Pre-trial Procedures: Orders—Summary Judgment

A pre-trial order controls the subsequent course of an action unless it is modified at the trial to prevent manifest injustice.¹²⁷ This rule serves to expedite litigation by simplifying and narrowing the issues to be tried. Thus, where a trial judge entered a pre-trial order over three weeks before the trial that defendant was an independent contractor and there was no motion to modify the pre-trial order, such order controlled the subsequent course of the action.¹²⁸

A trial judge may enter summary judgment on his own motion at a pre-trial conference, but such procedure should be employed with extreme caution.¹²⁹

Depositions and Discovery

Depositions

Depositions—generally. Depositions are not a part of the evidence before a court unless made so pursuant to rules of evidence and rules of court. A motion to strike depositions from the record and portions of brief and appendix quoting from such depositions will be granted if the record does not show that the depositions were introduced into evidence. If the deposition is evidentiary in nature, it is admissible even though it contains different or inconsistent prior statements.¹³⁰

Motion for deposition to perpetuate testimony pending appeal verification not necessary. The chancellor without exercising his discretion denied defendant's motion for leave to take a deposition finding that the motion itself was legally insufficient in that it was not verified.¹³¹ *Held*, the motion was improperly denied on the ground that it was not verified. The requirement for verification is contained in that portion of the rule providing that depositions before the action may be had by *petition*.¹³² When the depositions may be had pending an appeal the reference is to a *motion*

126. *Atlantic Coastline R.R. v. Bracewell*, 110 So.2d 482 (Fla. App. 1959). FLA. R. Civ. P. 1.15(b). Amendments may be made at any time.

127. FLA. R. Civ. P. 1.16.

128. *Vaughn v. Smith*, 96 So.2d 143 (Fla. 1957).

129. *Best v. 17545 Collins Avenue, Inc.*, 98 So.2d 490, 492 (Fla. 1957). "As we said in *Hillsborough County v. Sutton*, 1942, 150 Fla. 601, 8 So.2d 401, 402, . . . If the conference (pre-trial) progresses to the point of eliminating all questions of fact then the court may give judgment according to law on the facts before him. . . ."

130. *Parker v. Parker*, 109 So.2d 893 (Fla. App. 1959); *Gidney Auto Sales v. Cutchins*, 97 So.2d 145 (Fla. App. 1957). FLA. R. Civ. P. 1.21; 10 FLA. JUR. *Depositions* § 45 at 218 (1956).

131. *Chaachou v. Chaachou*, 102 So.2d 820 (Fla. App. 1958). Motion was made pursuant to FLA. R. Civ. P. 1.22(b).

132. FLA. R. Civ. P. 1.22(a).

and there is no requirement for verification.¹³³ In the latter situation the motion should be granted as a matter of course unless the court finds that for some reason the preservation of the testimony would not be proper.

Statutory Note: Depositions

Under a 1959 act to be cited as the Uniform Foreign Depositions Act, the testimony of a witness may be compelled in this state under process issued in another state in the same manner as in local proceedings.¹³⁴

Discovery

Limits of insurance liability not discoverable. The rules permitting discovery with respect to matters relevant to the subject matter involved in a *pending action* is applicable only to matters admissible into evidence, or calculated reasonably to lead to the discovery of admissible evidence concerning a pending action. Following this reasoning the Supreme Court of Florida held in a case of first impression that discovery cannot be had of the limits of the liability insurance of the defendant in an automobile accident case.¹³⁵

Work product not available. In the absence of a showing that the information sought is essential for justice or that its absence would unduly prejudice the requesting party or some other good cause, the work product of a party is not subject to discovery. The intent of the rule is to permit discovery of facts as opposed to law or opinion.¹³⁶

A municipality can have a work product the same as any other litigant.¹³⁷

Discovery may not be premature—must be established. It was error to order discovery by requiring the production of the records of insurance policies in a suit for the dissolution of an insurance agency partnership prior to the determination upon the merits of the issues upon which plaintiff's right to such information would depend. The information sought was not relevant or necessary in the trial on that part of the case involving plaintiff's status and his right to a dissolution or an accounting and such discovery is "objectionable as premature."¹³⁸

133. FLA. R. CIV. P. 1.22(b). See MOORE, FEDERAL PRACTICE 1942 (2d ed. 1950).

134. FLA. LAWS 1959, ch. 59-250.

135. Brooks v. Owens, 97 So.2d 693 (Fla. 1957). FLA. R. CIV. P. 1.21(b).

136. Boucher v. Pure Oil Co., 101 So.2d 408 (Fla. App. 1957). Defendants sought to discover what plaintiff or her attorney knew of any statute, ordinance or regulation involving the subject matter of the pending litigation. This decision follows the federal decisions in interpreting Fed. R. Civ. P. 26 from which the Florida Rule was copied in toto. See Hickman v. Taylor, 329 U.S. 495 (1947). See FLA. R. CIV. P. 1.21(b), 1.27.

137. City of Sarasota v. Colbert, 97 So.2d 872 (Fla. App. 1957). Plaintiff here sought to ascertain whether defendant had caused an investigation to be made of his potential claim against city and if there were written reports of the investigation to obtain copies of such reports. The Court in holding such reports to be a work product refused to draw a line as to whether the report contained information obtained prior to or after notice of the claim had been filed. See also City of Lake Worth v. First Nat'l Bank in Palm Beach, 93 So.2d 49 (Fla. App. 1957).

138. Cooper v. Fulton, 107 So.2d 798 (Fla. App. 1959). FLA. R. CIV. P. 1.28, 1.24(d). Rule 1.28 provides for the production of furnishing of documents for inspection "upon motion of any party showing good cause therefor and upon notice to all other

There are times when a suit is triable in separate parts, one affecting the right or liability and the other affecting the measure of recovery. In suits of that order a discovery as to damages will commonly be postponed until the right or liability has been established or declared. As a general thing it will be useless to decree it any earlier and may even be oppressive. Thus a suit to establish a partnership or to restrain the infringement of a patent culminates, if successful, in an interlocutory decree which will be followed by an accounting and discovery of documents. In these and like cases the accounts will not be probed until the right has been adjudged.¹³⁹

In suits for an accounting the plaintiff cannot, by interrogatories obtain discovery as to the accounting until his right to an accounting has been adjudicated.¹⁴⁰

Requiring Production of Documents: Good Cause Necessary Under Any Procedure. Upon motion of any party showing good cause, the court may order any other party to produce documents for discovery purposes.¹⁴¹ This same showing of good cause is necessary before another party will be required to produce documents under the subpoena duces tecum procedure allowed by the rules.¹⁴²

Physical and Mental Examination of Parties

Order Lies Within Discretion of Court: Accessibility of Hospital Records

The granting of an order for the physical examination of an injured plaintiff is within the discretion of the trial court.¹⁴³ There is no abuse

parties, and subject to provisions of Rule 1.24(b).” Rule 1.24 relates to “orders for protection of parties and deponents,” under which “upon motion seasonably made” the court may dispense with, limit or control the discovery process as the necessity and justice of the parties and the matter involved may require.

139. *Id.* at 800. The court cites with approval this statement by Justice Cardozo found in *Sinclair Ref. Co. v. Jenkins Petro. Process Co.*, 289 U.S. 689, 693, 694 (1933).

140. *Gladman v. Hallam*, 104 So.2d 46 (Fla. App. 1958).

141. *FLA. R. Civ. P.* 1.28.

142. *Brooker v. Smith*, 108 So.2d 790 (Fla. App. 1959). *FLA. R. Civ. P.* 1.34(d). See *North v. Lehigh Valley Transit Co.*, 10 F.R.D. 38, 39 (E.D. Pa. 1950). “The normal method of obtaining inspection of a document is under Rule 34. Rules 26 and 45 afford a practical, and under proper conditions permissible short-cut. This, however, is merely another, and often more convenient, method of accomplishing the same end and, regardless of the fact that those two rules do not contain the express limitation of Rule 34, they are, I think, necessarily subject to it. I cannot believe that the Supreme Court, having required good cause for production under Rule 34, intended that a party could become entitled, as a matter of right, to the production of the original of a document, without any showing of the propriety or necessity of such production, merely by adopting an alternative method. If a showing of good cause was considered a proper and reasonable limitation upon the right to a preview of the opposing party’s papers and documents, it must have been intended to obtain, whatever process may be resorted to.”

143. *FLA. R. Civ. P.* 1.29(a). *Order for Examination.* In any action in which the mental or physical condition of a party or injury to property is in controversy, the court in which the action is pending may in advance of the trial order such party to submit to a physical or mental examination. . . . (Emphasis added.) *Pepsi-Cola Bottling Co. of Miami v. Modesta*, 107 So.2d 43 (Fla. App. 1958); *Red Top Cab & Baggage Co. v. Grady*, 99 So.2d 871 (Fla. App. 1958); *Martin v. Tindell*, 98 So.2d 473 (Fla. 1957), *cert. denied*, 355 U.S. 959 (1958).

of discretion by the refusal of the court to appoint more than one type of physician or in denying a compulsory examination of the plaintiff where he was treated for injuries at a hospital partly supported by the defendant who had access to the hospital records and could have obtained the desired information.¹⁴⁴

Appointment of Only One Physician—Not Abuse of Discretion

The denial of a mental examination of plaintiff whose alleged injuries are both mental and physical is not an abuse of discretion when the court alternatively orders only a physical examination of the plaintiff.¹⁴⁵

Requests for Admissions—Improper Answer

An improper answer to a request for admissions is deemed an admission of the matter requested.¹⁴⁶

Voluntary and Involuntary Dismissal of Actions

Two Dismissal Rule

The Rule in General. Rule 1.35(a)(1) of the Florida Rules of Civil Procedure authorizes the voluntary dismissal by plaintiff of his suit "at any time before service by the adverse party of an answer or of a motion for summary judgment or decree, whichever first occurs . . . Unless otherwise stated in the notice of dismissal or stipulation the dismissal shall be without prejudice except that a dismissal shall operate as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the State an action based on or including the same claim."

Application of the rule: Distinction Between Action and Claim. In *Crump v. Gold House Restaurants*,¹⁴⁷ plaintiff sought an accounting, appointment of a receiver, damages and the dissolution of the defendant corporation on the ground of fraud and mismanagement. Defendants' motion for summary judgment was granted on the ground that the voluntary dismissals of two prior suits by plaintiff seeking to enjoin activities of defendant directors barred this suit under the two dismissal

144. *Red Top Cab & Baggage Co. v. Grady*, 99 So.2d 871 (Fla. App. 1958).

145. *Martin v. Tindell*, 98 So.2d 473 (Fla. 1957), *cert. denied*, 355 U.S. 959 (1958).

146. FLA. R. CIV. P. 1.30. *Wider v. Carraway*, 101 So.2d 13 (Fla. App. 1958). See the following federal cases: *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Woods v. Rohlf*, 171 F.2d 539, 541 (5th Cir. 1938); *United States v. Kellert*, 101 F. Supp. 698, 699 (D. Conn. 1951); *Beasley v. United States*, 81 F. Supp. 518, 527 (E.D.S.C. 1948). "The usual statute or rule on admissions requires affirmative action to constitute the admission, but under this rule affirmative action is required to avoid the admission. There must be, therefore, a sworn statement specifically denying the fact which the other party requests should be admitted or the admission will be deemed to have taken place. . . ."

147. 96 So.2d 215 (Fla. 1957).

rule. Plaintiff on appeal contended that the rule was not applicable in the instant case because the prior suits were not based on and did not include the *same claim* as now asserted and the defendants had filed an answer and motion for summary judgment in the first suit prior to the voluntary dismissal of that suit. *Held*, reversed. The supreme court, in considering the appellant's first contention was guided by the federal court decisions interpreting their Rule 41 which is almost identical with our Rule 1.35. "Rule 41(a)(1) provides for the voluntary dismissal of an 'action' not a 'claim'; the word 'action' as used in the Rules denotes the entire controversy, whereas 'claim' refers to what has traditionally been termed 'cause of action.'"¹⁴⁸

They then concluded that the first suit which sought an injunction was not on the *same cause of action* as the subsequent suits alleging fraud and mismanagement and seeking an accounting in that the facts necessary to the maintenance of the different suits were not essentially the same.

The court also agreed with the plaintiff on his second point of appeal. The plaintiff's voluntary dismissal on the first suit was taken after an answer had been filed by defendants and thus they could not invoke the "two dismissal" rule because under it, the dismissal relied upon must precede the answer or a motion for summary judgment, which ever occurs first.¹⁴⁹ Therefore, under the applicable rule, the dismissal in the first suit could be given proper legal effect only "upon order of court and upon such terms and conditions as the court deems proper."¹⁵⁰ It should be noted that the two dismissal rule being in derogation of a previously existing right is strictly construed and that a voluntary dismissal obtained by *an order of court* will not be counted against a plaintiff under the two dismissal rule. Thus in effect, a plaintiff is entitled to one free dismissal of his suit before a subsequent voluntary dismissal, *taken under the proper section of the rule*,¹⁵¹ will operate against him as an adjudication on the merits.

Effect of Involuntary Dismissal Caused by Summary Judgment

When an involuntary dismissal occurs under the circumstances outlined in section 1.35(b) of the Florida Rules of Civil Procedure, the entire controversy is dismissed and all the parties are carried out of court as distinguished from a dismissal of individual parties, or of a claim against one or more, but less than all of the defendants. Therefore, such an involuntary dismissal as to one of several joint tortfeasors dismisses all of the parties, but a dismissal entered pursuant to a motion by a joint

148. *Id.* at 218. The Florida court citing with approval from *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir. 1953).

149. FLA. R. CIV. P. 1.35(a)(1). See also *Robertshaw-Fulton Controls Co. v. Noma Elec. Corp.*, 10 F.R.D. 32, 35 (D.C. Md. 1950).

150. FLA. R. CIV. P. 1.35(a)(2).

151. FLA. R. CIV. P. 1.35(a)(1).

tortfeasor for *summary judgment* does not have such an effect on joint defendants.¹⁵²

Evidence—Adverse witnesses

"An 'adverse party' is not necessarily a party to the suit who is aligned in the pleadings in opposition to the party calling him."¹⁵³

Correction of judgments, decrees and proceedings—finality

Final decrees cannot be changed, added to or taken from except that the court may correct clerical mistakes or mistakes arising from oversight or omissions at any time. The expiration of the period within which to file a petition for rehearing renders a decree final.¹⁵⁴

Transfers of actions erroneously begun

If at any time a complaint fails to state a cause of action within the cognizance of the side of the court chosen it is subject to dismissal. However, if it appears that the complaint would be sufficient on the opposite side of the court, the dismissal is without prejudice and the cause "shall be transferred to the proper side and proceeded with without interruption."¹⁵⁵

For example, an equity suit was brought to establish a statutory or equitable lien and in the alternative a decree for money damages.¹⁵⁶ The defendant filed an answer incorporating a motion to dismiss, following which he moved for a judgment or decree on the pleading. At the hearing the defendant's motions were granted and the chancellor dismissed the cause with prejudice. On appeal the reviewing court held that the trial court did not commit error in refusing to retain jurisdiction in the equity suit for the trial of the claim for a money judgment because the evidence failed to show any basis for a statutory or equitable lien; but the legal

152. *Osborne v. Shell Oil Co.*, 104 So.2d 670 (Fla. App. 1958). The involuntary dismissal must be under the circumstances outlined in *FLA. R. Civ. P. 1.35(b)*. See also *State ex rel. Croker v. Chillingworth*, 106 Fla. 323, 143 So. 346 (1932); *Whitaker v. Wright*, 100 Fla. 282, 129 So. 889 (1930). A judgment may be properly entered as to one or more of several joint defendants in an action for conversion, *Home Insurance Co. v. Handley*, 120 Fla. 226, 162 So. 516 (1935); *Shaw v. Saunders*, 79 Fla. 846, 85 So. 162 (1920).

153. *Rubin v. Kapell*, 105 So.2d 28, 32 (Fla. App. 1958). See *Maryland Cas. Co. v. Kador*, 225 F.2d 120 (5th Cir. 1955); *United States v. Uarte*, 175 F.2d 110 (9th Cir. 1949). A suit was brought under Louisiana's direct action statute, the trial judge permitted plaintiff, over objection to call as adverse party the defendant's assured who was not even a nominal party to the proceeding. His ruling was affirmed on appeal.

154. *Batteiger v. Batteiger*, 109 So.2d 602 (Fla. App. 1959); *Cortina v. Cortina*, 98 So.2d 334 (Fla. 1957). *FLA. R. Civ. P. 1.38*.

155. *FLA. R. Civ. P. 1.39(b)*. *Brown v. Fine*, 102 So.2d 830 (Fla. App. 1958); *Concrete Block & Wall Co. v. Knap*, 102 So.2d 742 (Fla. App. 1958); *Braz v. Professional Ins. Corp.*, 101 So.2d 594 (Fla. App. 1958); *Commercial Eng'r & Contracting Co. v. Beals*, 99 So.2d 882 (Fla. App. 1958); *Staiger v. Greb*, 97 So.2d 494 (Fla. App. 1957); *Miller v. Rolfe*, 97 So.2d 132 (Fla. App. 1957).

156. *Commercial Eng'r & Contracting Co. v. Beals*, 99 So.2d 882 (Fla. App. 1958).

claim should not have been dismissed but should have been transferred to the law side of the court.¹⁵⁷

PROCEDURE: ACTIONS AT LAW ONLY

Motions for new trial and for directed verdict

Motion for new trial

Motion for new trial as to a part of the issues. In an action where there has been a trial by jury, a new trial may be granted as to all or a part of the issues.¹⁵⁸ An order granting a new trial as to the issue of damages in an automobile and train collision case was proper where it appeared that the jury applied to the plaintiff passenger the statutory comparative negligence doctrine which is applicable only in actions for the driver's injuries.¹⁵⁹

New trial on courts initiative: grounds necessary for review. Within tendays after verdict the trial court of its own initiative may order a new trial. For the purposes of review all orders granting a new trial must specify the specific grounds upon which the new trial is awarded.¹⁶⁰

Motion for directed verdict

General considerations: withdrawal of case from the jury. The considerations and legal principles involved in a reserved motion for a directed verdict and those involved in granting a new trial are not by any means the same. A verdict should never be directed unless under no view that the jury might lawfully take of the evidence could a verdict for the adverse party be sustained. The movant admits not only the facts shown by the evidence but every reasonable inference favorable to his opponent that might be fairly and reasonably arrived at from the evidence. The law requires that where there is substantial evidence tending to prove the issue or issues that it be submitted to the jury. The court is without authority, under such circumstances, to take the case from the jury and pass upon it as a question of law. If the jury fails to agree on a decision but there was substantial evidence on which the jury could have justifiably reached a decision, the court should deny the parties' motions for a directed verdict and instead should submit the case to another jury.¹⁶¹

157. FLA. R. CIV. P. 1.39(a) provides for the transfer of actions erroneously begun.

158. *Atlantic Coast Line R.R. v. Teuton*, 110 So.2d 485 (Fla. App. 1959); *Atlantic Coast Line R.R. v. Bracewell*, 110 So.2d 482 (Fla. App. 1959). FLA. R. CIV. P. 2.8(a).

159. *Atlantic Coast Line R.R. v. Teuton*, 110 So.2d 485 (Fla. App. 1959). FLA. R. CIV. P. 2.8(a).

160. *Baxley v. Atlantic Coast Line R.R.*, 110 So.2d 487 (Fla. App. 1959); *Means v. Douglas*, 110 So.2d 88 (Fla. App. 1959). FLA. R. CIV. P. 2.6(d), 2.8(c); FLA. STAT. §§ 59.04, 59.07 (1957).

161. FLA. R. CIV. P. 2.7(b); *Cutchins v. Seaboard Air Line R.R.*, 101 So.2d 857 (Fla. 1958). See *Hilkmeier v. Latin Am. Air Cargo Expeditors, Inc.*, 94 So.2d 821 (Fla. 1957).

Directed Verdict—Circumstantial Evidence

In Florida a case should go to the jury only if "the circumstantial evidence amounts to a preponderance of all reasonable inferences that can be drawn from the circumstances and evidence to the end that evidence is not reasonably susceptible of two equally reasonable inferences." A verdict should be directed when due to the nature of the evidence a jury's verdict would be based only upon guess or conjecture.¹⁶²

Offering evidence after denial of motion—rule not applicable in equity suits. A party who moves for a directed verdict is permitted to offer evidence if his motion is denied. This rule is applicable only to jury trials in actions at law and not to probate proceedings, which are traditionally governed by equity practice.¹⁶³ In equity the complaint cannot be dismissed at the conclusion of the plaintiff's evidence unless the defendant elects to submit the cause for entry of a final decree on only the plaintiff's proof.¹⁶⁴

Effect of failing to prove complaint by preponderance of the evidence. A directed verdict in favor of defendant is not necessarily correct merely because the plaintiff failed to prove the allegations of his complaint by a preponderance of the evidence.¹⁶⁵

Procedural aspects of various types of possible motions for directed verdict—post trial motion—pre-requisite of post evidence motion. In a case of first impression, the Florida court held that in the absence of a reserved ruling by the court until after the close of all the evidence or until after the verdict on defendant's motion for directed verdict made at close of plaintiff's evidence "only those litigants who have moved for a directed verdict at the close of all the evidence are in a position to renew their motion after verdict."¹⁶⁶ One of the sound reasons for this rule is that if a party does not move for a directed verdict at the close of all the evidence he must think that the evidence makes a case for the jury and he should not be permitted to impute error to the court for sharing that view. The Supreme Court of Florida in quashing a writ of certiorari as to the instant case carefully reviewed the following facts of the case and stated the theoretically correct law applicable in the present situation in an effort to clarify a complex procedural area.¹⁶⁷

162. *McNamara v. American Motor Corp.*, 247 F.2d 445, 448 (5th Cir. 1957); *Mutual Life Ins. Co. of N.Y. v. Hamilton*, 143 F.2d 726, 732 (5th Cir. 1944).

163. *In re Mollard's Estate*, 98 So.2d 814 (Fla. App. 1957), *opinion clarified and re-hearing denied*, 101 So.2d 880 (Fla. App. 1957).

164. *Ibid.* See 30 C.J.S. *Equity* § 579 at 972 (1942). *Pearce v. Tharpe*, 118 Miss. 107, 79 So. 69 (1918).

165. *Slavin v. Kay*, 108 So.2d 462 (Fla. 1958). FLA. STAT. § 54.17 (1957).

166. *6551 Collins Avenue Corp. v. Millen*, 97 So.2d 490, 492 (Fla. App. 1957), *cert. denied*, 104 So.2d 337 (Fla. 1958).

167. *Ibid.* FLA. R. CIV. P. 2.7(a)(b). FLA. STAT. § 54.17 (1957).

The facts of the instant case. Defendant moved for a directed verdict at close of plaintiff's case and the trial court reserved ruling thereon. At the close of all the evidence, he failed to renew his motion for directed verdict, but after an unfavorable verdict, he filed a post-trial renewal of his motion for directed verdict made at the close of plaintiff's case. He did not include a motion for a new trial.

The various conclusions reached by the supreme court. It is clear that a defendant is in no position to make a post-verdict motion for judgment in accordance with his motion for directed verdict on the ground of insufficiency of the evidence made at the close of plaintiff's case which was *denied* and not renewed at the close of all the evidence. The denial of such an unauthorized post-verdict motion cannot be assigned as error on appeal.¹⁰⁸ The Supreme Court of Florida held that a trial judge *may* on the basis of statutory authority reserve his ruling on a motion for directed verdict made by defendant at close of plaintiff's case although not expressly authorized or provided for in the rules.¹⁰⁹ If such a reservation is made by the trial judge, he may then at the close of all the evidence and upon his own motion direct a verdict for the defendant. A ruling on such motion may also be reserved until after the verdict. Upon a clear reservation of the decision of such a motion until after verdict, it is unnecessary for the defendant to renew his motion at the close of all the evidence in order to avoid a waiver of his prior motion. In such a situation the trial court could properly rule upon the defendant's motion after a mistrial or after a verdict for the plaintiff. In these situations the trial judge's ruling would obviously be based on a consideration of all the evidence and therefore the question of the sufficiency of the evidence could properly be considered by the appellate court on an assignment of error directed to the trial judge's ruling thereon. It should be noted that when a defendant moves for directed verdict at the close of plaintiff's case, the burden is upon him to make sure that the legal question presented is preserved for consideration by the trial judge after verdict and by the appellate court on appeal. If such motion is denied, it must be renewed at the close of all the evidence. If a ruling is reserved on such motion the movant should secure an affirmative statement as to the reasons for the deferral; thus, in the instant case where the record did not affirmatively show that the trial judge reserved his ruling on defendant's motion for the purpose of considering it in the light of all the evidence either at close of all the evidence or after verdict, or that he did in fact consider all the evidence before making his ruling the defendant could not raise

108. 6551 Collins Avenue Corp. v. Millen, 104 So.2d 337 (Fla. 1958). *Accord*, Boston Ins. Co. v. Fisher, 185 F.2d 977 (8th Cir. 1951); United States v. 363 Cases, 143 F. Supp. 219 (W.D. Ark. 1956), *rev'd*, 247 F.2d 473 (8th Cir. 1957).

109. FLA. STAT. § 54.17 (1957); FLA. R. CIV. P. 2.7(a).

on appeal any question concerning the sufficiency of the evidence to support the verdict.¹⁷⁰

Instructions to the Jury

Request for desired charge necessary

When a judge in charging the jury specifically inquires of counsel as to the adequacy of the charge as made and no request for additional instructions is made and no objections are entered, the appellant cannot raise objections to the charge for the first time on appeal.¹⁷¹

Charge to the jury—last clear chance doctrine

The judge's charge to the jury is not a stereotyped one to be given in all actions involving the negligent operation of automobiles. There does not appear to be any definite view that can be stated with reference to factual situations in which the charge should or should not be given. Each case must be judged on its own merits and the trial judge must make the decision. The reviewing court is hesitant to interfere with the decisions of a judge as to his charges to the jury.¹⁷²

Entering of Default Judgment

Judgment—Default

The trial judge, where authorized, may enter a default "to secure the just, speedy and inexpensive determination of every action." He also has it within his discretion to set aside the default.¹⁷³

Garnishment: Traverse of garnishee's answer—denying indebtedness to judgment debtor

Garnishment will not lie where the amount of indebtedness owing by garnishee to judgment debtor is contingent or uncertain. The failure to traverse a garnishee's answer which denies any indebtedness to the judgment debtor will generally discharge the garnishee from liability. But if the answer of a garnishee indicates that he had or should have had some assets of the judgment debtor in his hands he cannot be discharged

170. 6551 Collins Avenue Corp. v. Millen, 104 So.2d 337 (Fla. 1958). See Sattler v. Great Atl. & Pac. Tea Co., 18 F. R. D. 271 (W.D. La. 1955); Stevens v. G. L. Rugo & Sons, Inc., 115 F. Supp. 61 (D. Mass. 1952), *rev'd on other grounds*, 209 F.2d 135 (1st Cir. 1954).

171. Board of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co., 108 So.2d 74 (Fla. App. 1958). FLA. R. Civ. P. 2.6(a)(b).

172. Falness v. Kaplan, 101 So.2d 377 (Fla. App. 1958) (the court did not err in rejecting charge); FLA. STAT. § 54.17 (1957). The court did not err in refusing the charge, Ippolito v. Brenner, 72 So.2d 802 (Fla. 1954). The court did not err in refusing the charge, Yousko v. Vogt, 63 So.2d 193 (Fla. 1953). The court erred in rejecting the charge, Miller v. Ungar, 149 Fla. 79, 5 So.2d 598 (1941).

173. FLA. R. Civ. P. 2.9(a). Pan American World Airways Inc. v. Gregory, 96 So.2d 669 (Fla. App. 1957); Coggin v. Barfield, 150 Fla. 551, 8 So.2d 9 (1942).

from liability until a proper disposition is made, notwithstanding the fact that the answer also denied any indebtedness to the judgment debtor and that this was not traversed by the judgment creditor as required by the rules.¹⁷⁴

PROCEDURE: SUITS AT EQUITY ONLY

Interventions

Intervention Raising New Issues Allowed in Order to Avoid Irreparable Damage

Under special circumstances, such as insolvency and non-residence, an intervention which raises a new issue will be allowed in order to avoid irreparable injury.¹⁷⁵ Such special circumstances are not present where the apparent purpose of intervention in a cause is to stop the progress of the case until the determination of an appeal to the supreme court taken by the intervenor in another case. The trial court does not abuse its discretion by denying such intervention even though the decision of the supreme court could be determinative of the equities of the case in which intervention is sought.¹⁷⁶

Interest in Pending Litigation Gives Right to Intervene

In a suit wherein certain parties were contesting their respective rights in and to certain realty, it was error to deny the intervention of a party who had an interest in the litigation by virtue of a contract of purchase and sale executed in his favor by one of the litigating parties in view of the court's proposed approval of a sale of the property by a receiver. The determination of the rights of the original litigants would have a direct effect on the contractual rights of the party seeking intervention and he should be allowed to assert these rights to avoid irreparable injury and multiplicity of suits.¹⁷⁷

Time for Taking Testimony—When Cause is Deemed at Issue

Expiration of Time for Taking Testimony Necessary to set Cause Down for Hearing on Bill and Answer

The time for taking testimony may be fixed and limited by order of the court *when the cause is at issue* and it is not set for trial, but where that is not done, a two-month limit for taking testimony is imposed.¹⁷⁸ After

174. *Chaachou v. Kulhanjian*, 104 So.2d 23 (Fla. 1958); FLA. R. Civ. P. 2.12; FLA. STAT. § 77.06 (1957).

175. *Ibid.* *Switow v. Sher*, 136 Fla. 284, 186 So. 519 (1939).

176. *Central Bank & Trust Co. v. Morales*, 101 So.2d 900 (Fla. App. 1958).

177. *Morkelhouse Corp. v. Haige*, 96 So.2d 417 (Fla. 1957); *Morgareidge v. Howey*, 75 Fla. 234, 78 So. 14, 15 (1918). FLA. R. Civ. P. 3.4.

178. FLA. R. Civ. P. 3.13.

the time for taking testimony has elapsed, a party may seek a final hearing and decree on the merits by moving to set the cause down for final hearing on bill and answer.¹⁷⁹ A party who so moves after the expiration of the time for taking testimony obtains a valuable procedural advantage which should not be set aside except upon clear grounds of equity and right. This motion should be distinguished from the cases where the motion is for a decree on the pleadings which is a pre-trial step.¹⁸⁰

The action of the trial court in reference to the fixing of the time for taking testimony and on a motion for decree upon bill and answer is discretionary, but the time for taking testimony should not be extended beyond that allowed by the rules, unless clear and ample reason is submitted.¹⁸¹

The equity rule limiting time for taking testimony in chancery causes is applicable in an action for a declaratory decree.¹⁸²

Effect of Reservation of Motion to Dismiss on Cause Being at Issue

In an equitable action, the cause is deemed at issue at the expiration of twenty days from the service of the answer or from the service of the reply if a counterclaim has been filed. However, if a motion permitted by the rules is served within such twenty-day period, the cause shall not be considered at issue until the court rules on the motion.¹⁸³ However, a reservation until trial of a ruling on a motion to dismiss or the pendency of a motion for leave to amend does not prevent a cause from being at issue and in effect suspend the time for taking testimony, because:

179. *City of Miami v. Miami Transit Co.*, 96 So.2d 799 (Fla. App. 1957). See *Strong v. Clay*, 54 So.2d 193, 195 (1951). In discussing Equity Rule 46 which is now FLA. R. Civ. P. 3.13, the court said: "under Equity Rule 46, where a cause has not been set for trial before the court, and the court has not entered an order fixing the time within which the testimony of the parties shall be taken, a period of two months from the time the cause is at issue, and no longer, is all the time allowed for the taking of testimony. When that period has expired, either party has the right, under Equity Rule 46, to set the cause down for final hearing on the pleadings and thus bring the cause to conclusion. . . . At such a hearing all the proper allegations of the bill not sufficiently denied by the answer are to be taken as true and all allegations in the answer of new or affirmative matter are to be deemed denied. Moreover, where issues are made by denials in the answer, the decision at the hearing must be against the party who has the burden of proof according to the rules of evidence. . . ." (Emphasis added.) See also *Muller v. Maxcy*, 74 So.2d 879, 881 (Fla. 1954).

180. *Nystrom v. Nystrom*, 105 So.2d 605 (Fla. App. 1958). *City of Miami v. Miami Transit Co.*, 96 So.2d 799 (Fla. App. 1957). FLA. R. Civ. P. 1.11(c).

181. *Glassman v. Deauville Enterprises, Inc.*, 101 So.2d 432 (Fla. App. 1958); *Glassman v. Deauville Enterprises, Inc.*, 99 So.2d 641 (Fla. App. 1958). The reviewing court found an abuse of discretion in the lower court's denial of the appellant's third motion for hearing on bill and answer where the plaintiff had not moved in any of the three instances when time was extended until after the expiration of the time and after the defendant had moved for a decree and also he did not know why, or a sufficient reason why, testimony had not been taken. For other cases discussing these rules and their interrelationship, see *Nystrom v. Nystrom*, 105 So.2d 605 (Fla. App. 1958); *Tropicair Eng'r Serv. Corp. v. Chrysler Airtemp Sales Corp.*, 97 So.2d 149 (Fla. App. 1957); *City of Miami v. Miami Transit Co.*, 96 So.2d 799 (Fla. App. 1957); *Muller v. Maxcy*, 74 So.2d 879 (Fla. 1954). See also FLA. R. Civ. P. 3.8, 3.13, 1.11(c)(d).

182. *City of Miami v. Miami Transit Co.*, *supra* note 181.

183. FLA. R. Civ. P. 3.8, 3.13, 1.11(h).

[It] is clear that the provision in rule 3.8 to the effect that a suit will not be deemed at issue until a pending motion to dismiss is ruled upon by the court, has reference to instances where answer has not been served and the ruling on the motion is to precede the requirement to answer. But that provision does not operate where the court avails itself of the procedure furnished by rule 1.11(d) of postponing ruling on the motion to dismiss until the final hearing or trial. This is so because it is the practice where ruling is reserved until trial on a motion to dismiss for the court to fix the time for answer and to require answer to be served and filed. When answer is served or in the case of a counterclaim where a reply thereto is served then after a further lapse of twenty days the equity suit becomes at issue, by force of an express provision of rule 3.8. Then rule 3.13 operates, limiting the time for taking testimony.¹⁸⁴

Thus, a party can only benefit from the rule when issues have been created by a complaint and answer. A cause is not deemed at issue while there is an undisposed of motion for a decree pro confesso.¹⁸⁵

Default—Setting Aside Decree Pro Confesso

A chancellor upon stipulation of the parties may set aside a decree pro confesso and permit the filing of defensive pleadings.¹⁸⁶

Trials and Evidence—Masters

Trial Judge Not Required to Make Findings of Fact

The trial judge in an equity suit or a non-jury law action is not required to make findings of fact and conclusions of law as required of federal judges. However, the inclusion of such findings in a decree aids both the attorneys and the reviewing court.¹⁸⁷

Referral of Case to a Master: When Consent of Parties Needed

A chancery case may be referred in its entirety to an examiner or special master for the taking of testimony, but not in the absence of consent or over the objection of one of the parties who elects to have the privilege of presenting his cause to the chancellor. Particular aspects

184. *Tropicaire Eng'r Serv. Corp. v. Chrysler Airtemp Sales Corp.*, 97 So.2d 149, 151 (Fla. App. 1957); *Nystrom v. Nystrom*, 105 So.2d 605 (Fla. App. 1958).

185. *Cellucci v. King-Universal Corp.*, 106 So.2d 629 (Fla. App. 1958). Cf. *Tropicaire Eng'r Serv. Corp. v. Chrysler Airtemp Sales Corp.*, 97 So.2d 149 (Fla. App. 1957).

186. *Schroeder v. Schroeder*, 102 So.2d 729 (Fla. App. 1958). FLA. R. CIV. P. 3.10.

187. *Ibid.* *Dworkis v. Dworkis*, 111 So.2d 70 (Fla. App. 1959). See FED. R. CIV. P. 52.

of a case may be referred to an examiner or master regardless of objection or want of agreement between the parties.¹⁸⁸

Judgment Cannot Be Based on Personal Observations of Chancellor

A chancellor's findings based upon personal observation not consented to by one of the parties cannot be the basis for a judgment and is reversible error unless there is other sufficient evidence of record to support the judgment.¹⁸⁹

Compensation of Masters

The fees of a master in chancery proceedings are set out by statute and they may now be awarded additional compensation in the discretion of the court for extraordinary services "including time consumed in legal research required in preparing and summarizing his findings of fact and law." The supreme court did not consider a master's fee of \$1750 excessive where he had spent in excess of eleven full days in preparing his report which showed on its face that "extraordinary services" were required to produce it.¹⁹⁰

Rehearings in Trial Court—Granting of Timely Petition

The Petition in General: Granted in Discretion of Court

A timely petition in equity for a rehearing is not an appeal but a part and continuation of the suit. An equity decree is not final and absolute while a timely and appropriate petition for rehearing is pending or the time for filing the petition has not elapsed.^{190a} The granting or

188. *Powell v. Weger*, 97 So.2d 617 (Fla. 1957). See the well-written dissent at 620. The effect of the *Slatcoff* case is that in the face of opposition of one of the parties the special master cannot be authorized to make findings and conclusions of law together with recommendations as to an entire case without the consent of the parties. But there is nothing in the case limiting the power of the chancellor in the matter of appointing an examiner or special master just to take the testimony of the parties. See *Slatcoff v. Dezen*, 74 So.2d 59 (Fla. 1954) and *Stewart v. Mack*, 86 So.2d 143 (Fla. 1956). See FLA. R. CIV. P. 3.12, 3.14. The majority opinion is consistent with the construction given FED. R. CIV. P. 53 which is similar to our rule and which provides that reference to a master shall be the exception and not the rule; 19 AM. JUR. EQUITY § 371 at 255 (1939).

189. *Hammond v. Carlyon*, 96 So.2d 219 (Fla. 1957). See Annot., *Judges Findings on Personal Observation*, 97 A.L.R. 335 (1935), FLA. R. CIV. P. 3.12.

190. *Anderson v. City of Miami*, 99 So.2d 861 (Fla. 1958). FLA. STAT. §§ 62.07, 62.071 (1957).

190a. FLA. R. CIV. P. 3.16. No rehearing shall be granted unless the petition is served within 10 days after the reading of the decrees. *Cocalis v. Cocalis*, 103 So.2d 230 (Fla. App. 1958). Cf. *Kent v. Marvin*, 59 So.2d 791 (Fla. 1952) (motion for new trial in law action). *Cortina v. Cortina*, 98 So.2d 334 (Fla. 1957). After expiration of the ten-day period within which to file petition for rehearing a divorce decree providing support for children of parties is just as final as any other decree as to all conditions and circumstances that existed as of the date of the decree; and chancellor cannot modify support decree or any other decree unless issue of modification is presented to him in appropriate proceeding and each party is given an opportunity to be heard on such issue. See also *Alford v. Nunez*, 104 So.2d 677 (Fla. App. 1958).

denial of a timely petition for rehearing is within the sound discretion of the court.¹⁹¹

Who Should Act Upon the Petition

A petition for rehearing should be acted upon by the chancellor who entered the prior decree. If it is necessary to utilize another chancellor, he is without authority to reverse his predecessor if the petition is merely a re-argument of matters previously considered, but if it presents points which were clearly overlooked or were not considered which resulted in an inequitable or erroneous decree, the successor chancellor is within his authority to act on the merits of the petition.¹⁹²

Process in Behalf of and Against Persons Not Parties—Support Decrees

A maternal aunt who has been given custody of children of divorced parents is a proper party to enforce against the husband the provisions for the child's support contained in the divorce decree.¹⁹³

SUMMARY AND DECLARATORY JUDGMENTS

Summary Judgments and Decrees^{193a}

General Principles

When motion should be granted. A summary judgment or decree should only be granted when the pleadings, depositions or admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment or decree as a matter of law.¹⁹⁴

191. *Cocalis v. Cocalis*, 103 So.2d 230 (Fla. App. 1958); *Epperson v. Epperson*, 101 So.2d 367 (Fla. 1958); *Groff G.M.C. Trucks, Inc. v. Driggers*, 101 So.2d 58 (Fla. App. 1958); *Burnup v. Bagley*, 100 So.2d 622 (1958).

192. *Epperson v. Epperson*, 101 So.2d 367 (Fla. 1958).

193. *Dykes v. Dykes*, 104 So.2d 598 (Fla. App. 1958). FLA. R. CIV. P. 3.18.

193a. For an analysis of recent Florida cases involving summary judgment see Comment, 13 U. MIAMI L. REV. 457 (1959).

194. FLA. R. CIV. P. 1.36(c). *Humphreys v. Jarrell*, 104 So.2d 404 (Fla. App. 1958); *Williams v. Levine*, 103 So.2d 191 (Fla. 1958); *Rood Company, Inc. v. Board of Public Instruction of Dade County*, 102 So.2d 139 (Fla. 1958); *Dias v. Associates Loan Co.*, 99 So.2d 279 (Fla. 1957); *Farrey v. Bettendorf*, 96 So.2d 889 (Fla. 1957); *Pritchard v. Peppercom & Peppercom, Inc.*, 96 So.2d 769 (Fla. 1957); *Parker v. Brice*, 96 So.2d 154 (Fla. 1957); *Brooker v. Smith*, 108 So.2d 790 (Fla. App. 1959); *Palov v. Florida Power & Light Co.*, 107 So.2d 780 (Fla. App. 1958); *Rawls v. Ziegler*, 107 So.2d 601 (Fla. App. 1958); *Moore v. O'Connor*, 106 So.2d 606 (Fla. App. 1958); *Seaview Awning Shutters of Miami, Inc. v. E. M. Eisfield, Inc.*, 106 So.2d 597 (Fla. App. 1958); *Buck v. Hardy*, 106 So.2d 428 (Fla. App. 1958); *Osborne v. Shell Oil Co.*, 104 So.2d 670 (Fla. App. 1958); *Andrews v. Coatz*, 104 So.2d 653 (Fla. App. 1958); *Owens v. McKenzie*, 103 So.2d 677 (Fla. App. 1958); *Kelly v. Kaufman*, 101 So.2d 909 (Fla. App. 1958); *Patty v. Food Fair Stores of Florida, Inc.*, 101 So.2d 881 (Fla. App. 1958); *Cagan v. Eisenstadt*, 98 So.2d 370 (Fla. App. 1957); *Burns v. Florida Power & Light Co.*, 98 So.2d 96 (Fla. App. 1957); *Dameron v. Mittuch*, 96 So.2d 826 (Fla. App. 1957); *Biltmore Village Inc. v. Bacon*, 96 So.2d 594 (Fla. App. 1957).

Burden on Moving Party. The party moving for a summary judgment or decree has the burden of proving the lack of any genuine issue as to any material fact. All doubts are resolvable against the movant by the trial court and the reviewing court will draw all proper inferences in favor of the party against whom the motion had been requested. A summary judgment or decree may not be granted where the movant has failed to show the lack of a material fact issue or upon the appearance of a material fact issue.¹⁹⁵

Purpose of motion: Function of the trial court. The purpose behind summary proceedings is to establish whether there is any genuine issue of a material fact to be determined and not to try or determine the factual issues that may arise. Once the salient facts are established beyond dispute a question of law arises as to whom the judgment should be awarded and the trial judge must use the established facts as a premise for his decision. It is the function of the trial court in passing on the motion to determine whether there is a genuine issue of any material fact and not to determine any issue of fact.¹⁹⁶

Filing of the motion. A motion for summary judgment may be filed any time after the expiration of twenty days from the date the action was instituted and it is proper to grant a summary judgment even though no answer has been filed, or a pending motion to strike the answer or portions thereof has not been ruled on.¹⁹⁷

Situations Wherein Summary Judgment Should Be Cautiously Granted

Negligence Actions. The courts are extremely cautious in granting a summary judgment in tort actions because of the well settled principle that the question of negligence is ordinarily one to be resolved by a jury.¹⁹⁸ When a jury might properly draw varied conclusions from the

195. *Ibid.*

196. *Ibid.*

197. *Froelich v. Rawley*, 104 So.2d 720 (Fla. 1958); *Olin's, Inc. v. Avis Rental Car System, Inc.*, 102 So.2d 159 (Fla. App. 1958) (no answer filed). FLA. R. CIV. P. 1.36(b); FED. R. CIV. P. 56. Apparently judgment may be entered at any time during the proceedings once it is established that no material fact issue exists and only a question of law remains. *Marsh v. Sarasota County*, 97 So.2d 312 (Fla. App. 1957). In this case decree was apparently entered upon a motion for summary judgment, but the record does not disclose a formal motion for summary judgment having been made. The reviewing court does not directly answer the question of whether a summary judgment can be granted in absence of a motion therefor because appellant failed to object to such procedure at the trial.

198. *Farrey v. Bettendorf*, 96 So.2d 889 (Fla. 1957). *Patty v. Food Fair Stores, Inc.*, 101 So.2d 881, 884 (Fla. App. 1958) "this court does not intend to indicate by statement in this opinion a desire on our part to discourage or encourage the granting or denying of summary judgments or decrees. Like any other rule, it can be misused and abused but on the other hand its use should not be discouraged to the point of extinction. This we believe has been the view generally expressed by the court of last resort long before the creation of this court and as we are duty bound to do we follow and reiterate this view. *Palov v. Florida Power & Light Co.*, 107 So.2d 780 (Fla. 1958) (summary judgment should be sparingly granted so as not to infringe upon constitutional right to a jury trial); *Rawls v. Ziegler*, 107 So.2d 601 (Fla. App. 1958); *Gordon v.*

record as presented summary judgment should not be granted; such a situation is generally present where the record tenders an almost typical intersectional collision case with varied stories as to the circumstances leading to the accident.¹⁹⁹

[I]ssues of negligence including such related issues as contributory negligence are ordinarily not susceptible of summary judgment either for or against the claimant, but should be resolved in the ordinary manner.²⁰⁰

Cases involving a state of mind. Summary procedures should be cautiously utilized where one's intent or the wilfulness of a person's actions is an essential element placed in issue by the pleadings.²⁰¹ The district court of appeal held that a declaratory action to construe the terms of a will is not a proper one for summary procedure since such actions generally raise doubts as to the intention of the testator. Furthermore, the court was not obliged to use summary procedures merely because all the parties involved so moved and also contended there was no such issue involved.²⁰²

Affidavits in Support of Motion for Summary Judgment

General consideration given supporting papers: Admissibility. The party moving for a summary judgment or decree is generally held to a strict standard, and papers supporting his position are closely scrutinized. The papers of the opposing party are leniently treated in determining whether the moving party has satisfied the burden required of him. When an affidavit contains matter which would be incompetent and inadmissible if testified to at trial the whole affidavit should not be disregarded and the court should consider the competent and admissible portions.²⁰³

Failure to attach papers to affidavits. The failure to attach papers to the affidavit which refers to them and which are material to the cause is a ground for the striking of the affidavits offered. However, papers referred to in an affidavit are part of the record of the cause even though not attached thereto, when the reference to them is so explicit so as to leave no doubt as to their identity or relationship to the affiant's testimony.²⁰⁴

Hotel Seville Inc., 105 So.2d 175 (Fla. App. 1958). For negligence cases wherein summary decrees granted in lower court were reversed see *Buck v. Hardy*, 106 So.2d 428 (Fla. App. 1958); *Kelly v. Kaufman*, 101 So.2d 909 (Fla. App. 1958); *Kagan v. Eisenstadt*, 98 So.2d 370 (Fla. App. 1957).

199. *Weber v. Porco*, 100 So.2d 146 (Fla. App. 1958).

200. The Florida court in *Buck v. Hardy*, 106 So.2d 428 (Fla. App. 1958) quoting with approval 6 MOORE, *FEDERAL PRACTICE* 2732 (2d ed. 1948).

201. *Parker v. Brice*, 96 So.2d 154 (Fla. 1957) (wilfulness); *Owens v. McKenzie*, 103 So.2d 677 (Fla. App. 1958) (intent).

202. *Pancoast v. Pancoast*, 97 So.2d 875 (Fla. App. 1957).

203. *Humphrys v. Jarrell*, 104 So.2d 404 (Fla. App. 1958); *Crovella v. Cochrane*, 102 So.2d 306 (Fla. App. 1958). FLA. R. CIV. P. 1.36(e)(f).

204. *Crovella v. Cochrane*, 102 So.2d 306 (Fla. App. 1958).

Affidavits not only form of proof acceptable in support of summary judgment. Although it may be the better practice to support a motion for summary judgment by proof in the form of affidavits there is no compulsion to do so if the interested parties elect to submit oral proofs and the trial court so permits.²⁰⁵

The relative weight between the complaint and counter affidavits filed in support of motion for summary judgment. Generally, where the plaintiff fails to present affidavits in support of his complaint, or in the alternative affidavits in opposition to a motion for summary judgment, the trial judge has for his consideration only an unsupported complaint and the deposition or affidavit of the movant and if the latter reveal no cause for the complaint it is proper to enter summary judgment for the defendant.²⁰⁶ The allegations of a sworn complaint will be considered as against a motion for summary judgment with supporting affidavits if the sworn complaint meets the requirements of counter affidavits within the contemplation of rule 1.36(e).²⁰⁷

Where affidavits are unavailable in opposition to motion for summary judgment: Extension of time. Where a party does not present affidavits in opposition to a motion for summary judgment showing that he could not "for reasons stated present by affidavit facts essential to justify his opposition" the court will assume he has gone as far as he can and will enter the summary judgment.²⁰⁸

A motion for summary judgment should not be granted in those cases where because of peculiar circumstances a party is unable on short notice to interrogate witnesses and procure affidavits or depositions in opposition to the motion asserted by his opponent. In such a situation, upon written motion filed with supporting affidavits, the trial court should either postpone the final disposition of the motion for summary judgment for such a reasonable time as may be necessary for the party to obtain such proofs, or deny the motion and promptly set the case for trial on the merits; the denial of the motion for an extension of time would be an abuse of discretion.²⁰⁹

205. *Hall v. Davis*, 106 So.2d 599 (Fla. App. 1958). FLA. R. CIV. P. 1.36(a)(b).

206. *Pritchard v. Peppercorn & Peppercorn, Inc.*, 96 So.2d 769 (Fla. 1957). FLA. R. CIV. P. 1.36(e).

207. *Central Bank & Trust Co. v. Davis*, 102 So.2d 600 (Fla. 1958). See 6 MOORE, FEDERAL PRACTICE 2063 (2d ed. 1948); 3 BARON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 1235 (rev. ed. 1958).

208. *General Truck Sales, Inc. v. American Fire & Cas. Co.*, 100 So.2d 202 (Fla. App. 1958). FLA. R. CIV. P. 1.36(f).

209. *Gaymon v. Quinn Menhaden Fisheries, Inc.*, 108 So.2d 641 (Fla. App. 1959). FLA. R. CIV. P. 1.36(f). See the well reasoned dissent of Chief Judge Sturgis at 645. However it should be noted that the facts as stated by the majority and those stated by the dissent seem to be completely different.

Depositions in Support of Motion for Summary Judgment

Florida Rule of Civil Procedure 1.36(c) reads:

judgment or decree sought shall be rendered forthwith if the pleadings, *depositions* and admissions *on file*, together with affidavits, if any, show that there is no genuine issue of any material fact and that moving party is entitled to a judgment for decree as a matter of law. (Emphasis added.)

Thus, depositions which were filed but which were never opened, offered or admitted into evidence could properly be considered by the trial court on motion for summary judgment.

Case not Fully Adjudicated on Motion for Summary Judgment

A motion for final summary judgment should *not* be granted even though the terms of the contract allegedly breached cannot be proven if the facts brought forth by the plaintiff show that he would have a different cause of action against the defendant if he had properly pleaded his case. In this situation the rule governing summary judgments where cases are not fully adjudicated on the motion should be applied. The court could properly enter summary judgment as to the attempted recovery of damages for the breach of the contract and also an order setting forth conditions under which the plaintiff may amend his complaint.²¹⁰

*Declaratory Decrees, Judgments and Orders**The Complaint—General Test of Sufficiency—Purpose*

The test of the sufficiency of a complaint in a declaratory proceeding is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all.²¹¹

The legislature has declared the statute to be substantive and remedial; "its purpose is to afford relief from insecurity and uncertainty with respect to rights, status and other equitable or legal relations; and is to be liberally administered and construed."²¹² A declaratory proceeding may be brought to clarify or construe a statute as to which there are doubts or uncertainties.²¹³

210. *Riviera Printing Co. v. Hesslers, Inc.*, 109 So.2d 778 (Fla. App. 1959).

211. *Northshore Realty Corp. v. Callaher*, 99 So.2d 255, 256 (Fla. App. 1957) (approving the quote from *White v. Manassa*, 252 Ala. 396, 397, 41 So.2d 395, 397 (1949)).

212. FLA. STAT. § 87.11 (1957). For a list of cases upholding the appropriateness of declaratory relief to determine a variety of questions see *Title & Trust Co. v. Title & Guar. & Abstract Co. of Sanford*, 103 So.2d 211 at 214 (Fla. App. 1958).

213. *City of Miami v. Miami Transit Co.*, 96 So.2d 799 (Fla. App. 1957). FLA. STAT. § 87.02 (1957).

Form of the Decree—Type of Relief Available

A declaratory decree, judgment or order of the circuit court may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final decree. The statute allows a party seeking such a decree to also request in the same action alternative, coercive, subsequent or supplemental relief. The complainant must have a right to institute the suit; *e.g.*, where the party's rights would be particularly effected by the declaratory decree or he has an interest in the subject matter separate and apart from the general public.²¹⁴

Declaratory Action in Law or Equity—Determination of Issues of Fact

An action under the declaratory decree statute, depending on its subject matter, may be filed either on the law or the equity side of the court. If brought in equity it is not transferrable to the law side on the grounds that there are issues of facts which should be properly determined by a jury. The statute provides that particular issues of fact which are appropriate for trial before a jury may be submitted to a jury for determination; but there is nothing in the statute *requiring* a jury to determine issues of fact in equity cases and it in no way requires or contemplates a jury trial merely because the action is one cognizable at law.²¹⁵

Suit for Declaratory Decree Cannot Be Substituted for Available Appellate Procedure

Florida has accepted the general rule that where a party does not avail himself of the appellate procedure provided by law to review an adverse judgment, order or decree, he may not seek to have it altered or reversed by a suit for declaratory decree. The rule also applies to orders of administrative boards in proper exercise of their quasi-judicial powers where appellate procedure is provided, but not followed.²¹⁶

214. FLA. STAT. § 87.01(1)(2) (1957). *Guernsey v. Haley*, 107 So.2d 184 (Fla. App. 1958) (the decree must have a personal effect as opposed to public in general); *Thomas v. Cilbe, Inc.*, 104 So.2d 397 (Fla. App. 1958); *Coast Cities Coaches, Inc. v. Whyte*, 102 So.2d 848 (Fla. App. 1958) (in this case refusal to transfer the cause to the law side was not error when suit was within purview of the declaratory judgment act in that the party was in real doubt and disagreement regarding the construction to be placed upon the contract).

215. FLA. STAT. §§ 87.08, 87.01 (1957). *Coast City Coaches, Inc. v. Whyte*, 102 So.2d 848 (Fla. App. 1958); *Olin's Inc. v. Avis Rental Car System of Fla., Inc.*, 105 So.2d 497 (Fla. App. 1958) (note the court's language here when it says that the declaratory judgment statute provides for specific issues appropriate for jury trial to be submitted to jury for determination. It would appear that this is not exactly correct as the statute says they may be submitted to a jury for determination and another case definitely says it is not required).

216. *Frix v. Beck*, 104 So.2d 81 (Fla. App. 1958). For the general rule see *Clark v. Memolo*, 174 F.2d 978 (D.C. Cir. 1949).

Declaratory Decree: Effect of Another Adequate Remedy

The existence of another adequate remedy does not preclude the issuance of a decree, judgment or order for declaratory relief. The court, in declaratory proceedings has the power to grant full and complete equitable relief.²¹⁷

Summary Decree Possible in Declaratory Action

A summary decree may be obtained in a declaratory action but in order for the moving party to obtain it, there must be not only an absence of any genuine issue as to any material fact, but he must be entitled to the judgment or decree as a matter of law.²¹⁸

Declaratory Judgments—Res Judicata Only to Issues Actually Adjudged

A declaratory judgment does not merge the cause of action in it and it is res judicata only to matters actually declared by the judgment. Thus, where an assignee of a lease sought a declaratory decree, interpreting a particular clause of the lease, the lessor had the burden of establishing by extrinsic evidence the affirmative defense that a prior declaratory decree on the same clause which was brought by a previous lessee against the defendant and which had been dismissed with prejudice by consent of the parties was res judicata. A dismissal of a petition for declaratory decree by consent of the parties without more is thus not conclusive of the rights in question.²¹⁹

Supplemental Relief Based on a Declaratory Decree—In General

A party obtaining a declaratory decree may, by petition, seek supplemental relief in a subsequent action brought in the circuit court having jurisdiction. This subsequent action is a new and distinct adjudication and the orders rendered therein are appealable. The adverse party is entitled to reasonable notice and the right to show cause why further relief should not be granted. The petition for supplemental relief may be filed after the time for appeal from the declaratory decree upon which it is based has expired. The order to show cause is not immediately reviewable upon issuance but only after the trial court has had an opportunity to pass on the merits of the petition or the defenses offered against it.²²⁰

217. FLA. STAT. § 87.12 (1957). *Title & Trust Co. of Fla. v. Title Guar. & Abstract Co. of Sanford*, 103 So.2d 211 (Fla. App. 1958) (replevin was available).

218. *Pancoast v. Pancoast*, 97 So.2d 875 (Fla. App. 1957). See also *Olin's, Inc. v. Avis Rental Car System of Fla., Inc.*, 105 So.2d 497 (Fla. App. 1958).

219. *Northshore Realty Corp. v. Callaher*, 99 So.2d 255 (Fla. App. 1957) (court recognizes that consent could be res judicata under certain circumstances but not under facts of this case).

220. FLA. STAT. § 87.07 (1957). *South Dade Farms, Inc. v. Peters*, 107 So.2d 30 (Fla. 1958); *Thomas v. Cilbe, Inc.*, 104 So.2d 397 (Fla. App. 1958).

Form of supplemental relief. The court in a supplemental proceeding may grant whatever relief is necessary or proper to effectuate its prior declaration. The relief granted may be coercive or it may be in the form of a money judgment for damages.²²¹

Service of petition—adjudication—distinct and appealable. A petition for supplemental relief grounded on a declaratory decree does not have to be served within the ten-day period applicable to petitions for rehearing, and an order based on such a petition is an additional and distinct adjudication and is appealable.²²²

Statutory Note: Declaratory Judgments

Municipality as a party. Section 87.10 of the 1959 Florida Statutes amends the act so that in any declaratory proceeding involving the validity of a county or municipal charter, ordinance or franchise, such county or municipality shall be made a party and shall be entitled to be heard. If the statute, charter, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state or the state attorney of the judicial circuit in which the action is pending shall also be served with a copy of the proceedings and shall be entitled to be heard.²²³

STATUTORY—TRIAL PRACTICE AND PROCEDURE

Harmless Error

Harmless Error: General Effect

No judgment will be set aside or reversed for error as to any matter of pleading or procedure unless upon consideration of the entire record such error resulted in a miscarriage of justice. Furthermore, "This section shall be liberally construed."²²⁴

Impeachment of Witness—Harmful Error

The statutory rule allowing the introduction of prior criminal convictions in order to impeach the creditability of a witness is applicable in both criminal and civil cases. The refusal to permit such an impeachment of the creditability of the only witness whose testimony was directly

221. *Thomas v. Cilbe, Inc.*, 104 So.2d 397 (Fla. App. 1958). FLA. STAT. § 87.07 (1957).

222. *Ibid.* The action was brought prior to the effective date of the Florida Appellate Rules. FLA. R. CIV. P. 3.16(a).

223. FLA. LAWS 1959, ch. 59-440; FLA. STAT. § 87.10 (1959).

224. FLA. STAT. § 54.23 (1957). *Sherwood v. State*, 111 So.2d 96 (Fla. App. 1959) (criminal case); *Rubin v. Kapell*, 105 So.2d 28 (Fla. App. 1958) (equity case); *Victor Hotel Owners, Inc. v. Sperling*, 104 So.2d 120 (Fla. App. 1958) (civil negligence case).

on the causal facts involved in a negligence action was reversible error.²²⁵

Comment on Failure to Testify—Harmful Error

The harmless error statute has no application to the criminal procedure statute which gives absolute protection to the defendant against any comment by the prosecuting attorney on his failure to testify in his own behalf. Any such comment regardless of intent or affect, is reversible error.²²⁶

Release or Covenant Not to Sue

Personal Injury Within the Statute Includes Invasion of Personal Rights

A release or covenant not to sue as to one tortfeasor for property damage to, *personal injury* of, or the wrongful death of any person, shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death. (Emphasis added.)

The "personal injury" referred to includes the invasions of individual rights for which damages are allowable in an action for malicious prosecution.²²⁷

Release Not to Be Made Known to Jury—Effect

The fact of a release or a covenant not to sue any defendant shall not be made known to the jury. If at trial the defendant makes it known to the court that the plaintiff has released any person in partial satisfaction of the damages sued for, the court shall set off such amount from the amount of any judgment to which the plaintiff would otherwise be entitled.²²⁸

In one case the appellant introduced such a release into evidence and then requested the judge to instruct the jury that any recovery in favor of plaintiff must be reduced by the amount he received from the released negligent joint tortfeasor. Both the court and the attorneys were not aware of the instant statute and the court was in error in giving the requested instructions, but the reviewing court would not allow the defendant on appeal to complain of the erroneous actions of the trial judge occasioned by the granting of his requests.²²⁹

225. FLA. STAT. §§ 54.23, 90.07, 90.08 (1957). *McArthur v. Cook*, 99 So.2d 565 (Fla. 1957) (this was a negligence action).

226. FLA. STAT. §§ 54.23, 918.09 (1957). *McLendon v. State*, 105 So.2d 513 (Fla. App. 1958).

227. FLA. STAT. § 54.28(1) (1957). *Adler v. Segal*, 108 So.2d 773 (Fla. App. 1959). Cf. *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1945).

228. FLA. STAT. § 54.28(2)(3) (1957).

229. *Arsenault v. Thomas*, 104 So.2d 120 (Fla. App. 1958).

PART II

FLORIDA APPELLATE PROCEDURE—THE RULES
AND STATUTES*Effective Date*

All appellate proceedings, whether criminal or civil in nature commenced on or after July 1st, 1957 are governed by the new Florida Appellate rules.²³⁰ Appellate proceedings pending in the Supreme Court on July 1st, 1957 are governed by the former Supreme Court rules and any applicable procedural statutes then in effect, whether such proceedings are retained by the supreme court or transferred to a district court of appeal under the provisions of revised article V of the Florida Constitution.²³¹ These rules apply equally to the procedure in the supreme court, the district courts of appeal and the circuit courts when exercising their appellate jurisdiction.²³²

230. The new Florida Appellate Rules will be hereafter cited as F.A.R. See F.A.R. 1.4, 1.1. *Clark v. City of Orlando*, 109 So.2d 416 (Fla. App. 1959). Criminal case: Appeal from municipal court to circuit court filed May 13th, 1958 was not taken within thirty days as provided by FLA. STAT. § 932.52(2) (1957). The 90 day period allowed by F.A.R. 6.2 at that time did not apply to appeals from municipal courts to circuit courts. However, rule 6.1 was amended, effective July 1st, 1958, and makes part 6 of the Florida Appellate Rules applicable to such appeals. Apparently this would supercede FLA. STAT. § 932.52(2) (1957) and extend the appeal time from 30 to 90 days. See *City of Miami v. Gilbert*, 102 So.2d 818 (Fla. App. 1958) (criminal case dictum). *Fort v. Fort*, 104 So.2d 69 (Fla. App. 1958) (Fla. App. Rule 4.2(a) supercedes FLA. STAT. § 59.02(3) as to appeals from interlocutory orders and decrees in equity by proceedings in the nature of certiorari. See Author's Comment 31 FLA. STAT. ANN. 33, 34 (Supp. 1958).

231. FLA. CONST. art. V, § 26(6) as amended 1956. *Clemms, Inc. v. Cline*, 105 So.2d 881 (Fla. 1958) (where notice of appeal was before supreme court prior to July 1st, 1957, supreme court will retain jurisdiction of cause pursuant to constitution as amended in 1956); *Carmazzi v. Board of County Commissioners of Dade County*, 104 So.2d 727 (Fla. 1958). *Florida Hotel & Restaurant Comm. v. Dowler*, 99 So.2d 852 (Fla. 1958) (involved an appeal from a circuit court order quashing an order of the Florida Hotel and Restaurant Commission. Case recognized that FLA. STAT. 509.261 (1955) is no longer in effect and that appeal could no longer be prosecuted to the supreme court from judgment of circuit court on petition for certiorari quashing an order of the Hotel and Restaurant Commission. *Armenian Hotel Owners v. Kulhanjian*, 96 So.2d 896 (Fla. 1957). This cause was before the supreme court on an interlocutory appeal taken by the appellant from an amended final decree entered by the lower court pursuant to the mandate of the supreme court rendered in 96 So.2d 146. Jurisdiction to review the amended final decree on an interlocutory appeal under F.A.R. 4.2 was assumed by the court under the policy that where a cause was pending in it prior to the effective date of revised article V of the constitution all orders, judgments or decrees entered by the lower court in such cause to effectuate the mandate of this court are reviewable by this court as a court of prior appellate jurisdiction.

232. F.A.R. 1.1, 1.4. *In re Juen's Estate*, 105 So.2d 908 (Fla. App. 1958) (proceedings commenced "refer to any proceedings in the appellate court and not in the trial court.") *Appeal of Syracuse University*, 105 So.2d 904 (Fla. App. 1958) (under new article V section V, (c) Florida Constitution and Florida Appellate Rule 4.1 District Court of Appeal has no jurisdiction of appeals from an order of circuit court sitting as an appellate court. This in effect supercedes FLA. STAT. § 732.15 (1957); *Alliance for Conservation of Natural Resources in Pinellas County v. Furen*, 104 So.2d 803 (Fla. App. 1958) (circuit court in acting pursuant to a writ of certiorari sits as an appellate court and not a trial court). See also *Codomo v. Shaw*, 99 So.2d 849 (Fla. 1958) (FLA. STAT. § 475.35 (1957) superceded by Florida Appellate Rules). See Author's Comment 31 FLA. STAT. ANN. 33, 34(Supp. 1958).

*Rendition of a Decision**Definition of the Term Rendition*

The most important definition in Florida Appellate Rule 1.3 is probably that given to the term "rendition" since it is the "rendition" of the judgment decree or order appealed from that starts the running of the time within which appellate proceedings must be commenced. Also, the rules provide that a decision must be "rendered" before it can be the subject of a writ for certiorari.²³³

An anomalous situation concerning the definition of "rendition" was presented in *Hawley v. Coogan*.²³⁴ The defendants, expressing an intention to petition the supreme court for a writ of certiorari, petitioned the district court of appeal to stay issuance of its mandate. They also filed a petition for rehearing. The then existing definition of "rendition" provided that a decision was not rendered while a petition for rehearing was pending, and that a "decision of an appellate court shall not be deemed rendered until the mandate is issued." Thus, the dilemma; if the appellate court denied the petition for rehearing the decision would still not be "rendered" until its mandate was issued and if the court granted the petition to stay the mandate there would be no "rendered decision" upon which a writ of certiorari could be based. The rule had inadvertently placed the defendant in a quandry.

This decision was subsequently negated by the deletion from the definition of "rendition" of the sentence requiring an appellate court to issue a mandate before its decision can be considered "rendered."

When a Decision is Deemed Rendered

A judgment, decision, order or decree is rendered when it is recorded or if recording is not required, then filed. A timely and proper motion or petition for a new trial, rehearing or reconsideration by the lower court suspends the date of "rendition" until disposition of such motion or petition.²³⁵

APPELLATE PROCEEDINGS IN GENERAL

*Commencement of Appellate Proceedings**Trial Court Cannot Extend Time for Appeal*

The time for appeal commences to run from the date that the final decree is recorded notwithstanding the entry of an order upon stipulation of the parties amending the effective date of the final decree. A trial

233. F.A.R. 3.2(b) (deals with time allowed to appeal); F.A.R. 4.5 (c) (relates to certiorari).

234. *State v. Coogan*, 99 So.2d 243 (Fla. App. 1957).

235. F.A.R. 1.3 as amended March 19th, 1958, effective July 1st, 1958.

court does not have the power to extend, directly or indirectly the time allowed for taking an appeal.²³⁶

Effect of Filing Notice and Deposit of the Filing Fee

There is no doubt that timely and proper filing of the notice of appeal is necessary to confer jurisdiction on the reviewing court.²³⁷ And under the rule as now existing the filing of the notice of the appeal and the depositing of the filing fee would appear to be jurisdictional.²³⁸ However, in *Moore v. Murphree*,²³⁹ a district court of appeal has held that the combining of the provisions concerning filing of fees and notice of appeal in the same rule for jurisdictional purposes probably was legislative inadvertence, thus concluding that the dismissal of an action due to a party's failure to properly deposit the required filing fee is within the sound discretion of the reviewing judge and that this discretion should not allow a rule of procedure to prevent realization of the essential ends of justice where no fundamental rights of the parties are involved.^{239a}

Payment of Cost by Original Plaintiff

Right to Dismissal for Nonpayment of Costs May Be Waived

The plaintiff must pay all costs taxed against him in a suit up to the time of the appeal before he will be allowed to appeal. This requirement is mandatory and upon a proper motion to dismiss because of appellant's (original plaintiff) failure to pay costs the court is without discretion and must dismiss the appeal.²⁴⁰ However, the right to a dismissal of an appeal for non payment of the costs may be waived. Thus, there was a waiver where appellee (defendant below) did not file his motion to dismiss until ten months after the appellant's notice of appeal. The parties had agreed

236. *Salinger v. Salinger*, 100 So.2d 393 (Fla. 1958) (case was prior to Florida Appellate Rules, FLA. STAT. 59.08 (1957) then was in effect). Trial court may not grant directly or indirectly an extension of time for taking an appeal. *Houck v. Dade County*, 97 So.2d 272 (Fla. 1957). F.A.R. 3.2(d).

237. *Ibid.* See note 238 *infra*. *State ex rel Diamond Berk Ins. Agency, Inc. v. Carroll*, 102 So.2d 129 (Fla. 1958) (alleged fact that notice of appeal resulting from a clerical misprison was erroneously filed in the wrong court did not authorize district court of appeal to take jurisdiction of the appeal in view that the original filing of the notice of appeal in trial court is necessary to confer jurisdiction upon the appellate court). *Laloie v. General Motors Acceptance Corp.*, 108 So.2d 497 (Fla. App., 1959). A motion for new trial, or petition for rehearing upon summary final judgment does not authorize an attack or review of a summary final judgment in a law action. Filing of such a motion or petition does not toll or stay appeal from the day of the recording of the summary final judgment. Method of review of summary final judgment is by direct appeal.

238. F.A.R. 3.2(d) *Hock v. Dade County*, 97 So.2d 272 (Fla. App. 1957) (the notice of appeal was filed too late under former Sup. Cr. R. 22 and was dismissed because of the lack of jurisdictional foundation).

239. 106 So.2d 430 (Fla. App. 1958).

239a. *Id.* at 432.

240. *Spector v. Ahrenholz*, 99 So.2d 714 (Fla. App. 1958) (this case, however, was decided under FLA. STAT. 59.09 (1957). F.A.R. 3.2(f)).

to six or seven extensions of time for filing of briefs and even then the appellee did not file his motion to dismiss the appeal until after the appellant by stipulation allowed him an extension of the time to file his brief.²⁴¹

Failure to Pay Costs Not a Basis For Summary Judgment

The rules authorize the court to stay proceedings when a plaintiff has failed to pay the costs of a previously dismissed action involving the same claim.²⁴² This discretion extends only to an abeyance or stay of the proceedings until the prior costs have been paid or otherwise secured as the court may direct, and it does not afford a basis for the entry of a summary judgment.²⁴³

Failure to Pay Costs as to Multiple Defendants

Upon an appeal from a judgment which was adverse to one of two defendants, the plaintiff may not join the non-appealing defendant where the costs as to that defendant which were taxed against the plaintiff have not been paid and the plaintiff fails to assign as error the taxation of such costs or supersede their taxation; he may not accomplish indirectly that which cannot be done directly.²⁴⁴

Basis of Hearing and Determination

General Rules

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 on the record-on-appeal.

The appendix to the appellant's brief should contain among other things a copy of the particular parts of the original record, material to the points presented, as the appellant desires the court to read.

However, the appellant should be guided by reason in determining the length of his appendix. He should not include in it the entire record-on-appeal or large and superfluous segments. He should include those portions of the original record that he considers necessary to demonstrate the correctness of his position without resort to the record-on-appeal, that

241. *Funke v. Federal Trust Co.*, 99 So.2d 636 (Fla. App. 1958). This case was decided under FLA. STAT. 59.09 (1957) which has been incorporated into F.A.R. 3.2(f), 3.3, 3.7(f)(5), 3.7(h), 3.7(c).

242. FLA. R. CIV. PR. 1.35(d).

243. *Martin v. Arrow Cabs, Inc.*, 107 So.2d 394 (Fla. App. 1958).

244. SUP. CT. R. 29. *Villanueva v. Shane, Inc.*, 96 So.2d 537 (Fla. 1957). The case overrules as to any inferences contrary to it *Thomas Awning Co. v. Morgan*, 57 So.2d 427 (Fla. 1952).

reversible error had been committed below. Matter which is unwieldly or which appears very frequently throughout the record may be narratively summarized in the appendix with appropriate references to pages of the record wherein such matter appears.²⁴⁵

Assignments of Error

Appellate requirement of assignments of error — In general. When an issue is not raised by the pleadings and it does not appear from the record that the parties expressly or impliedly consented to a trial of the issue, such an issue cannot be raised on appeal even if it would have been appropriate to the facts.²⁴⁶ The appellate court will not consider on appeal questions that had not been raised before the trial court nor properly presented by assignment of error.²⁴⁷ A point will be insufficient for purposes of review unless a specific assignment of error from which the point argued arose is stated.²⁴⁸

Criminal cases — relaxation of the specific assignment rule. It appears that in criminal cases the appellate courts will relax the rule requiring that assignment of errors shall clearly and distinctly point out the errors or grounds relied upon for reversal. Thus, where error was assigned to the overruling of a motion for new trial, the court considered points argued on appeal that were fairly raised by such motion even though the assignment of error failed to detail or point out the grounds relied upon.²⁴⁹

Assignments of error should be directed to the specifically alleged errors of the trial court and not to the final judgment or decree from which

245. F.A.R. 3.7(f) *Walton v. City of Clermont*, 109 So.2d 403 (Fla. App. 1959) (it was duty of appellants to include in their appendix such part of original record as would demonstrate without resorting to the record on appeal that error requiring reversal had been committed below).

246. *Meadows So. Constr. Co. v. Pezzaniti*, 108 So.2d 499 (Fla. App. 1959) (order overruling finding of master was not reviewable by appeal where transcript of testimony before master was not included in record on appeal pursuant to specific direction of appellant); *Kaufman v. Bernstein*, 100 So.2d 801 (Fla. 1958) (accord and satisfaction); *Cortina v. Cortina*, 98 So.2d 334, 337 (Fla. 1957) "it is fundamental that a judgment upon a matter entirely outside of the issues made by the pleadings cannot stand; and where, as here, an issue is not presented by the pleadings nor litigated by the parties during the hearing on the pleadings as made, a decree adjudicating such issue is, at least, voidable on appeal."

247. *Kelly v. Kaufman*, 101 So.2d 909 (Fla. App. 1958). Appellees contended that judgment should be affirmed on basis that contributory negligence of the plaintiff appears as a matter of law. In this connection, note first, that the answer does not plead that defense and therefore it was not in issue. Second, court should not assert function of trial judge and pass upon a matter which it affirmatively appears that trial judge would not consider.

248. F.A.R. 3.7(f) 4, 3.14(b). *Red Top Cab & Baggage Co. v. Grady*, 99 So.2d 871 (Fla. App. 1958); *6551 Collins Ave. Corp. v. Millen*, 97 So.2d 490 (Fla. App. 1957), *cert. denied*, 104 So.2d 337 (Fla. 1958); *McCann Plumbing Co. v. Plumbing Industry Program, Inc.*, 105 So.2d 26 (Fla. App. 1958) (assignments of error specifying only that a certain decree is contrary to the law and evidence fails to comply with the spirit of the appellate rules). *Miami Investors Syndicate, Inc. v. Johnnie & Mack, Inc.*, 104 So.2d 617 (Fla. App. 1958) (assignments of error not clearly and distinctly pointing out alleged errors are inadequate).

249. F.A.R. 3.5(c) *Harrington v. State*, 110 So.2d 495 (Fla. App. 1959).

the appeal is taken. An assignment of error should not be directed to the verdict but to some action of the court with reference to the matter complained of as error. An assignment of error directed to a verdict or to a judgment thereon cannot support questions involving consideration of the sufficiency or weight of the evidence. These questions are properly raised by a motion for the new trial or a proper motion for directed verdict, and the resulting order. Where the assigned error is based on a ruling on a motion for new trial, the grounds relied on must be pointed out.²⁵⁰

Assignments of error — extension of filing time — good cause necessary. An untimely assignment of error is a basis for the dismissal of an appeal. The appellate court or the lower court, for a good cause, may extend the time for filing of briefs, appendices and assignments of error, but the rule as to the latter does not specifically require a showing of good cause in order for a party to receive such an extension. Nevertheless, the courts have read the requirement into the rule and a timely motion for an extension of time to file assignments of error must be supported by a *sufficient reason for the delay* and a motion made after the time has expired must show *good cause for the default*. Economic hardship is not a good cause for default.²⁵¹

The sufficiency of assignments of error cannot be challenged by petition for rehearing. The sufficiency of an assignment of error to support points argued in briefs and before an appellate court will not be considered upon a petition for rehearing.²⁵²

The Record on Appeal

Duties and responsibilities of appellant and the court reporter. It is the appellant's duty to furnish a record of the evidence or other matters upon which the decree appealed from is predicated.²⁵³ Court reporters are officers of the court. They are required to report the testimony taken and the

250. F.A.R. 3.7(f)(3)(4) *State v. City of Hialeah*, 109 So.2d 368 (Fla. 1959). "Have all pertinent requirements of the Constitution and laws of the State of Florida preliminary to and in connection with issuance and sale of said water revenue certificate been strictly followed? A question of such sweep is not justified under our rules and does not obligate this court to conduct search for error. Furthermore, the point is unsupported by a proper assignment of error" The latter was the way the question on appeal was framed and it did not merit discussion because of its generality or the generality of the language in which it was framed. See also *Humphreys v. Jarrell*, 104 So.2d 404, (Fla. App. 1958). Rule 3.5 F.A.R.

251. *Quality Furniture House, Inc. v. General Bond and Disc. Co.*, 97 So.2d 203 (Fla. App. 1957). Compare the wording of F.A.R. 3.7(d) & 3.5(d).

252. See materials cited note 248 *supra*.

253. *Hall v. Davis*, 106 So.2d 599 (Fla. App. 1958) (record did not contain transcript of proofs in the nature of exhibits and oral testimony presented on motions for summary decree and court of appeal could not pass upon such questions); *Green v. Horisii*, 103 So.2d 226 (Fla. App. 1958) (appellants' points required consideration of depositions to determine the contentions raised and depositions were not included in the record transmitted to the appellate court; therefore contentions could not be considered). F.A.R. 3.6.

proceedings had in the trial of any civil action upon the request of either party. He is supposed to transcribe, certify and file his trial notes with the clerk of the lower court and to supply the appellant with all the copies ordered by him within thirty days after the filing and service of appellant's designations. The court may penalize a court reporter for failing to perform his duties. The appellant has the responsibility of taking timely action to insure the performance by others of acts necessary to his perfecting a timely appeal. Thus, where the sole reason given for several extensions of the time to file the transcript of record was the repeated failure of the court reporter to perform his duties, the appellant should have brought him to account before the court. In the absence of such action by the appellant and his failure to show a good cause for the extensions received, he will be required to show cause to the court why his appeal should not be dismissed.²⁵⁴ A hearing upon a motion to direct a court reporter to perform or be subjected to penalty will not be had unless he has been served with the charges and given the opportunity to appear and show cause.²⁵⁵

Result of appellant preparing the record on appeal. The presentation and transmittal of the record on appeal is the duty of the clerk of the lower court, but the appellant may elect to prepare the record on appeal. If he does, he need not file directions with the clerk, nor is he required to serve a designation on his adversary or the portions of the record which he has included in the record on appeal. This procedure places an appellee at a great disadvantage as he is left in the dark as to the contents of the record on which appellant will base his appeal. Therefore, in such a situation, although the appellant has not committed any procedural errors justice requires that the appellee be given an opportunity to supplement the record as he may desire, even though the time for filing assignments of error has expired.²⁵⁶

Intermediate orders. If a party desires to present to the district court of appeal a motion for an intermediate order prior to the transmitting of the record on appeal, he must transmit to the district court certified copies of so much of the original papers in the action or proceeding in the lower court as are needed for that purpose.²⁵⁷

Allowing argument on issue not contained in record on appeal. In a recent case, the supreme court entertained argument on an issue not referred to in the record on appeal. The trial court after oral argument

254. FLA. STAT. § 59.02 (1957); F.A.R. 3.6(j), 3.17, 6.9. *Lambert v. State*, 105 So.2d 612 (Fla. App. 1958).

255. *International Shoe Co. v. Carmichael*, 105 So.2d 389 (Fla. App. 1958) (criminal case).

256. *South Dade Farms, Inc. v. Peters*, 102 So.2d 287 (Fla. 1958) F.A.R. 3.6(c), 3.6(d)(1).

257. F.A.R. 3.6(k). *Slaff v. Chapman*, 104 So.2d 797 (Fla. App. 1958). Motion was filed on June 21, 1958 pursuant to F.A.R. 3.9(c) prior to the effective date of the amendments to the rules which abolished the motion to affirm.

had upon request of counsel filed a certification in the supreme court to the effect that the issue argued had in fact been passed upon by the lower court. In view of this effort to make the record speak the truth and the fact that the issue involved was necessary to a determination of the cause and a finding on it was inherent in the opinion and judgment of the lower court, the supreme court allowed it to be argued on appeal.²⁵⁸

Appeal upon the original record — omission of appendices. The rule that "appendices may be omitted if the record on appeal consists of a certified transcript or stipulated statement of seventy-five pages or less" is also applicable where the appeal is upon the original record.²⁵⁹ (Emphasis added.)

Briefs: Form, Content and Filing

Briefs — form and content. If the brief as filed is carelessly and negligently drawn as to the form and technical requirements prescribed by the rules, the district court of appeal may grant a motion to strike the brief and allow a limited period in which to file a brief complying with the rule or suffer a dismissal of the appeal.²⁶⁰ In one instance the appellant's brief had no appendix as required by the rules, but the court examined the original record because of the glaring equity in the appellant's favor. However, the court noted that had a motion to strike been made, it probably would have been granted.²⁶¹

The brief — statement of the case — proper form. A brief containing a long question which is merely a slanted re-statement of the factual background of the case and a suggestion that the court erred in its decree does not comply with the rule which requires "a statement of the case and of the facts and points involved in a clear and concise manner. . . ."²⁶²

The brief — abandonment of points not argued. Points not argued in the briefs will be deemed abandoned but the court may, on its own initiative take note of jurisdictional or fundamental errors apparent in the record on appeal.²⁶³

258. *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So.2d 439 (Fla. 1959). F.A.R. 3.6(1).

259. F.A.R. 3.7(i). *Thompson v. Food Fair Stores of Fla. Inc.*, 107 So.2d 393 (Fla. App. 1958).

260. *Axtell v. Lyons*, 105 So.2d 610 (Fla. App. 1958) (it will be the policy of the district court of appeal to insist with more and more emphasis as time goes on, that the letter as well as spirit of the Florida Appellate Rules be observed). F.A.R. 3.7.

261. *Williams v. Grogan*, 100 So.2d 407 (Fla. App. 1958). F.A.R. 3.7.

262. *Srotkin v. Flavin*, 111 So.2d 483 (Fla. App. 1959). F.A.R. 3.7(f)3.

263. *Stanford v. Slate*, 110 So.2d 1 (Fla. 1959); *State v. City of North Miami Beach*, 108 So.2d 764 (Fla. 1959); *In re Coleman's Estate*, 103 So.2d 237 (Fla. App. 1958). *In re Weiss' Estate*, 102 So.2d 154 (Fla. App. 1958); *DeFonce Constr. Co. v. Ewing*, 99 So.2d 718 (Fla. App. 1958). *Ramsey v. Aronson*, 99 So.2d 643 (Fla. App. 1958). F.A.R. 3.7(i).

Briefs — Amicus Curiae. An attorney may file a brief as amicus curiae if all parties agree or if the court grants permission upon motion filed within eighty days after the filing of the notice of appeal.²⁶⁴

The Brief — appellee's duty on appeal. On appeal from dismissal of complaint, appellee has the duty to furnish appellate court with a brief.²⁶⁵

Statutory Note: Appellee's Brief, Service

The new version of rule 3.7(b) of the Florida Appellate Rules as amended June 8, 1959 and effective September 1, 1959 reads as follows:

It shall be the duty of appellee within twenty days after a copy of appellant's brief has been served upon him to file in the appellate court the original and one copy of his brief and appendix and serve a copy thereof upon appellant. Failure of appellee to file his brief and appendix as required by these rules shall, unless otherwise ordered by the court prior to the date set for oral argument, forfeit the right of said appellee to oral argument.

Time allowed for filing of briefs and appendices — extending for good cause. The Florida Appellate Rules require that the record on appeal be transmitted to the clerk of the appellate court no later than 110 days after the filing of the notice of appeal. The appellant must serve the appellee a copy of his brief at least forty days before the date on which the record on appeal is due in the appellate court.²⁶⁶ This latter period may be extended by motion upon the showing of good cause. A miscalculation of time due to secretarial mistakes in the office of a party's attorney is not sufficient cause.²⁶⁷

Appellant's reply brief: limited to a response to appellee — effect of appellee's omission of appendix. The appellant may file a reply brief, but the appendix thereto is limited to such parts of the record as appellant desires the court to consider in view of the parts presented by the appellee.²⁶⁸

In *Urban v. City of Daytona Beach*,²⁶⁹ the appellant failed to include in her appendix on appeal a copy or summary of her depositions which were considered by the lower court in entering the summary judgment. The appellee filed a brief solely on the ground that due to this omission the appellant cannot overcome the presumption of correctness which accompanies the actions of a trial court on appeal. Appellee did not include an appendix in its brief. Appellant promptly filed a reply brief and attached

264. *Chacon v. State*, 102 So.2d 593 (Fla. 1958) (notice of appeal in present case was filed 2 yrs. 9 mos. 16 days after the motion). This case was considered under Sup. Cr. R. 36.10 which was effective at the time and under which the brief had to be timely and with reason for the request.

265. *Brown v. Fein*, 102 So.2d 830 (Fla. App. 1958). F.A.R. 3.7(b).

266. F.A.R. 3.6(j)(1), 3.7(a).

267. F.A.R. 3.7(d); *Nitsos v. Carlisle*, 104 So.2d 144 (Fla. App. 1958); *Graham v. Thornton*, 104 So.2d 95 (Fla. App. 1958); *Farmer v. State*, 104 So.2d 94 (Fla. App. 1958); *Eidson v. State*, 101 So.2d 831 (Fla. App. 1958).

268. F.A.R. 3.7(h).

269. 101 So.2d 414 (Fla. App. 1958).

an appendix containing the previously omitted material. The appellee then moved to strike the appendix to appellant's reply brief as not within the scope of appendices authorized and permitted by the Florida Appellate Rules. The court, in considering this motion, held that the failure of an appellee to include an appendix with its brief precludes an appellant from filing an appendix to its reply brief, since such an appendix is allowed only to meet such parts of the record as presented by appellee's appendix. The proper procedure for appellant would have been a motion for leave to amend her original appendix to include the omitted matter.

Although technically the appellee apparently had the appellant cornered, the court, desirous of avoiding mere procedural technicalities, allowed the appellant to vitiate her mistake. The result apparently being based upon the consent of appellee's counsel, obtained after hearing argument of counsel, to the entry of an order allowing appellant to amend her original appendix and allowing appellee to accordingly amend its brief. This result and the following quotes from the court's opinion present an interesting challenge to appellate attorneys:

We are not here dealing with a mere procedural technicality which bears no relationship to the merits of the cause. On the contrary we are called upon to pass on a question of compliance with *an essential and indispensable phase of established procedure* governing the appellate process.

While ignorance of the rules alone will not suffice to excuse a failure to conform the court is inclined under the circumstances here presented to deny appellee's motion and to consider the appendix complained of as constituting a part of appellant's main brief to the same extent as if appellants had *properly moved* for permission to amend by adding the deposition. In so doing, however, *we do not intend that this opinion will serve as a precedent for further violations of the rule such as this, either with or without consent of opposing counsel.*²⁷⁰ (Emphasis added.)

Advancement of Causes

Under the former rule, the only cases entitled to advancement on the calendar were those involving crimes, habeas corpus proceedings, appeals from railroad and public utility commissions, review by certiorari in regard to workmen's compensation proceedings, cases where the state was the real party in interest, and those so entitled by statute or rule of court. A motion to advance a cause for final hearing must be complete within itself, containing appropriate reference or excerpts from the record so that the court will be able to rule thereon without having to review the entire record.²⁷¹

270. *Id.* at 417.

271. *Atlas Travel Serv. Inc. v. Morelly*, 97 So.2d 496 (Fla. App. 1957). F.A.R. 3.12; Sup. Ct. R. 43.

For the guidance of the bar, we wish to observe that while Florida Appellate Rule 3.12, governing appeals filed after July 1, 1957, affords complete latitude to this court to advance causes for final hearing upon a showing of good cause, the rule will be strictly construed to the end that litigants shall receive equal treatment, and only those cases which have traditionally been entitled to preferential consideration will be taken up out of order. Mere possibilities or threat of inconvenience or hardship will not justify this court in giving preference to any individual suitor upon a crowded calendar.²⁷²

Petitions for Rehearings in Appellate Court — Generally

A petition for rehearing must be applied for in writing within fifteen days after filing of the decision or order of the court. This is designed to bring the litigation to a conclusion and the requirements of the rule are strictly construed. The filing of a petition for rehearing should not be considered a routine step in every appellate decision. Its purpose is to call the court's attention to some fact, precedent or rule of law which it has inadvertently overlooked. The petition will not be considered if it attempts to re-brief or re-argue the case; or to raise new points which were not relied on at the hearing; or to argue with the court as to the correctness of its conclusions; in fact, the inclusion of any argument in the petition is forbidden.²⁷³

Judgment: Mandate — Attempt to Enjoin Lower Court from Complying Therewith

Generally where a judgment is reversed it is sent back for entry of final judgment as directed by the appellate court. If the trial court refuses or neglects to follow this judgment, the upper court has the statutory power to enter the judgment which should have been entered by the lower court.²⁷⁴ The judgment of a reviewing court when it issues a mandate is a final judgment in the cause and is directed not to the parties but to the lower court whose compliance therewith is purely ministerial and no further action by the litigants is necessary to accomplish its performance. The appellate court here also may act directly if trial court does not follow its mandate.²⁷⁵ In comparison the equitable power to restrain judicial proceedings is confined to a restraint of the parties. "It is not addressed to the court and is in no sense a prohibition on it in

272. *Id.* at 497.

273. F.A.R. 3.14. *Cali v. State*, 111 So.2d 703 (Fla. App. 1959) (Not timely); *Chemical Corn Exchange Bank & Trust Co. v. Frankel* 111 So.2d 99 (Fla. App. 1959) (substantial violation); *Sherwood v. State*, 111 So.2d 96 (Fla. App. 1959) (substantial violation); *Harris v. State*, 107 So.2d 402 (Fla. App. 1959) (nottimely); *State ex rel. Realty Co. v. Green*, 105 So.2d 817 (Fla. App. 1959) (substantial violation).

274. *State ex rel. Peterson v. Weissing*, 100 So.2d 373 (Fla. 1958). *Wright v. Board of Pub. Instr.*, 100 So.2d 403 (Fla. 1958). FLA. CONST. art. V, § 4 F.A.R. 4.5.

275. *Berger v. Leposky*, 103 So.2d 628 (Fla. 1958).

the exercise of its jurisdiction."²⁷⁶ Therefore, the compliance with a mandate by the lower court cannot be lawfully prevented by the injunctive process.

JUDICIAL REVIEW — ORDERS REVIEWABLE

Judicial Review in General

Proceedings in General

Nature of Proceedings. Appellate review in law or equity is by appeal except where review by certiorari is permitted by law or by the rules. Interlocutory orders or decrees in equity are reviewable only by appeal and not by certiorari.²⁷⁷ In an action at law only final judgments are reviewable by appeal. The appeal must be based upon the final judgment actually entered and not the motion or order granting or denying such judgment.²⁷⁸ An appellate court may always consider a question of jurisdiction even though raised for the first time on appeal,²⁷⁹ but it should be remembered that where the trial court lacks jurisdiction, the appellate jurisdiction is also lacking.²⁸⁰

Judicial Review: Equitable distribution under workmen's compensation. An order for equitable distribution of a recovery under Workmen's Compensation Act is an appealable final order and therefore not reviewable by certiorari.²⁸¹

Judicial Review: A single appeal from action brought by husband and wife may bring up separate judgments. Generally, a single notice of appeal will not bring up separate judgments for review. However, where

276. *Id.* at 631, quoting 28 AM. JUR. *Injunctions* § 191 (1959).

277. F.A.R. 3.1, 4.2. *Jones v. Johnson*, 98 So.2d 506 (Fla. App. 1957) (order denying a motion to dismiss complaint should have been brought up for review by interlocutory appeal and not by petition for writ of certiorari.)

278. Under FLA. STAT. 59.02 (1957) only final judgments are appealable in actions at law, except for appeals from rule of court 59.03, appeals from order granting new trial 59.04, and appeals from order of non-suit 59.05. An order granting a motion to dismiss a complaint is not a final appealable judgment: *Weinmann v. Ligon*, 105 So.2d 204 (Fla. App. 1958); *Herpel, Inc. v. Pfundston*, 104 So.2d 620 (Fla. App. 1958). An order granting a motion for summary judgment or decree is not an appealable final judgment: *Brannon v. Johnston*, 83 So.2d 779 (Fla. 1955); *Elliott v. Lazar*, 104 So.2d 618 (Fla. App. 1958); *Rennard v. Kirkeby Hotels, Inc.*, 99 So.2d 719 (Fla. App. 1958). An order granting motion to dismiss action and to strike the complaint is not a final judgment from which an appeal will lie: *Baker v. Colley*, 104 So.2d 473 (Fla. App. 1958). An appeal from an order denying petition for rehearing does not bring the final decree entered in the cause to the supreme court for review. The appeal should be from the final decree and not the petition for rehearing. The petition for rehearing presents no issue for review other than those determined by the final decree from which no appeal has been taken: *Burnup v. Bagley*, 100 So.2d 622 (Fla. 1958); *McNarg v. Hudson*, 110 So.2d 73 (Fla. App. 1959); *Finley v. Finley*, 103 So.2d 191 (Fla. 1958). An order denying a motion for new trial is not appealable: *Means v. Douglas*, 110 So.2d 88 (Fla. App. 1959); *Koch v. State Road Dept. of Fla.*, 106 So.2d 426 (Fla. App. 1958); *Denton v. Cummins Diesel Engines of Fla., Inc.*, 101 So.2d 617 (Fla. App. 1958); *Haley v. Milan*, 100 So.2d 643 (Fla. App. 1958).

279. *In re Weiss' Estate*, 102 So.2d 154 (Fla. App. 1958).

280. *In re Coleman's Estate*, 103 So.2d 237 (Fla. 1958).

281. *Burdines, Inc. v. Drennon*, 97 So.2d 259 (Fla. App. 1957).

a husband and wife join in an action and they receive two favorable judgments based on a single complaint and a single trial on the same set of facts, a single notice or appeal is adequate for review purposes.²⁸²

Judicial Review of Contempt Proceedings. In *Pueblo v. State*,²⁸³ a Florida appellate court decided that appeal is the proper method to review contempt proceeding. The court also concluded that since a contempt proceeding, whether criminal or civil in nature, did not constitute a misdemeanor an appeal from a contempt proceeding in the criminal court of record should be taken to the district court of appeal and not to the circuit court.²⁸⁴

Final Judgment Must Be Recorded Before Issuance of Writ of Error

An order granting a motion to dismiss the complaint is not an appealable final judgment when it is shown that the final judgment on such order was recorded subsequent to the date of the writ of error. A writ of error in an action at law purports to be issued on a final judgment, and if such writ is dated prior to the date that the clerk entered the judgment sought to be appealed it is ineffectual to bring the judgment before an appellate court.²⁸⁵

Transfer of Improvident Appeal to Court of Proper Jurisdiction

When an appellate court's jurisdiction is improvidently invoked it may of its motion or on motion of either party transfer the cause to the court having proper jurisdiction.²⁸⁶ This constitutional provision for the transfer of a case to the court having jurisdiction applies only where appellate jurisdiction as distinguished from original jurisdiction of appellate court has been improvidently invoked; and supreme court, finding itself without jurisdiction to issue an original writ of prohibition, could not transfer the case to the proper court.²⁸⁷

282. *North Am. Co. v. Landahl*, 107 So.2d 749 (Fla. App. 1958). As to the general rule see 4a C.J.S. *Appeal & Error* § 593(5) (1957).

283. 109 So.2d 37 (Fla. App. 1959).

284. The criminal court of record being a trial court, appeals therefrom would be to the district court of appeal, FLA. CONST. art. V, § 5(3), unless the action tried in the criminal court of record was a misdemeanor which is appealable to the circuit court, FLA. CONST. art. V, § 6(3).

285. *Herpel, Inc. v. Pfundston*, 104 So.2d 620 (Fla. App. 1958).

286. F.A.R. 2.1(a)5(d), *Carmazzi v. Board of Cty. Comm'rs of Dade Cty*, 104 So.2d 727 (Fla. 1958) (transfer); *National Dairy Products Corp. v. Odham* 100 So.2d 394 (Fla. 1958) (rule supersedes FLA. STAT. 501.09 (5), writ was transferred to circuit court where it would be treated as if it had originally been filed there). See also *Evans v. Carroll*, 104 So.2d 375 (Fla. 1958); *Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958); *Sinnamon v. Fowlkes*, 101 So.2d 375 (Fla. 1958); *State v. J.K.*, 104 So.2d 113 (Fla. App. 1958).

287. *State ex rel. Peterson v. Weissing*, 100 So.2d 373 (Fla. 1958). FLA. CONST. art. V, § 4(2). See also *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, 109 So.2d 599 (Fla. App. 1959).

*Misconception of Remedy — Statute Applicable to
All Appellate Courts*

When an appeal in an action is improvidently taken to the supreme court and certiorari would have been proper, such an appeal will be treated by the court as a petition for certiorari.²⁸⁸ Although the statute here involved refers only to the supreme court, it has been held that it also applies to the district courts and the circuit courts in the exercise of their appellate jurisdiction.²⁸⁹ Therefore, although an order granting a motion for a summary judgment and judgment on the pleading is not a final judgment from which an appeal will lie, it will be received as though it were on petition for certiorari.²⁹⁰ It should be noted that this was an appeal from an order in equity filed prior to the effective date of the Florida Appellate Rules and under which interlocutory orders and decrees in equity can no longer be reviewed by certiorari. Such orders and decrees may be reviewed on appeal from the final decree in the cause.²⁹¹ *Note however that an improvident petition for a writ of certiorari will not be treated as an appeal.*²⁹²

Reviewable Judgments, Decrees and Orders

Appeals from Orders of Non-Suit

Involuntary non-suit — court's intention to render adverse judgment. The plaintiff may appeal a non-suit which he necessarily had to take because of any decision or ruling of the court made during the trial of the cause. Thus the plaintiff could appeal where he took a judgment of involuntary non-suit because the court had indicated its intention to direct a verdict for defendant; the scope of such review is similar to that of a review of a judgment entered after a directed verdict.²⁹³

Voluntary non-suits — not appealable. Appeals from orders of non-suit are permissible only by virtue of statute.²⁹⁴ The court of appeals does not have jurisdiction to review an order granting defendant's motion for

288. FLA. STAT. § 59.45 (1957).

289. FLA. STAT. § 59.45 (1957). Made part of the rules by F.A.R. 1.4, formerly SUP. CT. R. 28. *Cortina v. Cortina*, 98 So.2d 334 (Fla. 1957) (involved SUP. CT. R. 28). *Alliance for Conservation of Natural Resources in Pinellas County v. Furen*, 104 So.2d 803 (Fla. App. 1958) (an appeal from commission order). Note that under definition of rule 1.3, the word "court" means supreme court, district courts of appeal and circuit courts in the exercise of their appellate jurisdiction.

290. *Elliott v. Lazar*, 104 So.2d 618 (Fla. App. 1958). An equity order in equity and under old rules. *Thomas v. Cilbe, Inc.*, 104 So.2d 397 (Fla. App. 1958) (an equity order denying supplemental relief). *Kissling v. McCarthy*, 100 So.2d 434 (Fla. App. 1958) (order denying post final decree motion for defendant).

291. *Jones v. Johnson*, 98 So.2d 506 (Fla. App. 1957). F.A.R. 4.2, 3.1.

292. *Fort v. Fort*, 104 So.2d 69 (Fla. App. 1958). See also *Jones v. Johnson*, *supra* note 291.

293. *Adler v. Copeland*, 105 So.2d 594 (Fla. App. 1958).

294. FLA. STAT. § 59.05, 54.09 (1957).

summary judgment on appeal from a voluntary non-suit because a voluntary non-suit is not a final judgment from which an appeal will lie.²⁹⁵

Review of Order Granting New Trial

Interlocutory appeal from order granting new trial only by party aggrieved. The Florida Statutes permit an interlocutory appeal in a law action by the party aggrieved from an order granting a new trial. The trial judge is required to specify the grounds in his order when he grants a new trial and only the grounds so specified are reviewable on appeal.²⁹⁶

Refusal of trial court to include a particular ground in order — cross-assignment of error. The trial court should set forth the grounds or reasons followed in making appealable orders particularly where the ground may be determinative of the proper appellate form.²⁹⁷ The reviewing court cannot consider a particular ground which the trial court has refused to include as a basis for its order granting a new trial. Such a refusal cannot be made the subject of a cross-assignment of error since it would go beyond the limitations of the statute authorizing the appeal.^{297a}

Review of order containing a condition for remittitur. A jury verdict was returned for plaintiff and the trial court denied defendant's motion for a new trial on the condition that the plaintiff file a remittitur. Upon plaintiff's refusal to remit the order by its own terms was converted into an order granting a new trial, and the plaintiff appealed.²⁹⁸ The order granting a new trial did not recite or specify any grounds on which it was based as required by the rules,²⁹⁹ and review is limited to consideration of the grounds so enumerated. However, the condition of the remittitur indicated that the trial court on its own initiative granted a new trial on the ground of excessiveness of verdict. The appellate court was restricted by law to consider only the question of excessiveness as appearing in the record, since any other possible reasons for rejecting the verdict were not indicated in the order granting the new trial. The court reluctantly reversed and remanded on the ground that the excessiveness of the verdict did not clearly appear from the record as is necessary before the trial court can issue this specific type of conditional order.

Discretion of trial court in granting a motion for new trial now reviewable in Florida — Motion for directed verdict not necessary. "[T]he order of a trial judge denying a motion for new trial on the ground that

295. *Ramsey v. Aronson*, 99 So.2d 643 (Fla. App. 1957).

296. *Edwards v. Young*, 107 So.2d 244 (Fla. 1958); *Kovacks v. Venetian Sedan Serv., Inc.*, 108 So.2d 611 (Fla. App. 1959). FLA. STAT. § 59.07 (1957); F.A.R. 2.6(d).

297. *State v. Bruno*, 104 So.2d 588 (Fla. 1958).

297a. *Lockhart v. Friendly Fin. Co.*, 110 So.2d 478 (Fla. App. 1959); FLA. STAT. § 59.07 (4) (1957). See also *Leonetti v. Boone*, 74 So.2d 551 (Fla. 1954).

298. *Kovacks v. Venetian Sedan Serv. Inc.*, 108 So.2d 611 (Fla. App. 1959) FLA. STAT. § 59.07 (1957).

299. FLA. R. CIV. P. 2.6(d). FLA. STAT. § 59.07(4). FLA. R. CIV. P. 2.6(d); FLA. STAT. § 59.07(4) (1957).

the verdict of the jury is contrary to the manifest weight of the evidence *is reviewable in the appellate courts* of this state on an appeal from the final judgment, even though no motion for directed verdict was made by the appellant. . . ." (Emphasis added.) This result is contrary to the federal practice under which the question of the sufficiency of the evidence can be considered *on appeal* only by interposing a motion for directed verdict at the close of all the evidence.³⁰⁰

Review of order for new trial where granted as to one issue and denied as to another issue in the same cause. An order granting a new trial on the issue of damages implicitly sets aside and vacates that portion of the judgment entered on that issue. The denial of a motion for a new trial on the issue of liability renders that portion of the judgment a final one from which an appeal will lie, even though a motion for a new trial as to the issue of damages was granted.³⁰¹

Review of an order on a petition for rehearing. An order on a petition for rehearing in chancery is not subject to review if it is necessary in considering the correctness of the order to examine the final decree from which no appeal has been taken. Thus, to raise the merits of a final decree the notice of appeal should be directed to the final decree and not the order based on a petition for its rehearing.³⁰² The filing of a timely petition for rehearing by a party's adversary suspends as to all parties the time to appeal from the original decree until the court disposes of it.³⁰³

A party on an appeal from an order on a petition for rehearing cannot attack a final decree from which he has not appealed. This recognizes the fact that an appeal may be taken from a part of a final decree, but that an appeal from a part does not bring the remainder of the decree before the reviewing court.³⁰⁴

300. *Ruth v. Sorensen*, 104 So.2d 10, 15 (Fla. 1958); *Chomont v. Ward*, 103 So.2d 635 (Fla. 1958). FLA. STAT. § 59.06(1) (1957); FLA. R. CIV. P. 2.7; FED. R. CIV. P. 50. For federal position see *Een v. Consolidated Freightways*, 220 F.2d 82, 85 (8th Cir. 1955). A federal appellate court "can only consider the question of the sufficiency of the evidence when that has been made a question of law and this can only be done by interposing a motion for directed verdict at the close of all the evidence." See also *Kessler v. Schonbrun*, 102 So.2d 639 (Fla. App. 1958). The decision in *Ruth v. Sorensen*, *supra* on the point involved overrules *Southwestern Lumber Co. v. Roberts*, 99 So.2d 875 (Fla. App. 1958); *Lee County Oil Co. v. Marshall*, 98 So.2d 510 (Fla. App. 1957); *6551 Collins Avenue Corp. v. Millen*, 97 So.2d 490 (Fla. App. 1958). See also *Lindsay v. McLaughlin*, 311 S.W.2d 148 (Mo. App. 1958) which mis-interpreted the Florida law on point.

301. *Wise v. Jacksonville Gas Corp.*, 97 So.2d 704 (Fla. App. 1957).

302. *Klemenko v. Klemenko*, 97 So.2d 11 (Fla. 1957). See also *Burnup v. Bagley*, 100 So.2d 622 (Fla. 1958).

303. *Ibid.* See *Ganzer v. Ganzer*, 84 So.2d 591 (Fla. 1956).

304. *Burnup v. Bagley*, 100 So.2d 622, 626 (Fla. 1958) (see concurring opinion). The appeal was from the order modifying the final decree and not from the final decree. The decision found support in *Hollywood, Inc. v. Clark*, 153 Fla. 501, 15 So.2d 175 (1943) which was an appeal from an amendment to a final decree previously entered. The FED. R. CIV. P. 73(b) expressly authorizes an appeal from a part of a final decree. Of course, an appeal from the final decree takes with it the decree as amended and all its parts, but an appeal from a part takes with it nothing more.

Review of arbitration proceedings and orders. The court will not review the findings of fact contained in a statutory arbitration award and it may not be set aside for any erroneous application of law but only on grounds of fraud, corruption, gross negligence or misbehavior of the umpire or one or more of the arbitrators.³⁰⁵

SPECIAL AND EXTRAORDINARY PROCEEDINGS

Interlocutory Appeals

In General

Interlocutory orders or decrees in equity and orders or decrees entered after final decree are reviewable by appeal. An appeal from an interlocutory order in a law action may be taken only as to questions of venue or jurisdiction over the person.³⁰⁶ For example, an interlocutory appeal may be taken from an order overruling a motion to dismiss on grounds of venue in a law action.³⁰⁷ Interlocutory appeals are not reviewable by certiorari except when it clearly appears no adequate and complete remedy would be available to petitioner by an appeal after final judgment. Thus, where a trial court acts without, and in excess of, its jurisdiction or its order does not conform to essential requirements of law and may cause material injury throughout the subsequent proceedings, the remedy by appeal would be inadequate.³⁰⁸

Examples: Improper and Proper Interlocutory Appeals

Improper: Statutory condemnation proceedings. Interlocutory appeals are not permitted in actions at law except in respect to orders relating

305. FLA. STAT. §§ 57.01, 57.07 (1957); *Merritt-Chapman & Scott Corp. v. State Road Dept.*, 98 So.2d 85 (Fla. 1957); *National Hotel, Inc. v. Koretzy*, 96 So.2d 774 (Fla. 1957).

306. F.A.R. 4.2, 3.2(b). *Boucher v. Pure Oil Co.*, 101 So.2d 408 (Fla. App. 1958); *Pullman Co. v. Fleishel*, 101 So.2d 188 (Fla. App. 1958) (there is no authority which authorizes the granting of certiorari to review an order denying summary judgment in an action at law); *Schutzer v. City of Miami*, 99 So.2d 729 (Fla. App. 1958) (granting of defendants's motion for directed verdict is not a final judgment on which an appeal will lie); *Renard v. Kirkbee Hotels, Inc.*, 99 So.2d 719 (Fla. App. 1958): In accord with federal decisions which have held that an order granting motion to dismiss a complaint but not actually dismissing it is not a final decision within the meaning of the rules and therefore is not appealable, see *Turnbull v. CYR*, 184 Fed.2d 117 (9th Cir. 1958). See also *Ramsey v. Aronson*, 99 So.2d 643 (Fla. App. 1958). (court did not have jurisdiction to review order granting motion for summary judgment on appeal and voluntary nonsuit inasmuch as voluntary nonsuit was not a final judgment from which an appeal would lie).

307. *Peterson v. Kirk*, 103 So.2d 656 (Fla. App. 1958). See also *Central & So. Fla. Flood Control Dist. v. Dupuis*, 109 So.2d 596 (Fla. App. 1959) (the scope of an interlocutory appeal is limited to review of order appealed).

308. *Brooks v. Owens*, 97 So.2d 693 (Fla. 1958). The Supreme Court reviewed an order by certiorari requiring defendant to answer a question on discovery as to the limits of his liability insurance, and because of his refusal to comply they further ordered that the defendant's answer to the complaint be stricken and that he be adjudged in default. *Pullman Co. v. Fleishel*, 101 So.2d 188 (Fla. App. 1958). *Boucher v. Pure Oil Co.*, 101 So.2d 408 (Fla. App. 1958).

to venue or jurisdiction over the person and since statutory proceedings are generally treated as actions at law an interlocutory appeal is not permitted from a statutory condemnation proceeding.³⁰⁰

Proper: Child custody and support orders — alimony orders. The proper and faster procedure for review of an order directing confinement for the violation of a child support order or orders involving the modification of custody or divorce decrees is by an interlocutory appeal rather than an appeal from the order treated as a final order.³¹⁰ Also, it is now the proper method to review a post decree order relating to alimony instead of by a writ of certiorari.³¹¹

Interlocutory Appeal by Municipality — A Stay Without Supersedeas

The Florida Statute providing that the filing of the notice of appeal by a municipality shall stay the execution or performance of the judgment, decree, or order appealed from without the necessity of a supersedeas bond also applies to interlocutory appeals in chancery.³¹²

Review of Administrative Boards and Agencies

All appellate review of the rulings of any commission or board shall be by certiorari as provided by the Florida Appellate Rules.³¹³

In board hearing the circuit court acts as an appellate court³¹⁴ and thus its judgments, decrees or orders are not appealable to the district court; but the district court may review same by certiorari.³¹⁵

309. FLA. STAT. ch. 74 (1957); F.A.R. 4.2. *Wilson v. Jacksonville Expressway Auth.*, 110 So.2d 707 (Fla. App. 1959).

310. F.A.R. 4.2. *Dykes v. Dykes*, 104 So.2d 598 (Fla. App. 1958); *Epperson v. Epperson*, 101 So.2d 367 (Fla. 1958).

311. F.A.R. 4.2 (a). *Fort v. Fort*, 104 So.2d 69 (Fla. App. 1958) (in view of provision in this rule for appeals of decrees entered after final decree divorced husband was not entitled to writ of certiorari to review post decree order relating to alimony. This superseded statutes on point; FLA. STAT. 59.02 (3) (1957). Formerly interlocutory orders were reviewable by certiorari and an improvident appeal was treated as a writ of certiorari. *Schuerman v. Shamas*, 97 So.2d 314 (Fla. App. 1957); *Connolly v. Conolly*, 86 So.2d 167 (Fla. 1956); *Haley v. Millan*, 100 So.2d 643 (Fla. App. 1958) (appeal from denial of new trial); *Kissing v. McCarthy*, 100 So.2d 434 (Fla. App. 1958).

312. F.A.R. 4.2. *City of North Miami v. Engel*, 111 So.2d 90 (Fla. App. 1959); FLA. STAT. § 59.14(1) (1957). The statute is applicable upon the rule announced in *City of Miami v. Lewis*, 104 So.2d 70 (Fla. App. 1958) although the appeal there was from a final judgment at law whereas the case at bar is an interlocutory appeal from an order in chancery.

313. *Maryland Cas. Co. v. Marshall*, 106 So.2d 212 (Fla. App. 1958) (workmen's compensation proceeding). *National Dairy Products Corp. v. Odham*, 100 So.2d 394 (Fla. 1958) (Fla. Milk Commission); *Codomo v. Shaw*, 99 So.2d 849 (Fla. 1958); *Florida Industrial Commission ex rel. Special Disability Fund v. Nat'l Trucking Co.*, 107 So.2d 397 (Fla. App. 1958) (Fla. Industrial Commission); *Swope v. Coryell*, 107 So.2d 153 (Fla. App. 1958); *Sullivan v. Mayo*, 106 So.2d 4 (Fla. App. 1958); *Anderson v. Florida Real Estate Commission*; *Alliance for Conservation of Natural Resources in Pinellas County v. Furen*, 104 So.2d 803 (Fla. App. 1958) (County Water and Navigation Control Authority); *Ace Del. Serv. v. Boyd*, 100 So.2d 417 (Fla. 1958) (Railway and Public Utilities Commission).

314. *Codomo v. Shaw*, 99 So.2d 849 (Fla. 1958).

315. *Pinellas County v. Furen*, 104 So.2d 803 (Fla. App. 1958).

Validation of Bond Proceedings

Allowable Issues in Bond Validation Proceedings

A bond validation proceeding should be used only to decide issues going directly to the power to issue the securities and the validity of such proceedings; collateral issue should never be injected into such proceedings.³¹⁶

Approval of Freeholders Not Necessary Where Subject Matter Is Essential to Governmental Existence

A county's petition for validation of certificates of indebtedness issued to finance the cost of repairs and additions to the courthouse and jail, and which did not constitute an obligation nor pledge the credit of the county, was held not to require approval by vote of the freeholders of the county as required by the Constitution for the issuance of bonds, because the courthouse and jails are essential to the existence of the government body.³¹⁷

*Extraordinary Writs*³¹⁸

Constitutional Writs

Writ to preserve subject matter of pending litigation. The Constitution of Florida grants to the supreme court, the district courts of appeal and the circuit courts the power to issue all writs necessary or proper to the complete exercise of their jurisdiction. These constitutional writs may be

316. *State v. City of Miami*, 103 So.2d 185 (Fla. 1958). A proceeding to validate water works system bonds of the City of Miami wasn't available to decide collateral questions involving the rights of Dade County to acquire part of the waterworks system of the city or to take any action affecting the operation thereof or whether such waterworks system property outside the city was exempt from state taxation. FLA. STAT. § 75.08 (1957).

317. *State v. County of Santa Rosa*, 105 So.2d 365 (Fla. 1958). FLA. CONST. art. IX, § 6, FLA. STAT. § 75.01 (1957).

318. Certain sections of the Florida Appellate Rules involving extraordinary writs have been amended as of June 8, 1959, effective September 1st, 1959. They are: Rule 4.5(a)(1)—all applications and original proceedings in the supreme court and district courts of appeal for extraordinary writs authorized by the Constitution shall be made as the rules thereafter provide. Rule 4.5(a)(5). This is an amendment to the rule providing that at least five days notice shall be given to the adverse party of intention to apply for the issuance of any writ mentioned in this rule. 4.5(c)—The biggest addition to the new rules has taken place in the section of the rules dedicated to certiorari proceedings, wherein a detailed statement of the procedure to be followed in taking certiorari from the district court of appeal to the supreme court has been stated. The court has more or less codified all the prior statutes, rules, constitutional sections and case law involving certiorari proceedings into this section. It has taken the proceedings contained within the particular rule involving certiorari proceedings in general and has made it apply specifically to certiorari proceedings moving from the district courts of appeal to the supreme court. An important addition to this section of the rule would appear to be that if the court decides to entertain proceedings on the petition, oral argument will be had. Rule 7.2 dealing with the forms for the petition for writ of certiorari has also been amended. It is suggested that these amendments be read carefully by both the student and the practicing attorney.

issued only as to a cause over which the court is properly exercising jurisdiction.³¹⁹ Thus, a district court can grant a writ to preserve the subject matter of a controversy pending the decision of an appeal where the granting of such a writ is "necessary" and "proper" to complete the exercise of its jurisdiction. This drastic writ should not be granted except in extreme urgency as where it appears that appellant will suffer irreparable damage during the interim between the entry of appeal and the final decision of the appellate court.³²⁰ It should be noted that the circuit courts may issue constitutional writs in aid of proceedings properly before them in the exercise of original jurisdiction as well as in the exercise of the granted appellate jurisdiction.³²¹

Granting of writ by appellate court before appeal is actually taken. Although there are no Florida cases directly on point, it has been intimated that the Florida courts would probably follow the federal courts and recognize an appellate court's power to issue writs in aid of jurisdiction, "not only after appeals have been filed but prior to the filing of such appeals in aid of appellate jurisdiction which is only potential and incipient."³²²

*Certiorari*³²³

Certiorari from district court to supreme court — general procedure. A decision of a district court of appeal may be reviewed by the supreme court by certiorari when (1) it affects a class of constitutional or state officers or (2) decides a question which the district court certifies to be of great public interest, or (3) it is in direct conflict with a decision of another district court or with the supreme court on the same point of law. A condition precedent to the consideration or granting (by the supreme court) of a petition for certiorari is the filing of a timely petition for rehearing and a notice of intention to petition for certiorari. This notice of intention stays the mandate of the district court until the expiration of the time allowed for filing for certiorari, or until the supreme court rules on the petition for certiorari.

The stay of the court's mandate under these circumstances is automatic, there being absolutely no discretion allowed to the district court in this

319. FLA. CONST. art. V, §§ 4(2), 5(3), 6(3). *Seaboard Airline R.R. v. Gay*, 68 So.2d 591 (Fla. 1953).

320. *Engel v. City of North Miami*, 111 So.2d 92 (Fla. App. 1959). This was a mandamus action brought to compel the city to repeal resolution for transfer of police functions to county government and to make provisions for continuing the realtors, police officers of city, in city's employ and in the present rank or grade. City failed to disclose that under circumstances of case it was either necessary or proper to complete exercise of jurisdiction of court on appeal that writ of drastic character prayed for should be issued.

321. *City of North Miami v. Engel*, 109 So.2d 33 (Fla. App. 1959).

322. *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, 109 So.2d 599, 601 (Fla. App. 1959). *E.g.*, *United States v. United States Dist. Ct.*, 334 U.S. 258 (1947).

323. See rule amendments discussed in note 318 *supra*.

instance.³²⁴ The petition for certiorari must be filed in the supreme court within sixty days from the *rendition* of the decision, order, judgment or decree sought to be reviewed; it is the date of the *rendition* or entry of the order, judgment or decree and *not* the date of its *filing* that is material in this computation. If a party files a notice of intention to petition for certiorari he is subject to penalties if he fails to actually file such a petition.³²⁵ A decision of the district court is not deemed to be *recorded* if a petition for rehearing has been filed until the court disposes of said petition. These filing requirements are jurisdictional.

Certiorari not available when appeal is available. Certiorari is not available to review a judgment which may be reviewed by appeal.³²⁶ Thus, an interlocutory order at law granting a summary judgment only as to question of liability is not reviewable by certiorari.³²⁷

Certiorari—conflict of decisions. The supreme court has granted certiorari to review a conflict between a decision under review and one of the supreme court decisions even though there was no conflict between the decision under review and the prior decisions of the supreme court relied on by the court of appeal to support its judgment.³²⁸

324. F.A.R. 4.5(c)(6). *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, 111 So.2d 437 (Fla. 1959); *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, 109 So.2d 24 (Fla. App. 1959).

325. F.A.R. 4.5(c)(6), 4.5(c)(1). *Schutzer v. City of Miami*, 111 So.2d 94 (Fla. App. 1959) (petition had not been filed, mandate, which had been withheld during period in which certiorari should have been filed would be ordered to issue and defendant would be required to pay damages in the amount of \$50. *Russon v. State*, 109 So.2d 30 (Fla. 1959) (supreme court held that where more than 60 days had elapsed between date of denial of petition for rehearing of judgment of district court of appeal affirming defendant's conviction, and filing of application for certiorari in the supreme court dismissed defendant's petition for certiorari; the requirement being jurisdictional). *Atkinson v. State*, 109 So.2d 581 (Fla. App. 1959) (should be filed prior to denial of hearing; i.e., notice of intention to apply to court for writ of certiorari); *Meeks v. Kohten*, 109 So.2d 46 (Fla. App. 1959) (notice of intention to apply to supreme court for writ of certiorari not being filed within time provided by F.A.R. 4.5(c)(6) this court has lost jurisdiction of said cause and it is ordered that the pleadings herein mentioned be and they are hereby stricken from the record); *Christopher v. Oliver*, 103 So.2d 240 (Fla. App. 1958) (untimely filing). See *Central Truck Lines Inc. v. Boyd*, 106 So.2d 547 (Fla. 1958) (involves time for filing and FLA. STAT. § 59.08 (1957), supreme court held that while petition for certiorari sought review of order denying petition to re-open proceedings order attacked was original order which had been granted more than 8 months prior to the date of petition for certiorari and the supreme court was without jurisdiction under applicable statutes and rules 60 days after entry of order).

326. *Hastings v. Osius*, 104 So.2d 21 (Fla. 1958). The court has often held that a writ of certiorari "will not be granted" when there is a plain, adequate and complete remedy by appeal, but whether the right to appeal existed does not appear to be clear. The case is unique in that the court granted certiorari to review the discretion of the court of appeals in granting certiorari when the jurisdiction of the court of appeals to grant certiorari was not involved. The effect of the holding is that it ought not have granted certiorari because an appeal was available.

327. *Gamble v. Halman*, 102 So.2d 638 (Fla. App. 1958). See also cases cited note 306 *supra*.

328. *Bilingham v. Thiele*, 109 So.2d 763 (Fla. 1959) (overruling anything to the contrary in *Ward v. Forde*, 154 Fla. 383, 17 So.2d 691 (1944)).

Conflict of decisions—refusal to dismiss an appeal not a decision reviewable by certiorari. In another case a writ of certiorari was sought on the grounds that the district court of appeal in *refusing to dismiss an appeal on jurisdictional grounds* rendered a "decision" in direct conflict with a decision of the supreme court.³²⁹ The supreme court denied certiorari because such an *order* of the district court was not a "decision" within the meaning of the constitutional provision applicable to certiorari, but the court noted that the denial was without prejudice to petitioner to apply for a writ of prohibition.

Certiorari—the order must be final. A county judge's order revoking the returns of guardians and discharging them as incompetent and setting for hearing the question of whether the guardian had committed defalcations is not a final order so as to permit the filing of petition for certiorari in the circuit court prior to the hearing set by the county judge.³³⁰

Certiorari—special statutory proceedings control the rules. The procedure prescribed by the Duval County Teachers Tenure Act requiring a petition by the teacher for writ of certiorari to be filed within ten days from discharge is a "special statutory proceeding" and therefore the form, content, procedure and time for pleading prescribed in such act control where a conflict exists over the terms of the 1954 Florida Rules of Civil Procedure which allow a general sixty day period for the filing of a petition for certiorari.³³¹

Certiorari—Service of brief in response to certiorari. The respondent to a petition for writ of certiorari is required to file an opposing brief and serve a copy of it upon the petitioner within twenty days after he has been served with a copy of petitioner's brief.³³²

Mandamus

In general. An original proceeding in mandamus which named the State Motor Vehicle Commissioner as respondent and alleged that rights given by statute to petitioner were being denied him by respondent typifies the type of proceeding that falls within the jurisdiction of the supreme court as indicated by the Florida Constitution which provides that the

329. *Diamond Berk Ins. Agency v. Goldstein*, 100 So.2d 420 (Fla. 1958) (petitioners contended that the district court of appeal lacked jurisdiction because appellants filed notice of appeal in district court instead of the trial court. See also *Counne v. Saffan*, 87 So.2d 586 (Fla. 1956).

330. *United States Fid. & Guar. Co. v. Davis*, 97 So.2d 715 (Fla. App. 1957). FLA. R. CIV. P. 2.17. FLA. CONST. art. V, § 9. FLA. STAT. § 746.14 (1957).

331. FLA. R. CIV. P. 2.17. *Harley v. Board of Pub. Instr.*, 103 So.2d 111 (Fla. 1958). FLA. STAT. § 230.01 (1957). FLA. R. CIV. P. A.

332. *Woolin & Son, Inc. v. McKain*, 111 So.2d 475 (Fla. App. 1959). F.A.R. 4.5(c)(3).

supreme court may issue writs of mandamus when a state commission authorized to represent the public generally is named as respondent.³³³

Existence of legal right to writ. A petition for a writ of mandamus requiring a county board of education to award petitioner a contract as a "contract teacher" was improperly dismissed on the ground that it failed to show a clear legal right to the writ, because it was legally sufficient and made out a prima facie case which justified the issuance of an alternative writ and a disposition of the cause on the merits.³³⁴

Prohibition

Prohibition — right of direct appeal to supreme court necessary. The supreme court has the authority to issue writs of prohibition to the district courts and to trial courts only when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right. There is no such limitation on district or circuit courts.³³⁵

Allegations of error by lower court insufficient prima facie case. A rule of prohibition should issue only to restrain an inferior court from acting without authority of law or from exceeding their powers. Allegations contained in a suggestion applying for a writ of prohibition that the lower court has committed error is insufficient to establish the required prima facie case necessary for the issuance of a rule to show cause, or ultimately, a writ of prohibition.³³⁶ Prohibition will not issue against a judge who has jurisdiction of the parties and the subject matter in the absence of a showing that he proposes to exceed his jurisdiction in any respect.³³⁷

Quo Warranto

A real interest in subject matter necessary. A private citizen without any apparent real interest in a corporation is not entitled to institute proceedings for the state challenging the corporate existence without permission of the attorney general to use his name.³³⁸

Proper procedure to have land excluded from boundaries of a municipality. An injunction is not the proper method to restrain a municipality

333. *State ex rel. Wedgworth Farms, Inc. v. Thompson*, 101 So.2d 381 (Fla. 1958). FLA. CONST. art. V, § 4(2). See also *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, 109 So.2d 599 (Fla. App. 1959).

334. *Trawick v. Board of Pub. Instr.* 110 So.2d 86 (Fla. App. 1959). FLA. R. CIV. P. 2.19.

335. FLA. CONST. art. V, §§ 4(2), 5(3), 6(3). See *State ex rel. Peterson v. Weissing*, 100 So.2d 373 (Fla. 1958).

336. F.A.R. 4.5(d) *State ex rel. Fla. R.R. & Pub. Utilities Comm'n. v. Taylor*, 104 So.2d 745 (Fla. App. 1958); See *State ex rel. Schwarz v. Heffernan*, 142 Fla. 137, 194 So. 313 (1940); *Curtis v. Albritton*, 101 Fla. 853, 132 So. 677 (1931).

337. *State ex rel. Josephson v. Revels*, 100 So.2d 813 (Fla. 1958).

338. *Washington County Kennel Club, Inc. v. State ex rel. McAllister*, 107 So.2d 176 (Fla. App. 1958). FLA. R. CIV. P. 2.20. FLA. STAT. § 80.01 (1957).

from exercising jurisdiction and control over the plaintiff's land. *Quo Warranto* is the proper remedy to have plaintiff's land excluded from the territorial limits of a municipality.³³⁹

Certified Questions

Nature of Answer Sought

A certified question will not be answered if it is not determinative of the cause and the certifying court has both the power and controlling precedent to adjudicate the question the answers to which can be reviewed on appeal if necessary.³⁴⁰

Certified Question as a Basis for Certiorari

The certification of a question as one of great public interest constitutes a sufficient predicate on which a party may petition the supreme court for a writ of certiorari to re-examine its decision in another case.³⁴¹

Supersedeas on Appeal — Injunctions

Supersedeas on Appeal

Discretion of the trial court. There is no abuse of discretion by a chancellor in denying a supersedeas to an appellant where he obviously believes that the appellee is entitled to the use and enjoyment of the subject matter of the litigation.³⁴² The trial court did not abuse its discretion in denying a wife's petition to stay her husband's Florida divorce proceedings pending the outcome of her subsequently brought New York divorce action or in refusing to grant a supersedeas on the wife's interlocutory appeal from said order of denial.³⁴³

Municipalities: exclusive authority to require supersedeas bond in appellate court. The filing of a notice of an appeal by the state or any of its political subdivisions in a purely official capacity automatically stays the execution or performance of the judgment appealed without the necessity of a supersedeas bond *unless one is expressly required by the appellate court*. Also the injunction chapter of the Florida Statutes provides

339. *Caldwell v. Losche*, 108 So.2d 295 (Fla. App. 1959). FLA. STAT. ch. 80 (1957); FLA. R. CIV. P. 2.20. See also 74 C.J.S. *Quo Warranto* § 4 at 181 (1951).

340. F.A.R. 4.6; *Chapman v. Slaff*, 101 So.2d 413 (Fla. App. 1958).

341. *Walker v. United States Fid. & Guar. Co. of Baltimore*, 101 So.2d 437 (Fla. App. 1958). Question of whether surety on official bond furnished by deputy sheriff was liable in damages for unlawful acts of deputy sheriff done under color of his office, as distinguished from acts done by virtue of his office, was one of great public interest warranting certification of question to supreme court. Court held him liable as to latter acts and not former type. Chief Judge Sturgis dissented in this case as to the petition for certification being granted because he felt the subject before the supreme court was moot and authorities supporting decision were sound and that decision did not have the constitutional importance prescribed by certificate.

342. F.A.R. 5.1; *Froelich v. Rowley*, 102 So.2d 720 (Fla. 1958). SUP. CT. RULE 19.

343. F.A.R. 5.10, 5.1. *Linguanti v. Linguanti*, 96 So.2d 906 (Fla. App. 1957).

in effect that a trial court is without authority to require a municipality to post any bond upon any injunction or appeal.³⁴⁴ Since a municipality is a political subdivision of the state this former statute in effect modifies the latter and creates an exclusive authority in the reviewing court to require supersedeas of a municipality appealing in a purely official capacity.³⁴⁵

Statutory Note — Injunction: Bond

Injunction — Trial court may require state or political subdivision to post bond. Note the effect of the following statute passed by the 1959 legislature on the immediately preceding paragraphs: "When any injunction is issued upon complaint of the state or any officer, agency or political subdivision thereof, the court may in its discretion, having due regard to the public interest, require or dispense with the requirement of a bond with or without surety and conditioned as the circumstances may make equitable."³⁴⁶

Bond When Judgment is for Recovery of Money not Secured

Excessiveness. Where a judgment or decree is from a money judgment, the appellant is entitled as a matter of right to a stay upon the posting of a properly conditioned bond. Where a money judgment is for \$55,000 a supersedeas bond in the sum of \$110,000 is excessive and should be reduced to approximately \$60,000.³⁴⁷

Liability of surety. A supersedeas bond on appeal from a money judgment shall be conditioned to satisfy the judgment contained in the final decree or any modification not increasing its amount. The surety on such an appellate bond is liable to the extent of the terms of his obligation and no further. Thus, where a judgment on appeal is affirmed in part and reversed in part and the cause is remanded with directions for an accounting upon which a just decree should be entered, the forthcoming decree would itself be subject to appellate review and the partial affirmance of the original decree is ineffective to mature the obligation of the surety on the existing supersedeas bond.³⁴⁸

Surety — liability for attorneys fees. A surety on a supersedeas bond is not liable for attorneys fees incurred on the appeal in the absence of

344. See statutory note material in text accompanying note 346 *infra*.

345. *City of Miami v. Lewis*, 104 So.2d 70 (Fla. App. 1958). FLA. STAT. § 59.14(2)(3) (1957) (express power); FLA. STAT. § 64.04 (1957) (general power). *City of Miami Beach v. State ex rel Fontainebleau Hotel Corp.*, 109 So.2d 599 (Fla. App. 1959). For the purpose of this statute the appellate court is that court to which the appeal or intended appeal is to be taken.

346. Fla. Laws 1959, ch. 59-58.

347. *State Farm Mut. Auto Ins. Co. v. Ganz*, 111 So.2d 91 (Fla. App. 1959). F.A.R. 5.3(a), 5.7, 5.10.

348. *Kulhanjian v. Moomjian*, 105 So.2d 783 (Fla. 1958). F.A.R. 5.7.

a provision therefor, or an express contractual provision. However, the amount placed by appellant with the surety to indemnify him is considered principal of the appellant and the attorneys fees may be deducted from that amount as long as the reduction in the deposit is not detrimental to the surety.³⁴⁹

Injunctions

Procedure necessary to enjoin execution on a law judgment. An equity court will not enjoin the execution of a law judgment where the procedures for the issuance of the injunction are not properly followed. The statutory proceedings required for the issuance of an injunction include the filing of a complaint praying its issuance; and where a proceeding at law is sought to be enjoined it shall issue only on motion to the court after reasonable notice of such motion is served on the adversary and after the posting of a sufficient bond by the movant.³⁵⁰

Injunction — to preserve subject matter of pending mandamus action. It is within the power and discretion of the circuit court to enter an injunction order to maintain the status quo of the subject matter of a pending mandamus action until its determination in that court. However, once the court reaches a decision in the mandamus action, the injunction issued in aid of the mandamus jurisdiction is automatically terminated and in the event of an appeal, any other necessary order in the aid of jurisdiction would have to be made in the appellate court.³⁵¹

PART III

THE JUDICIAL DEPARTMENT

THE COURTS OF FLORIDA

The Courts in General: Effect of Repealing Jurisdictional Authority

If a statute which creates the jurisdiction of a court is repealed or otherwise nullified, the jurisdiction of that court falls and this is so even as to pending causes, unless the repealing statute contains a saving clause.

349. F.A.R. 5.7. *Smith v. Smith*, 100 So.2d 391 (Fla. 1958). See *Larson v. Higginbotham*, 66 So.2d 40 (Fla. 1953); *Hardwick Trust Co. v. Dodge*, 117 Vt. 73, 84 A. 2d 583, 37 A.L.R. 2d 523 (1951) (majority view).

350. FLA. STAT. §§ 64.01, 64.02, 64.03 (1957). See also FLA. R. CIV. P. 3.19. *City of Miami Beach v. Greater Miami Hebrew Academy*, 108 So.2d 50 (Fla. App. 1959) (This was a suit to enjoin enforcement of zoning ordinance as to lots purchased by plaintiff in single-family resident district); *Fontainebleau Hotel Corp. v. Kaplan*, 108 So.2d 503 (Fla. App. 1959) Tenant's action for injunctive relief and damages growing out of alleged breach of lease by landlord. This case involved lease to a tenant who was a doctor and he claims exclusive right to operate medical offices in landlord's hotel and also reference right. *Webb v. Gregory*, 105 So.2d 183 (Fla. App. 1958) (suit for an injunction of the execution of a judgment granted by civil court of record).

351. *City of North Miami v. Engel*, 109 So.2d 33 (Fla. App. 1959).

This rule is also applicable when a jurisdiction dependent upon a statute adopted as a rule of court is extinguished by another rule of court.^{351a}

The Supreme Court

General Review Policy

The power of the supreme court to review decisions of the district court of appeal is limited and strictly prescribed. The new rules intend that review by the district courts of appeal in most instances should be final and absolute. The theory being that the supreme court is to act as the supervisory body of the judiciary, exercising appellate power when essential to the settlement of issues of public importance and for the preservation of uniformity of principle and practice.³⁵²

Supreme Court — Review by Appeal

Direct appeal — construction vs. application of constitutional provision. A direct appeal to the supreme court is authorized from a final decree *construing* a controlling provision of the Florida or federal constitution, or passing on the *validity* of a state statute. The final decree assaulted must constitute a *construction* as distinguished from an *application* of a controlling constitutional provision. A municipal ordinance is not a state statute as used in constitutional provision authorizing direct appeals to the supreme court.³⁵³

Direct appeal where decision on validity of a statute inherent in decree of trial court. The supreme court assumed jurisdiction of an appeal where it was *inherent* in the opinion and judgment of the trial court that the validity of a state statute was passed upon even though such fact did

351a. *State ex rel Arnold v. Revels*, 109 So.2d 1, 3 (Fla. 1959). See *De la Rama S. S. Co. v. United States*, 344 U.S. 386 (1952).

352. F.A.R. 2.1 (5); FLA. CONST. art. V, § 4(2); FLA. STAT. ch. 25 (1957). See *Ansin v. Thurston*, 101 So.2d 808 (Fla. 1958); *Sinnamon v. Fowlkes*, 101 So.2d 375 (Fla. 1958).

353. *State v. Bruno*, 107 So.2d 9 (Fla. 1958) (supreme court will entertain an appeal when constitutionality of state statute is involved); *Armstrong v. City of Tampa*, 106 So.2d 407 (Fla. 1958) (a municipal ordinance is not a state statute as used in constitutional provisions authorizing direct appeals to the supreme court); *Carnazzi v. Board of County Commissioners of Dade County*, 104 So.2d 727 (Fla. 1958) (where property owner contended his property was being taken away without just compensation and the court found that if a property right in a plaintiff did not exist it therefore became unnecessary to apply the constitutional provisions and thus no construction or interpretation of the constitution was involved); *Milligan v. Wilson*, 104 So.2d 35 (Fla. 1958); *Evans v. Carroll*, 104 So.2d 375 (Fla. 1958) (where examination of record before supreme court revealed that constitutional questions posed are merely colorable and unrelated to the particular facts involved, no substantial basis is presented for direct appeal from trial court to supreme court as a matter of right). F.A.R. 2.1(a)(5), 2.1(b). FLA. CONST. art. V, § 4; DECLARATION OF RIGHTS § 1; *Dade County v. Kelly*, 99 So.2d 856 (Fla. 1957) (case involved interpretation of the Dade County Home Rule Amendment to the Florida Constitution). F.A.R. 2.1(a)(5)(a); FLA. CONST. art. V, § 4.

not appear in the record-on-appeal and there was no specific ruling upon it in the final decree of the lower court.³⁵⁴

Effect of failure to raise part of decree declaring a statute unconstitutional. The supreme court has refused to accept jurisdiction of an appeal even though the final decree did declare a statute invalid. The appellant failed to raise that aspect of the decree and instead raised the points that the trial judge was without jurisdiction to determine the constitutionality of the statute and that his adversaries were estopped to raise the question. By failure to raise the constitutional point which would have given the supreme court jurisdiction, the appellant is deemed to have abandoned it and the case will not be considered even though it appears to be within the jurisdiction of the supreme court because of the trial court's ruling.³⁵⁵

Supreme Court — Review by Certiorari

In general. Review by certiorari is limited to where the reviewing party shows that there is a direct conflict on the same point of law either among the districts or with the supreme court,³⁵⁶ or the decision affects a class of constitutional or state officers or is one certified by the district court to be of great public interest. A city police officer is not a "constitutional or state officer" within the terms of the applicable statutes of the constitution.³⁵⁷ The supreme court may also issue writs of certiorari to commissions established by law.

Certiorari denied when available elsewhere. Also, the supreme court will not ordinarily issue a writ of certiorari to review the rulings of an administrative board while a court of inferior jurisdiction also has the power to do so. The petition in such a case will be transferred to the proper court where it will be treated as if it had originally been filed.³⁵⁸

354. *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So.2d 439 (Fla. 1959). FLA. CONST. art. V, § 4(2). Cf. *State v. Bruno*, 107 So.2d 9 (Fla. 1958); *State v. Bruno*, 104 So.2d 588 (Fla. 1958). See text material to note 258 *supra*.

355. F.A.R. 2.1(a)(2), 2.1(a)(5)(d). *City of Miami v. Steckloff*, 111 So.2d 446 (Fla. 1959).

356. FLA. CONST. art. V, § 4(2). F.A.R. 2.1(a)(5)(b). *Sinamon v. Fowlkes*, 101 So.2d 375 (Fla. 1958); *Ansin v. Thurston*, 101 So.2d 808 (Fla. 1958); *Diamond Berk Ins. Agency, Inc. v. Goldstein*, 100 So.2d 420 (Fla. 1958). See also *In re Weiss' Estate*, 106 So.2d 411 (Fla. 1958); 21 C.J.S. *Courts* § 462 (1959). *Lake v. Lake*, 103 So.2d 639 (Fla. 1958). (Supreme court would not examine the record to determine whether district court's *per curiam* opinion conflicted with other supreme court opinions where it did not appear from restricted examination required in certiorari proceedings). *City of Miami Beach v. State ex rel Fontainebleau Hotel Corp.*, 111 So.2d 437 (Fla. 1959). *Billingham v. Tuiele*, 109 So.2d 763 (Fla. 1959) (certiorari granted conflict present). *Seaboard Airline Ry. v. Branham*, 104 So.2d 356 (Fla. 1958) (no conflict shown). *Hollywood, Inc. v. Broward County*, 18 So.2d 752 (Fla. App. 1959) (writ decreed no prima facie showing of conflict).

357. *Haken v. City of Miami Beach*, 108 So.2d 608 (Fla. 1959).

358. F.A.R. 2.1(a)(5)(b); *National Dairy Prod. Corp. v. Odham*, 100 So.2d 394 (Fla. 1958) (supersedes FLA. STAT. § 501.09(5) (1957); writ was transferred to circuit court where it would be treated as if it had originally been filed there).

Thus in *Codomo v. Shaw*,³⁵⁹ the supreme court upon determining that the circuit court could entertain a review by certiorari of an order of the Florida Real Estate Commission, refused to assume jurisdiction and transferred the petition to that court.

Power to Issue All Writs Necessary to Complete Exercise of Jurisdiction — Mandamus — Prohibition

The supreme court may issue writs of mandamus when "a state officer, board, commission or other agency authorized to represent the public generally . . . is named as respondent. . . ."³⁶⁰ The rules authorize the court to issue writs of prohibition to commissions established by law and to lower tribunals "when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right." It may also issue "all writs necessary or proper to the complete exercise of its jurisdiction."³⁶¹ Apparently, combining these two powers the supreme court took jurisdiction of a prohibition proceeding to prevent a circuit court from taking jurisdiction of a mandamus proceeding. The original litigation had been before the supreme court and the instant proceeding involved a question relating to the enforcement of the mandate it (the supreme court) had issued in the prior case.³⁶²

Statutory Note — Supreme Court Review of Commission Orders

Review of Workmen's Compensation Orders. This 1959 amendment of the Florida Statutes provides that the review of compensation orders of the Industrial Commission after July 1, 1959 shall be by the supreme court rather than the district court of appeal.³⁶³

Review of Florida Real Estate Commission Orders. Appellate review of the Florida Real Estate Commission shall be by certiorari to the district court, or when permitted, to the supreme court as provided by the Florida Appellate Rules or by law.³⁶⁴

The District Court of Appeal

Jurisdiction: Appeals from Trial Courts

Juvenile court is a trial court. All appeals from trial courts must be taken to the district court of appeal unless under the constitution the

359. 99 So.2d 849 (Fla. 1957).

360. FLA. CONST. art. V, § 4; F.A.R. 2.1(a)(5)(b). *State ex rel Wedgworth Farms, Inc. v. Thompson*, 101 So.2d 381 (Fla. 1958).

361. F.A.R. 2.1(a)(5), 2.1(b), 2.1(e).

362. *State ex rel Josephson v. Revels*, 100 So.2d 813 (Fla. 1958) (writ denied; judge had jurisdiction and there was no showing that he intended to exceed his jurisdiction in any respect).

363. FLA. STAT. §§ 440.25(4)(c), 440.27(1) (1959).

364. Fla. laws 1959, ch. 59-197; FLA. STAT. § 475.35 (1959).

appeal may be taken directly to the supreme court or to a circuit court.³⁶⁵ The district court of appeal, of its own motion, may dismiss an appeal not prosecuted in accordance with the appellate rules.³⁶⁶ A review of an order of a circuit court reversing a juvenile court order was sought by certiorari in the district court of appeals. The district court granted certiorari and quashed the order of the circuit court. The court held that a juvenile court for appellate purposes is a trial court and that the circuit courts no longer had jurisdiction to hear such cases on appeal due to the new constitutional provision which vests such appellate jurisdiction in the district courts of appeal.³⁶⁷

Appeal from civil courts of record. The statutory jurisdiction in the circuit courts to entertain appeals from civil courts of record has also been repealed and is now constitutionally within the jurisdiction of the district court of appeal.³⁶⁸

Trial Court as Final Appellate Court — Possible Review by Certiorari

A decision of a trial court in the exercise of its authorized final appellate jurisdiction may be reviewed by certiorari within established limits to correct a departure from essential requirements of law, but not to pass generally on the correctness of the ruling on the merits.³⁶⁹

The Circuit Courts

Administrative Boards and Agencies — Review by Appeal

The statutory *right of appeal* from administrative boards and agencies to the circuit courts has been repealed because the language enabling the legislature to provide for the final appellate jurisdiction of the circuit courts has been eliminated from the Florida Constitution.³⁷⁰ The legislature may still provide for the original jurisdiction of the circuit courts. The constitution now provides that the *district courts* "shall have such powers of direct review of administrative action as may be provided by law."³⁷¹ The Florida Appellate Rules provide that "all appellate review of the

365. F.A.R. 2.2; FLA. CONST. art. V, § 5(3).

366. *Carson v. Aluminum Prod., Inc.*, 106 So.2d 864 (Fla. App. 1958). But see *Kirby v. State*, 107 So.2d 197 (Fla. App. 1958) (criminal action was technically subject to dismissal due to improper appellate procedure but court did not dismiss due to plaintiff's poverty and lack of counsel).

367. FLA. CONST. art. V, § 5(3), contains jurisdiction of district court of appeal; art. V, § 6(3), contains jurisdiction of circuit courts; art. V, § 4(2), contains jurisdiction of supreme court. FLA. STAT. § 39.14 (1957) which did authorize appeal in this situation to the circuit court is now invalid. See *In re C.E.S.*, 106 So.2d 610 (Fla. App. 1958) (juvenile court is a trial court); *State v. J. K.*, 104 So.2d 113 (Fla. App. 1958).

368. *Rosenblum v. Boss*, 101 So.2d 596 (Fla. App. 1958) (case nullified FLA. STAT. § 33.11 (1957)). FLA. CONST. art. V, Sec. 5(c) as amended 1956.

369. *State v. Katz*, 108 So.2d 60 (Fla. App. 1959).

370. *Codomo v. Shaw*, 99 So.2d 849 (Fla. 1958) (for example, FLA. STAT. § 475.35 (1957) repealed by the rules).

371. FLA. CONST. art. V, § 5(3).

rulings of any commission or board shall be by certiorari as provided by the Florida Appellate Rules."³⁷²

Court of Final Appellate Jurisdiction from Criminal Court of Record — Certiorari Not Allowed

Circuit courts have final appellate jurisdiction of all misdemeanors tried in the criminal court of record. Certiorari can not be used to effectuate an unauthorized appeal thereof to the district court.³⁷³

Method of Determining Number of Judges for Each Circuit

In an advisory opinion to the governor, the supreme court stated that for the purposes of determining the population of a judicial circuit and the number of judges authorized for such circuit, the population counts of a single county under a special census may be combined with the population count under the last proceeding regular census of other counties in a judicial circuit.³⁷⁴

Jurisdiction to Enjoin Private Corporations

The circuit court has jurisdiction to enjoin and restrain (private) corporations from operating child care institutions as petitioned for by the Department of Public Health.³⁷⁵

Review of Charge to Jury: Unassailable Discretion

The circuit courts, when sitting as appellate tribunals have an unassailable discretionary power in deciding whether or not to review charges made to the jury when no objections were interposed at trial.³⁷⁶

Jurisdiction: Conflict with County Judge's Courts as to Real Property

The circuit courts have exclusive original jurisdiction in all actions involving the titles or boundaries of real estate.³⁷⁷ The county judge's courts have jurisdiction of the settlement of estates and other matters and duties usually pertaining to courts of probate.³⁷⁸ There is a great deal of uncertainty in the law as to the extent of a county judge's jurisdiction to construe and effectuate its decree in regard to real property in view of the constitutional grant of exclusive jurisdiction to circuit courts in actions involving title to realty.³⁷⁹

372. F.A.R. 4.1.

373. See note 369 *supra*.

374. Advisory Opinion to the Governor, 96 So.2d 546 (Fla. 1957).

375. State Dep't of Pub. Welfare v. Galilean Children's Home, 102 So.2d 388 (Fla. App. 1958).

376. Townsend v. State, 97 So.2d 712 (Fla. App. 1957).

377. FLA. CONST. art. V, § 6(3).

378. FLA. CONST. art. V, § 7(3).

379. See *In re Feldman's Estate*, 109 So.2d 407 (Fla. App. 1959); *In re Weiss' Estate*, 102 So.2d 154 (Fla. App. 1958), *cert. denied*, 106 So.2d 411 (Fla. 1958).

*County Judge's Court**Jurisdiction: Cannot Determine Validity of Deeds*

County judge's courts are statutory courts of limited jurisdiction within which is the power to construe and determine the validity of wills. However, this does not include the power to incidentally determine in such litigation the validity of deeds or the satisfaction of a mortgage allegedly executed by the decedent and delivered during his lifetime since the circuit courts have exclusive original jurisdiction of actions involving title to realty.³⁸⁰

Jurisdiction to Assign Dower: Lack of Such Power in Circuit Courts

The county judge's courts have the primary jurisdiction to assign dower and the circuit courts do not have such jurisdiction except as an *incident to* the granting of full relief in a suit cognizable in equity. Even if the pleading alleges facts entitling the pleader to equitable relief on some other grounds, a court of equity does not have the power to assign dower *independent* of any other relief where the proofs fail to establish a basis for such other equitable relief.³⁸¹

*Civil Court of Record**Affirmative Equitable Relief Not Available*

In the civil court of record, equitable defenses must be urged by way of defense and not affirmatively since it is a statutory court of limited jurisdiction which does not possess equitable powers.³⁸²

Jurisdiction: Actions for Removal of Tenants

A summary proceeding for removal of a tenant may be brought in the civil court of record as well as the county judge's court and the statutory procedures originally enacted for such proceedings in the latter court also apply to the former court.³⁸³

Statutory Note: Civil Court of Record

A 1959 amendment to the Florida Statutes abolishes the civil courts of record in all counties having a population of not less than 300,000 inhabitants and not having home rule under the constitution upon the

380. *In re Coleman's Estate*, 103 So.2d 237 (Fla. App. 1958) (this case was decided before the constitutional amendments of 1956). FLA. STAT. §§ 36.01, 36.02 (1957). Also see FLA. STAT. §§ 733.02, 732.01, 732.41 (1957); FLA. CONST. art. V, § 6(3), art. V § 7.

381. *Coleman v. Davis*, 106 So.2d 81 (Fla. App. 1958).

382. FLA. STAT. §§ 33.02, 33.14 (1957). *Klein v. C.F.C. Corp.*, 103 So.2d 120 (Fla. App. 1958).

383. FLA. STAT. §§ 33.14, 83.21, 83.27 (1957). *Placid York Co. v. Calvert Hotel, Inc.*, 109 So.2d 604 (Fla. App. 1959) (the statutory procedure for appeal from the now extinct county courts does not apply). FLA. STAT. § 83.38 (1957).

retirement, resignation, disability or expiration of the present term of office or death of the judge of any such court. It also provides for the transfer of cases pending in such civil courts upon their abolition and the procedure to be followed therefor. The act further provides that all cases not so transferred within one year from the date such civil court of record is abolished shall be deemed abated for want of prosecution and dismissed without prejudice.³⁸⁴

Justice of the Peace Courts

Statutory Note: Justice of the Peace Courts

Jurisdiction: landlord and tenant proceedings. A 1959 amendment to the chapter of the Florida Statutes dealing with the Justice of the Peace courts and their jurisdiction provides:

In all counties in the state having a population of more than four hundred thousand (400,000) according to the latest official state-wide decennial census, every justice of the peace court shall have concurrent jurisdiction in all cases at law relating to landlord and tenant, wherein the matter in controversy does not exceed, exclusive of interest and cost, the sum of one hundred dollars (\$100.00).³⁸⁵

THE JUDGES

Disqualification of a Judge

Suggestion of Disqualification

Distinction of effect between suggestion of disqualification and affidavits of prejudice. A judge may, by his own order, disqualify himself from presiding over any pending cause upon the filed suggestion of any party to the cause or that of any person interested in the subject matter of the litigation. The suggestion for disqualification must allege the grounds for disqualification and set out facts in their support. A judge will automatically disqualify himself if the truth of the suggestion is apparent from the record, or upon the filing by a party to the cause of a properly supported affidavit that he will not receive a fair trial due to the prejudice or bias of the presiding judge.³⁸⁶

A motion to transfer an appeal entitled "affidavit of prejudice" which was not properly verified was treated as a suggestion for disqualification. The motion was denied³⁸⁷ since its truth did not appear on the face of the record and its only ascertainable ground was that the appellant would prefer another court.

384. Fla. Laws 1959, ch. 59-516; FLA. STAT. § 33.001 (1959).

385. Fla. Laws 1959, ch. 59-284; FLA. STAT. § 37.011 (1959).

386. FLA. STAT. §§ 38.02, 38.10 (1957).

387. *Ibid.* Biscayne Associates, Inc. v. Carson, 104 So.2d 871 (Fla. App. 1958) (motion failed to set out facts nor does it allege grounds for disqualification contained in sections 38.02 of Fla. Stat.); Shotkin v. Rowe, 100 So.2d 429 (Fla. App. 1958).

Testing legal sufficiency of the affidavit of prejudice. The trial judge, in ruling upon an affidavit of prejudice may test its legal sufficiency but cannot consider its truth and veracity. The test of sufficiency is whether or not the affidavit shows that the party making it fears he will not receive a fair trial at the hands of the judge; it is the *state of mind* of the affiant and not that of the judge that is determinative. If the affidavit meets the test the judge must retire himself from the case. Thus a judge who expressed his belief during the trial that the defendant was a liar and did not deserve to be put on probation was in error in refusing to disqualify himself upon the defendant's affidavit of prejudice and he was subsequently without authority to act upon defendant's motion to withdraw his guilty plea.³⁸⁸

Impeachment of Judge — Disbarment Proceedings

The Florida Constitution provides that a judge can be removed from office only by impeachment. The Board of Governors of the state bar does not have authority to challenge a judge's conduct as an attorney prior to the time he became a judge as long as he remains a duly qualified and acting judge. The disbarment proceedings would not directly remove a judge from office but would eventually lead to it indirectly; the state bar will not be allowed to do indirectly what it cannot do directly.³⁸⁹

Statutory Note: Judges

Disqualification of party — but not by reason of being a citizen of a municipality involved in suit. This 1959 amendment to the Florida Statutes relates to the disqualification of judges, providing for his disqualification when he is a party to the suit. Any act done or attempted to be done by any judge so disqualified, whether done inadvertently or otherwise shall be null and void and of no effect. "No judge shall be disqualified for sitting in trial of any suit of which any county or municipal corporation is a party by reason that such judge is a resident or taxpayer of such county or municipal corporation."³⁹⁰

Judge's Power to Punish — Contempt Proceedings

"Any act which is calculated to interfere with, hinder or obstruct the proper flow of justice may be a contempt."³⁹¹ In Florida every court has the statutory power to punish contempts against the court. The common law rule that in cases of indirect or constructive contempts a sworn

388. *Crosley v. State*, 97 So.2d 181 (Fla. App. 1957) (criminal case).

389. FLA. CONST. art. 5 §§ 1, 13, 17, 18, 23. *In re Proposed Disciplinary Action by Fla. Bar against circuit judge*, 103 So.2d 632 (Fla. 1958).

390. Fla. Laws 1959, ch. 59-43; FLA. STAT. § 38.01 (1959).

391. *Dodd v. State*, 110 So.2d 22, 25 (Fla. App. 1959). See *Contempt of Court in Florida*, 9 MIAMI L.Q. 281 (1955).

general denial by the alleged contemtor was conclusive and entitled him to a discharge has been superseded by a statute providing that whether the contempt be direct, indirect or constructive the court shall proceed to hear and determine all questions of law and fact. The punishment for contempt to be imposed by a justice of the peace is limited to a \$20 fine or twenty-four hours imprisonment. There is no such monetary or time limitation as to imprisonment for contempt imposed on the other Florida courts.³⁹²

THE ATTORNEYS

Jurisdiction to Discipline

The people by approving revised Article 5 of the Florida Constitution as of July 1st, 1957 eliminated whatever statutory or inherent disciplinary power over attorneys that the circuit courts had previously held. The legislature was divested of any legislative control in this area. The revised judicial article of the constitution vested the supreme court with exclusive jurisdiction in matters involving the admission and discipline of attorneys. However, the supreme court by rule of court has given back to the circuit court of the judicial circuit in which the accused attorney's office is located its pre-existing statutory power of discipline. These proceedings are subject to supervision and review by the supreme court.³⁹³

Foreign Attorneys Practicing in Florida Courts

An appeal filed by a foreign attorney is subject to dismissal in the absence of an order granting permission to such attorney to act in the cause based upon his showing that he met the requirements of the rule respecting practice by foreign attorneys in the courts of Florida.³⁹⁴

Statutory Note: Attorneys

Solicitation of Legal Business

This is a 1959 act which makes the solicitation of legal business a misdemeanor and provides other punishment for such activities by any person, his agent or employee. The act describes in detail those procedures which shall constitute solicitation of legal business.³⁹⁵

392. *Dodd v. State*, 110 So.2d 22 (Fla. App. 1959) (plaintiff's attorney attempted to induce a defendant to give perjured testimony); *Puelo v. State*, 109 So.2d 39 (Fla. App. 1959); FLA. STAT. § 38.22 (1957).

393. *State ex rel Arnold v. Revels*, 109 So.2d 1 (Fla. 1959), FLA. CONST. art. V, § 23; FLA. R. CIV. P. 1.5(e), as amended by rule of court May 9, 1958. This rule adopted FLA. STAT. §§ 454.24-454.32 (1955) except those parts therein conflicting with rule 1.5(e) which were deemed superceded thereby.

394. F.A.R. 2.3(b); *Great Southern Trucking Co. v. Standard Wholesale Grocery Co.*, 110 So.2d 507 (Fla. App. 1959).

395. Fla. Laws 1959, ch. 59-391.

Suit or Litigation Promoted by Bribery, Etc.

This is a 1959 act which prohibits the use of valuable consideration in connection with the stirring up of strife and litigation or influencing courts to bring suit or seek professional legal advice. The act details what action constitutes such an act and describes the penalties therefor.³⁹⁶

Prohibition on Business of Budget Planning Not Applicable to Attorneys

Only active practicing Florida attorneys are exempt from the prohibitions imposed on "budget planning"³⁹⁷ by the 1959 Florida legislature.³⁹⁸

COURT COSTS AND ATTORNEYS FEES

*Court Costs**The Florida Appellate Rule 3.16(b)*

"All costs including appellate costs shall be taxed in the lower court pursuant to law."

Court Costs: Premium on Surety Bond—Municipal Court Proceedings

The Florida Statutes which provide that if costs are awarded to a party in any "civil cause" the reasonable premiums paid on surety bonds may be taxed as part of the costs, do not apply to proceedings of a municipal court which are quasi-criminal in character. A city's prosecution for the violation of an ordinance is such a quasi-criminal proceeding and the city is not liable in an unsuccessful prosecution of such a proceeding for the fee paid by the defendant for a supersedeas bond.³⁹⁹

Expense of Court Reporter—Depositions

"The court may in its discretion allow as taxable costs in a civil action expense of the court reporter for per diem transcribing proceedings of the court and depositions."⁴⁰⁰ An item of cost of \$173.25 covering the amount paid by the defendant to the court reporter for taking the plaintiff's deposition was not excessive and was properly taxed against the plaintiff

396. Fla. Laws 1959, ch. 59-381.

397. Fla. Laws 1959, ch. 59-345 at § 1. "The term 'budget planning' as used in this act shall mean the act of entering into a contract by any person, firm, corporation or association with a particular debtor by the terms of which contract the debtor agrees to deposit periodically with such person, firm, corporation or association a specified sum of money and said person, firm, corporation or association agrees to distribute said sum of money among specified creditors of the debtor in accordance with an agreed plan for which service the debtor agrees to pay a valuable consideration."

398. Fla. Laws 1959, ch. 59-345.

399. *City of Miami v. Gilbert*, 102 So.2d 818 (Fla. App. 1958). FLA. STAT. § 58.08 (1957).

400. FLA. STAT. § 58.13 (1957).

upon the defendant's victory, where the deposition was used extensively at trial and for cross examination.⁴⁰¹

Attorneys Fees

Award of Attorneys Fees Within Discretion of Appellate Court

The new Florida Appellate Rules provide that attorney fees, if any are allowable, shall be awarded by the appellate court in which the services were rendered. The award of such fees is within the discretion of the court and the court did not abuse its discretion in denying attorneys fees where the attorney failed to file a brief as required by the rules in response to a petition for certiorari.⁴⁰²

Attorneys Fees — Power to Award Even Though Court Has No Jurisdiction Over the Controversy

The petitioner sought the reversal of an award of attorneys fees contained in an order by which the supreme court denied a writ for certiorari for lack of jurisdiction. The general principal that a court which lacks jurisdiction should refuse to determine any other rights of the parties was held answered by the elementary proposition that a tribunal always has jurisdiction to determine its own jurisdiction. The court concluded therefore that counsel was not in fact contending for fees for services rendered in proceedings over which the court had no jurisdiction, but rather for services in connection with obtaining a determination of the preliminary issue which the court certainly had jurisdiction to decide.⁴⁰³

Attorneys Fees — Not a Charging Lien on Realty

The supreme court has held that in the absence of statutory authority or an express contract or an implied agreement arising out of special equitable circumstances, an attorney is not entitled to the imposition of a charging lien on the real estate of the debtor property owners for legal services rendered for them in relation to such property.⁴⁰⁴

401. *Wilson v. Rooney*, 101 So.2d 892 (Fla. App. 1958).

402. *McArthur v. McArthur*, 106 So.2d 73 (1958); *Woolin v. McKain*, 111 So.2d 475 (Fla. App. 1959). F.A.R. 3.16(c).

403. *Sun Ins. Co. v. Boyd*, 105 So.2d 574 (Fla. 1958). See also 21 C.J.S. *Courts* § 118 (1959).

404. *Billingham v. Thiele*, 109 So.2d 763 (Fla. 1959). This is the majority rule as reflected in 5 AM.JUR. *Attorney at Law* § 238 (1959); 7 C.J.S. *Attorney and Client* § 228(c) (1959).