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Appeal and Error

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PART FOUR
PROCEDURAL LAW

APPEAL AND ERROR

PAUL D. BARNS*

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I

COURTS

Jurisdiction to tax cost after expiration of time for rehearing and after appeal. The lower court may tax costs after an appeal is taken when to do so will in no wise affect the merits of the controversy on appeal, and will not interfere with the jurisdiction of the appellate court.¹

Appellate court should state grounds for reversal. While an appellate court may not be required to state wherein the lower court has failed to give legal effect to the evidence when it reverses on that ground, propriety dictates that the court should do so.²

II

APPEALS

New appellate rules: Appeals from final and interlocutory orders — Law and Equity — Only common law certiorari left. No longer do we have interlocutory appeals in "the nature of certiorari" as provided by former

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1. *Winters v. Parks*, 91 So.2d 649 (Fla. 1956).

2. *Holland v. Cross*, 89 So.2d 259 (Fla. 1956).

supreme court rule 14. Rule 4.2 of the Florida Appellate Rules effective July 1, 1957, provides:

Interlocutory Appeals. Appeals from interlocutory orders or decrees in equity, orders or decrees entered after final decree, and orders at common law relating to venue or jurisdiction over the person, may be prosecuted in accordance with this rule; provided that nothing contained in this rule shall preclude the review of such orders and decrees on appeal from the final decree in the cause.

This clearly permits interlocutory appeals in equity from orders and decrees before or after final decree. The rule enlarges review of interlocutory orders in law actions by permitting appeals from "orders at common law relating to venue or jurisdiction over the person."

When review of jurisdiction of the *subject matter* is to be questioned in an action at law, the litigant must await final judgment or proceed by way of common law prohibition or mandamus. In the federal system the litigant may procure preliminary consideration of such questions of jurisdiction by motion after docketing a partial record of the case in the court of appeals under Federal Rule of Civil Procedure 75(j) which provides:

Record for Preliminary Hearing in Appellate Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

He then moves the court of appeals for an order of prohibition or mandamus. The jurisdiction of a federal court of appeals to grant prohibition or mandamus is based on Title 28 U.S.C., section 1651, which reads:

Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section (b) of article V of the Florida Constitution, recently adopted, provides:

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The language of article V of the constitution is not the same as section 1651 of the U. S. Code. However, it is broad enough to permit the state practice to follow the federal practice. This is particularly so by reason of section 3 of article V which provides:

The practice and procedure of all courts shall be governed by rules adopted by the Supreme Court.

Split judgment and split appeals permitted on a single claim against multiple parties. In a suit on one claim against multiple parties, one of whom was the maker and the other the endorser of a promissory note, the court entered separate judgments at different times; held, the time for appeal commenced to run on each judgment from the date of its entry.³

It appears that when a final judgment or decree is entered, the party against whom it is entered may not await a final determination as to all the parties and then appeal. What is and what is not a final judgment or decree in effect is often difficult to determine.

As a signal for when the time for appeal has commenced to run, in some cases it has been provided by the Federal Rules of Civil Procedure 54(b), that when there are *multiple claims* (to be distinguished from multiple parties) that one or more of the claims may be terminated by the trial court when the court directs the entry of a final judgment, "upon an express determination that there is no just reason for delay and upon express direction for the entry of judgment." However, since the above rule applies only to multiple claims, it would not be applicable to cases of the category in which the *Fellowship Foundation* case^{3a} falls, a single claim against multiple parties. The rule is applicable only when there are multiple claims against one or more parties.

Good rules save labor for the court and likewise benefit the litigants and their attorneys. Much confusion has existed for a long time as to what is a final judgment or decree for appellate purposes. This confusion has arisen generally under varying circumstances where there are multiple parties and multiple claims, single parties and multiple claims, single claims and multiple parties, and where the liability is joint and where the liability is severable. For appellant purposes, appeals have been dismissed for the lack of finality, although the judgments entered appeared to be final in form and substance. These judgments were found not to be final until the case was adjudicated as to all the parties. However, in other cases, where the judgments and decrees were entered as final in form and substance and the aggrieved parties delayed the appeal until final adjudication as to all the parties, the appeals were dismissed as being too late.

In Florida we have no rule corresponding to Rule 54(b) of the Federal Rules of Civil Procedure which serves to dispatch some cases for appellate purposes when properly "earmarked" as final. Federal Rule 54(b) relates only

3. *Fellowship Foundation Inc. v. Soule*, 85 So.2d 628 (Fla. 1956). Compare *Sohwenak v. Jacobs*, 169 Fla. 33, 33 So.2d 592 (1948); *Chisholm v. Coconut Grove Exch. Bank*, 144 Fla. 770, 198 So. 703 (1940); *Ropes v. Lansing*, 46 Fla. 231, 35 So. 863 (1903).

3a. *Ibid.*

to multiple claims without regard to whether there are multiple parties or only one party to the action.

The last report of the Supreme Court Advisory Committee on Rules of Civil Procedure for the District Courts of the United States dated October, 1955, recommended, *inter alia*, that rule 54(b) be amended. None of the recommendations were adopted and the committee was discharged. If we should adopt the committee's proposed amendment to rule 54(b), it doubtless would be a trouble saver.

The proposed amendment reads as follows:

Rule 54. JUDGMENTS; COSTS

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

The committee note to the foregoing suggestion reads:

The Committee has previously noted scholarly suggestions that existing Rule 54(b) does not permit appeal, even with the requisite finding by the trial judge, from an order dismissing an action as to less than all the parties jointly suing or being sued, and that an amendment should be made to permit appeal in such a situation.⁴

Florida. Appeals not permitted from order denying motion for judgment n.o.v. after an appeal from an order granting an alternative motion for a new trial. The case of *Atlantic Coast Line R.R. v. Boone*⁵ involves a situation where after an adverse verdict the defendant-appellant filed a timely motion for judgment *n.o.v.* and an alternative motion for a new trial, as permitted by Rule 2.7 of the Florida Rules of Civil Procedure which follows Rule 50(b) of the Federal Rules of Civil Procedure. The trial judge granted the new trial and denied judgment *n.o.v.* whereupon plaintiff appealed from the order granting a new trial and the defendant-railroad

4. MOORE, FEDERAL PRACTICE, Vol. V 6 Par. 43.34(2d) (2d ed. 1953); Note 62 YALE L.J. 263, 271, 232 (1953); *cf.* note: 28 N.Y.U.L. REV. 203 (1953).

5. 85 So.2d 834 (Fla. 1956).

appealed from the order denying the motion for judgment *n.o.v.* The appeals were separate and no effort was made to cross-assign errors.

The supreme court dismissed the appeal of the defendant upon the ground that the order granting the new trial has the effect, *ipso facto*, of vacating the judgment, hence there was no judgment from which plaintiff could appeal, and the appeal was dismissed.

Federal courts. Cross-appeals or cross-assignment of errors, when not permitted as an original appeal and when not authorized by statute. In the federal system a few of the courts of appeals have honored cross-appeals and cross-assignments of error addressed to orders from which an original appeal is not expressly allowed by statute, under circumstances similar to the *Atlantic Coast Line* case.

In *Marsh v. Illinois Cent. R. Co.*⁶ after a defendant's motion for a directed verdict made at the close of all the evidence was denied, a verdict was rendered adverse to the defendant. Thereupon the defendant filed a timely motion for judgment *n.o.v.*, under Rule 50(b) Federal Rules of Civil Procedure and, if that was not granted, a motion for new trial on the ground that the verdict was against the overwhelming weight of the evidence. The motion for judgment *n.o.v.* was granted, but in denying the motion for a new trial, the trial judge refused to invoke any discretion and denied the motion for a new trial. He did not follow the suggestion found in *Montgomery Ward & Co. v. Duncan*,⁷ of conditionally passing on the motion for a new trial. Thereupon the plaintiff appealed and the defendant, notwithstanding a favorable judgment, filed a cross-appeal, based on the ground that the trial court erred in not granting a new trial in the event that the judgment *n.o.v.* was reversed. The court of appeals reversed the judgment *n.o.v.* and also the order denying the alternative motion for a new trial, holding that the court of appeals did not have power to direct a new trial, as that was the primary function of the trial court, see *Montgomery Ward & Co. v. Duncan*,⁸ and stated that "The full discretion vested in the trial judge not having been exercised, we will remand the case with directions to the judge to grant a new trial * * * if he continues to think the verdict is against the overwhelming weight of the evidence."

In *Jackson v. Wilson Trucking Co.*,⁹ in an action for personal injuries after the rendition of an adverse verdict, the defendant filed a timely motion for judgment *n.o.v.* and weeks later the trial judge, in passing on the motion for judgment *n.o.v.*, granted a new trial in the absence of a motion for a new trial, on the ground that the verdict was against the greater weight of the evidence ". . . and the construction of Rule 50(b)

6. 175 F.2d 49 (5th Cir. 1949).

7. 311 U.S. 234 (1940).

8. *Ibid.*

9. 243 F.2d 212 (D.C. Cir. 1957).

of the Federal Rules of Civil Procedure as found in *Cone v. West Virginia Pulp & Paper Co.*,¹⁰ when construing the "either" "or" clause of 50(b).

From an order granting a new trial, which orders are not made appealable under federal law, the plaintiff appealed. The Court justified the review of the order granting a new trial by a footnote stating "an order granting a new trial is not ordinarily reviewable. But where as in the case at bar, such an order exceeds the power of the court it may be reviewed notwithstanding the absence of a final judgment."¹¹

In construing the power of the trial court to grant a new trial without a motion therefor when in passing on a motion for judgment *n.o.v.* the Court in the *Jackson* case *supra* stated:

When a trial court concludes that a proper basis exists for granting a timely, well-grounded motion for judgment *n.o.v.*, it has a discretion to grant the lesser relief and to order a new trial instead if justice would thereby better be served. This is so even though no motion for a new trial has been filed, and even though 10 days have elapsed since the entry of judgment. This discretion to grant the lesser relief, however, comes into being only when the record is such that the entry of judgment *n.o.v.* would be warranted. The court may then give the party against whom judgment *n.o.v.* could be entered another opportunity to supply those defects in the record which would warrant the harsher remedy of an adverse final judgment.

On review the court of Appeals reversed the lower court and did not follow the reasoning of the lower court, but, see the opinion of the dissenting judge, which dissenting opinion was followed in *Shaw v. Hines Lumber Co.*, 249 F.2d 434 (7th Cir. 1957). The *Shaw* case removed the conditions of "only" clause in the *Jackson* case as quoted *supra*, holding a new trial could be granted upon a hearing of a timely motion for judgment *n.o.v.* in the absence of a motion for new trial.

Prepayment of cost by plaintiff required of plaintiff-appellant; not jurisdictional. In the case of *O'Connell v. Mason*¹² the costs assessed against the plaintiff-appellant were \$1,750.75 and he appealed without having paid the costs. The court granted appellee's motion to dismiss the appeal on that ground. Section 59.09 Florida Statutes 1955 provides:

Payment of costs by plaintiff.—No appeal may be taken by the original plaintiff in any suit or proceeding until he shall pay all costs which have accrued, in or about the suit, up to the time the appeal is taken.

10. 330 U.S. 212 (1947).

11. *Phillips v. Negley*, 117 U.S. 665, 671 (1886); *Fried v. McGrath*, 133 F.2d 350 (1942).

12. 93 So.2d 71 (Fla. 1956).

Former supreme court rule 29 and present appellate court rule 3.2(f) provide:

Payment of costs by original plaintiff. No appeal may be taken by the original plaintiff in any suit or proceeding until he shall have first paid all costs that have accrued in or about the suit, and have been specifically taxed against him, up to the time the appeal is taken; provided, that nothing contained herein shall require the prepayment of costs by the original plaintiff when he has assigned as error the taxation of costs and has superseded the order, judgment or decree specifically taxing the same.¹³

The court in the *O'Connell* case approved *Berg v. New York Life Ins. Co.*,¹⁴ to the effect that prepayment was not a jurisdictional condition precedent.

Prepayment of cost obviated by new constitutional amendment to article V. Since the adoption of this amendment of the constitution effective July 1, 1957 it seems evident that in the event of an appeal to the supreme court or to any of the courts of appeals that any statute or rule such as section 59.09 of the Florida Statutes or present appellate court rule 3.2(f) would be in conflict with the following constitutional provisions permitting appeals to such courts *as a matter of right*.

Appeals to the supreme court. Section 4(b) of article V provides as follows:

(b) Jurisdiction. Appeals from trial courts may be taken directly to the supreme court, *as a matter of right* only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness.

Appeals to the courts of appeals. Section 5(c) of article V provides as follows:

(c) Jurisdiction. Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, *as a matter of right*, from all final judgments or decrees except those from which appeals may be taken direct to supreme court or to a circuit court.

It is fundamental that rights unqualifiedly and unconditionally granted or reserved by the constitution may not be impaired, abridged or curtailed by the legislature or by rules of the court.

13. For previous cases noted on this point see 10 *MIAMI L.Q.* 458 (1956).

14. 81 So.2d 630 (Fla. 1956).

Joinder in appeal. The supreme court decision of *Villaneuva v. Shayne Inc.*¹⁵ arouses one's curiosity as to whether appellate rule 3.11(b) relating to "joinder in appeal" serves any useful purpose. Villaneuva sued Shayne Inc. and Schweida; he obtained a judgment against Shayne Inc. and a dismissal was entered in favor of Schweida. Thereupon Shayne Inc. appealed from the judgment whereupon plaintiff-appellee Villaneuva filed a paper entitled a "joinder in appeal" to the appeal taken by Shayne Inc. stating that "the plaintiff appeal from a judgment entered in favor of the defendant Elva I. Schweida, bearing date of January 30, 1957." The court granted Schweida's motion to dismiss Villaneuva's "joinder in appeal" because Villaneuva was the original plaintiff and had not paid the costs taxed against him in favor of Schweida based on section 59.09 of the Florida Statutes which prescribes that no appeal shall be taken by an original plaintiff until he shall have paid such cost. The decision was grounded on the premise that to hold otherwise would permit the plaintiff-appellee to accomplish by indirection what he could not do directly by taking a cross-appeal. The decision clearly demonstrates that appellate rule 3.11(b) (1957) on "joinder on appeal" serves no useful purpose, but on the contrary, serves well to burden the appellate courts. The simple way to join in an appeal with another is to sign where the other signed, like the signing of a joint provision note by two or more persons. If one party has already taken an appeal and another wishes to do likewise, then the simple process is to just take an appeal or cross-appeal; such is the generally accepted practice.

The court cannot do much about section 59.09 of the Florida Statutes since it is substantive but of doubtful merit. It need not dignify its doubtful merit by incorporating it into the rules. A procedural rule that will give an appellee as much protection as one is entitled to would be to amend appellate rule 3.5(b) to read:

(b) *Cross-assignments of Errors by Appellee. Within the time allowed for him to serve a designation for additional matters for the record on appeal, an appellee may serve and file cross-assignments of errors, which shall be stated according to the facts and circumstances as they occurred, and which shall have the force and effect of a cross-appeal if an appeal of such matter was permitted by law at the time of the original appeal or at the time of the serving or filing of the cross-assignment of errors, but his failure to do so shall not prejudice any right on a subsequent appeal allowed by law.*

Should the foregoing amendment be made, then the troublesome "joinder in appeal" rule 3.11(b) could well be abolished.

15. 96 So.2d 537 (Fla. 1957).

III

RIGHT TO REVIEW

Estoppel by accepting benefits of decree. In *Weatherford v. Weatherford*¹⁶ two, but not all, of the husband's assignments of errors were based on the error *vel non* of granting the wife a divorce. The wife moved to dismiss the appeal on the ground that the husband had accepted the benefits of the final decree of divorce by remarrying. Thereupon the husband abandoned these two grounds and the court recognized the merits of the motion by quoting the following language:

In the case of *McMullen v. Fort Pierce Financing & Construction Co.*,¹⁷ the court stated the general rule as follows:

It is a well-settled doctrine that where a party recovering a judgment or decree accepts the benefits thereof, voluntarily and knowing the facts, he is estopped to afterwards seek a reversal of such judgment or decree on writ of error or appeal. His conduct amounts to a release of error . . . and estops the successful party from appealing.

IV

PARTIES

Intervention after final decree. The general rule is that it is too late to apply for intervention after final decree. However, when the ends of justice require it, such leave may be granted, and if an appeal has already been taken such intervention may be permitted in the appellate court.¹⁸ *Wags Transportation System, Inc. v. City of Miami Beach*, 88 So.2d 751 (Fla. 1956).

V

MAKING AND SAVING GROUNDS FOR REVIEW

Questions preliminary to admission of evidence. Although there was no proffer of testimony, where the lower court ruled that an attorney was not competent to testify concerning transactions with deceased about deceased's will competency of witness could be determined on appeal.¹⁹

When point considered in absence of exception. When jury instruction is on the central issue of the case, the appellate court may consider it under the general rule which allows appellate courts to notice plain errors even though they were not properly excepted to in the trial court.²⁰

Failure to transfer to law side, not error unless requested. When appellant failed to present for a ruling the propriety of transferring a

16. 91 So.2d 179 (Fla. 1956).

17. 108 Fla. 492, 495; 146 So. 567, 568 (1933).

18. *Wags Transportation System, Inc. v. Miami Beach*, 88 So.2d 751 (Fla. 1956).

19. *Seeba v. Bowden*, 86 So.2d 432 (Fla. 1956).

20. *United States v. Shemell*, 234 F.2d 944 (5th Cir. 1957).

case to the law side after equitable relief is denied, he has not made a point for consideration in review on appeal from the final decree in equity.²¹

VI

PROCEDURE AND LIMITATIONS OF TIME FOR APPEAL

Timely petition for rehearing in equity tolls time for appeal. *Gasque v. Ball*²² and *Lauderdale-by-the-Sea Development Co. v. Lauderdale Surf & Yacht Estate*,²³ are partially overruled, and justifiably so, by *obiter dictum* contained in the decision of *Ganzer v. Ganzer*,²⁴ stating that a timely petition for rehearing in equity cases will postpone the commencement of the running of time for taking an appeal. In the *Gasque* case and the *Lauderdale* case timely petitions for rehearing were filed and denied and both cases held that the filing of the petition did not postpone the commencement of the running of the time for taking an appeal from the final decree.

In the *Ganzer* case an untimely petition for rehearing was filed and denied, but the appeal was taken after the time allowed when calculated from the time of entry of the final decree; hence the court dismissed the appeal holding that the denial of an untimely petition for rehearing did not postpone or toll the time for taking an appeal from the final decree in equity. By way of *dictum* the court held that a timely petition for rehearing would have the effect of postponing the commencement of the running of the time for taking an appeal until the petition was adjudicated. The *Ganzer* case leaves open the question of the effect of *granting* an untimely petition for rehearing when done before the time for appeal has expired and when no appeal has been taken. However, in *Brenner v. Gelernter*,²⁵ the court referring to untimely petitions for rehearing, consistent with recognized law, in passing, suggested that if the petition had been granted, though without the provisions of any statute or rule, that the result may have been different by the following:

... the appellant should not be required to go to the expense and trouble of filing an appeal which might be unnecessary if the trial judge grants his motion for reconsideration of issues raised by the original action.

Suggest court rule: rules of court serve to crystallize the doctrine of courts and to inform the bar of the adopted doctrine in a way that makes the ascertainment more certain and simple; otherwise the policy can only be gleaned from the decisions, and decisions are rendered at different periods under different circumstances. It has been suggested that rule

21. *Wood v. Wilson*, 84 So.2d 32 (Fla. 1955).

22. 71 Fla. 257, 71 So. 329 (1916).

23. 160 Fla. 929, 37 So.2d 364 (1948).

24. 84 So.2d 591 (Fla. 1956).

25. 90 So.2d 306 (Fla. 1956).

3.2(b) of the new appellate court rules might be appropriately amended to read as follows:

Suggested rule 3.2(b).

(b) *Appeals: Tolling of time. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules of court permitting any of the orders hereinafter named and the full time for appeal commences to run and is to be computed from the entry of any of the following orders made upon a timely motion:*

- (1) *granting or denying a motion for judgment in accordance with a motion for a directed verdict;*
- (2) *granting or denying a motion for a new trial;*
- (3) *denying a motion or petition for rehearing in a non-jury matter;*
- (4) *granting or denying a motion to amend an appealable order, judgment or decree.*

Note: cf. Federal rules of civil procedure 73(a).

To make this amendment would tend to stabilize the law as presently found in the decisions and tend to preclude further controversy or doubt, and thereby serve both the bar and the bench. The time allowed for taking an appeal by statute is substantive and not procedural. The taking of an appeal is procedural.

Time for appeal begins to run though finality of decision is contingently effective. In *Brenner v. Gelernten*,²⁶ an appeal was taken from a final judgment worded as follows:

That defendants' motion to dismiss the complaint be, and the same is hereby granted, with leave to the plaintiffs to amend within 15 days from date, if they so desire. Otherwise, this cause shall stand dismissed with costs assessed against the plaintiffs. (Emphasis added.)

The plaintiffs did not amend but appealed after the expiration of the "fifteen days." The appellees filed a motion to dismiss the appeal on the ground that appeal was not timely, and the motion was granted. The appeal was timely if calculated from the expiration of the "fifteen days" following the date of the judgment, but not timely if calculated from the date of the judgment. The court did not hold that dismissal in the lower court was incomplete as to finality when the order was entered, nor suspended for the duration of the "fifteen days" allowed for leave to amend; neither did it hold that the dismissal was of conditional prospective legal effect. The question presented by the case was: Did the time

26. *Ibid.*

for appeal commence to run from the date of the order, or from the day that dismissal was effective? The order was a conditional dismissal, *i.e.* the dismissal was to be effective upon the contingency of the plaintiffs not amending within fifteen days. The dismissal was not absolute upon the entry of the order, but only contingently absolute.

It has been held that the granting of a motion to dismiss a complaint with leave to amend is interlocutory, and not a final judgment or decree, until the time allowed for amendment has expired.²⁷ In *Sumerall v. Florida Tar & Creosote Corp.*,²⁸ an appeal was taken from an order sustaining a motion to dismiss with leave to amend and the appeal was dismissed on the ground that the order was interlocutory and not a final judgment.

When time for taking an appeal from circuit court is not tolled by filing petition for rehearing. When the circuit court has rendered a judgment on appeal from the probate court, the filing of a petition for rehearing, being anomalous, does not toll or postpone the commencement or running of time for appeal to the supreme court when the petition is denied. In *re Lee's Estate*,²⁹ citing as authority *Counne v. Saffan*.³⁰ If the petition had been granted before the time for appeal had expired and before a timely appeal the decision would likely have been different.

In Law actions time for appeal not extended by filing of petitions for rehearing after entry of summary judgment. The filing of a petition for rehearing after the entry of an adverse summary judgment is an anomalous proceedings and has no effect on the commencement or the running of the time allowed for taking an appeal. In the *Counne* case *supra*, the appeal from the summary judgment was dismissed because it was not taken within the time allowed by statute, which is a jurisdictional requirement which could not be waived. In this case the petition for rehearing was denied. The court observed that *Weisberg v. Perl*,³¹ held that "there is no provision in our rules or statutes for attacking a summary judgment by petition for rehearing." But it does not necessarily follow that such petition could not be granted and the judgment vacated, if the time for appeal has not expired and in the absence of an appeal taken. It is clear however, that when such petition is simply denied, that the running of the time for appeal is not affected thereby. The appeal was held not taken until the notice of appeal was filed with the clerk and the service of notice of appeal on the adversary was not sufficient to affect an appeal.

*Counne v. Saffan*³² obviated by new appellate rules. The application of the rule of law as pronounced in the *Counne* case has doubtless

27. *Lykes Bros. Fla. Co. v. King*, 125 Fla. 101, 169 So. 595 (1936).

28. 55 So.2d 713 (Fla. 1951).

29. 90 So.2d 290 (Fla. 1956).

30. 87 So.2d 586 (Fla. 1956).

31. 73 So.2d 56 (Fla. 1954).

32. See note 30 *supra*.

been obviated by appellate rule 1.1 and rule 3.13, which are applicable to the circuit courts. Rule 1.1 provides that "From their effective date they shall govern all proceedings . . . in the circuit courts in the exercise of their appellate jurisdiction" and rule 3.13 provides that "Unless further time is allowed, rehearings must be applied for by petition in writing within 15 days after the filing of the decision or order of the court."

Tardy docketing of appeal. A failure to docket an appeal by filing the record on appeal within the time prescribed by the rules of the appellate court does not "involve jurisdictional questions but have to do with procedural steps" subject to such action as the appellate court deems appropriate.³³ The foregoing holding conforms to the law of appeals as stated in the Federal Rules of Civil Procedure 73(a) which provides:

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

VII

SUPERSEDEAS OR STAY

Supersedeas discretionary. In *re Jaeckels Estate*, the court reaffirmed the holding in *All Florida Surety Co. v. Coker*³⁴ to the effect that a party is entitled to a *supersedeas* as a matter of right only in the following instances:

(1) in appeals from money judgments or decrees and

(2) certain judgments in probate and guardianship cases;

and that "the granting or denial of *supersedeas* rests in the discretion of the court from whose judgment the appeal is taken and may be granted at any time before the record on appeal is lodged in this court," subject to review before the appellate court on motion.

When supersedeas is necessary. In the case of *Austin v. Oviedo*³⁵ on petition for certiorari to review a judgment of the circuit court dismissing an appeal from a conviction in a municipal court, a *supersedeas* bond was held to be a statutory condition prerequisite to the right of appeal. The opinion quoted the constitutional provision vesting the circuit court with "appellate jurisdiction" in such cases. Section 11 of article V of the constitution provided ". . . They shall have final appellate jurisdiction . . . of judgments and sentences of Mayor's Court . . ." and also fully quoted

33. *In re Jaeckels Estate*, 92 So.2d 633 (Fla. 1957).

34. 79 So.2d 762 (Fla. 1955).

35. 92 So.2d 648 (Fla. 1957).

section 932.51(16) Florida Statutes specifying that an appellant on appeal from a conviction in a municipal court "shall enter into a bond in double the amount of the fine * * *" and that "When the bond is entered into and filed with the clerk of the circuit court, it shall operate as a supersedeas. * * *" The case is unique in that a circumstance rarely exists where a *superseadeas* is held to be a prerequisite to the right of appeal, and especially so when imprisonment might be involved. Here the petitioner had been fined.

VIII

ASSIGNMENT OF ERRORS

Necessity of assignment of errors. Assignment of error must relate to judicial acts; after entry of appeal, assignments of error are indispensable at all stages and the appellate court will not review the trial court's judgment and will dismiss appeal therefrom, in absence of an assignment of error.³⁶

Record on appeal must support assignment of error. An assignment of error must be supported in point of fact by record on appeal. *Redditt v. State*³⁷ and in the case of *Vaughn v. Smith*,³⁸ the court instead of merely rendering a memorandum opinion, affirmed the decision of the lower court and clarified its opinion in respect to assignment of errors as follows:

A trial judge can be reversed only for errors presented by the assignments. *Red Top Cab & Baggage Co. v. Dorner*, 159 Fla. 538, 32 So.2d 321. The very nature of the pleading in court of review requires a proper assignment of error. *St. Andrews Bay Lumber Co. v. Bernard*, 106 Fla. 235, 143 So. 160. The function of an assignment of error is to point out the specific error claimed to have been committed by the court below in order that the reviewing court and opposing counsel may see on what point the appellant seeks reversal, and to limit argument and review to such point. A point made that is not based on or shown by the brief to be within the scope of some quoted assignment is futile and will be considered as moot.³⁹

Necessity of assignment of error. Where action of trial court in striking portion of appellant's answer was not assigned as error, it was not properly before reviewing court. *Dicks v. Colonial Finance Corp.*,⁴⁰ and a point which had not been raised by litigants could have no effect upon the outcome of the appeal.⁴¹

36. *Redditt v. State*, 84 So.2d 317 (Fla. 1955).

37. *Ibid.*

38. 96 So.2d 145 (Fla. 1957).

39. See note 36 *supra*.

40. 85 So.2d 874 (Fla. 1956).

41. *Larkin v. Jsavaris*, 85 So.2d 731 (Fla. 1956).

Assignment of errors, necessity of, in certiorari. In *Moses v. R. H. Wright & Son, Inc.*⁴² the court pointed out that supreme court rule 22 provides that a petition for certiorari "shall contain a concise statement of the cause and the reasons relied on for granting the writ" and, per Justice Thomal, the word "reasons" was construed as corresponding to assignment of errors.⁴³

Assignment of error, how stated in the Supreme Court of the United States. Although the use of assignments of errors, designated as such, is no longer the practice in the Supreme Court of the United States since the adoption of its new rules in 1954, the function of an assignment of error is accomplished in another way. That Court rules require that appellant state in his appeal "*the questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail,*" U. S. Supreme Court Rule 10; and requires that appellant shall also file a jurisdiction statement showing "*the questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail.*" * * * The statement of the question presented will be deemed to include every subsidiary question fairly comprised therein." Supreme Court Rule 15(c). The same matter is required to be contained in a petition for certiorari. The U. S. Supreme Court Rules 23 and 40, among other matters require that the brief of the appellant or petitioner shall contain:

The questions presented for review, *expressed in terms and circumstances of the case but without unnecessary detail.* The statement of the question shall be deemed to include every subsidiary question comprised therein.

Where formal assignments of errors are required, as in the state practice, it would seem that they should meet the standards specified in the foregoing rules as to questions presented, i.e. they, too, should be *expressed in the terms and circumstances of the case* and when so done the courts would construe the assignment "to include every subsidiary question comprised therein."

IX

BRIEFS AND ASSIGNMENT OF ERROR

The new rules promulgated by the Florida Supreme Court effective July 1, 1957 relative to briefs have discarded the language of the former rules relating to "question involved" and have substituted a simple provision that is likely to be more conducive to the proper presentation of a

42. 90 So.2d 330 (Fla. 1956).

43. For necessity of an assignment of errors, now treated as "reasons for," in certiorari cases see *Weis v. Marcus*, 160 Fla. 283, 34 So.2d 550 (1948); *Schupler v. Eastern Mtg. Co.*, 160 Fla. 2, 33 So.2d 586 (1948); *Leonard Bros. Trans. & Storage Co. v. Douglass*, 159 Fla. 510, 32 So.2d 156 (1946).

case on review. The provision of the new appellate rule 3.7 f(4) is as follows:

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

The rule is clear in requiring that the assignment of error relied on for reversal "shall be stated" with the point. To state does not merely designate by number. To state is to copy it. No longer will the indolent practice of the appellant stating in the brief that "This question is raised by assignments of errors No. 3, 5, 11 and 13," meet the requirements of the rule. As to reframing an assignment of error in the brief because of the want of clarity.⁴⁴

It would seem that points might be stated somewhat as follows:

- (1) Was It Error For The Trial Court To Charge The Jury That There Was No Specific Issue Properly Before It On The Subject Of Appellee Newman's Personal Responsibility For The Icy And Slippery Condition Of The Pathway?

(Copy supporting assignments of errors here)

- (2) Was It Error For The Trial Court To Exclude Testimony To Show That No Previous Accidents Had Occurred As A Result Of Icy Conditions?

(Copy supporting assignments of errors here)

- (3) Was Error Committed When Appellee's Counsel Was Allowed To Ask Appellant's Medical Witness On Cross-Examination Whether In His Opinion Good Advice Had Been Given To Appellee By A Company Doctor To Return To Work After He Returned From A Marine Hospital?

(Copy supporting assignments of errors here)

- (4) Was The Verdict Excessive?

(Copy supporting assignments of errors here)

To comply with appellate rule 3.7 f(4) each point must be argued separately and each point must be supported by at least one assignment of error stated; and an assignment of error should be stated according to the facts and circumstances as it occurred and, if necessary for clarity, reframed without departing from the substance of the original assignment.

44. See note 36 *supra*.

New assignments of errors may not be made without leave of the appellate court.

For purposes of review, court may rely solely on appendices. Appendices to Brief. Required in Industrial Commission Cases. In *Moses v. R. H. Wright & Son, Inc.*⁴⁵ it is clearly indicated that the court for the purpose of review may rely solely on the appendices as contained in the briefs without resort to the original record filed with the clerk. Per Justice Thornal, it is stated: "The fact that Rule 16, subdivision 4, requires the Industrial Commission to transmit the original record to this Court does not relieve the parties of the responsibility of attaching to their briefs the appendix required by Rule 36, subdivision 7(c). This appendix is important for the simple reason that it abstracts from the entire record those salient aspects of the matter upon which the parties rely to sustain their respective positions in this Court. Actually, unless there is a conflict between the appendices filed by the opposing parties, there is no obligation under our rules for this Court to examine any other portion of the record on appeal (capital cases are the exception)."

Points or propositions relied on for reversal. In *Graham v. State*,⁴⁶ the court held that a point relied on for reversal when stated in the brief to be "whether or not the lower court was in error in failing to grant appellant's motion for a new trial," which motion contained 12 grounds, was so general as not to require consideration by the court. Doubtless the court would have passed on the proposition if appellant had "pin-pointed" the ground which appellant considered sufficient to show prejudicial error.

Motions for new trial are usually based on some alleged error occurring at trial and under such circumstances it is the error occurring at trial that should be assigned as error and argued as a point relied on for reversal, and it is well to show that the error was again presented by motion for new trial, when such is the case.

X

REVIEW

Grounds for decision below not controlling. Where the order appealed from did not specify grounds or basis for order, the supreme court will consider it under its settled practice to affirm a decree of the lower court, even though based on erroneous ground, if its result is justified on any other ground appearing in the record.⁴⁷

Extent of review. On appeal, the reviewing court does not decide the case based upon how such court would have decided the case had the

45. 90 So.2d 330 (Fla. 1956).

46. 91 So.2d 662 (Fla. 1946).

47. *Petition of Freeman*, 84 So.2d 544 (Fla. 1956).

court heard the original testimony, but only decides whether there was sufficient evidence in record to justify the lower court's decision.⁴⁸

No presumption. The reviewing court will indulge in no presumption of irregularity,⁴⁹ but where error is made to appear, the injury will be presumed to follow.⁵⁰ However, the circumstances shown may have the effect of overcoming the presumption.

Motion to affirm under supreme court rule 38. In *Joseph T. Miller Construction Co. v. Borak*,⁵¹ it was held that a motion to affirm under supreme court rule 28 would be granted only when "from a consideration of the record and the briefs and oral arguments * * * in support of the motion there are no substantial errors," and that the motion must *affirmatively* make a showing to that effect. Furthermore it was held in *Owensby v. City of Quincy*,⁵² the court would "not consider it appropriate to file a motion to affirm judgment in a case . . . wherein it is necessary for this court to examine the entire transcript and to consider the case as fully as would be ultimately necessary for disposition of the matter" and the case should follow its regular course on appeal; and in *Cooksey v. Zimmerman*⁵³ it was held that the motion to affirm must show clearly the matter on which it is based; that when an appeal was presented for review and contained only questions of fact, and no substantive question of law the motion to affirm would be granted.

XI

DISMISSAL

Dismissal for tardy filing of record, not required. After a timely appeal from probate court, mere delay by the county judge of five months in transmitting the original records to the circuit court was not a sufficient ground to sustain appellee's motion to dismiss the appeal; no request for earlier transmission appears to have been made.⁵⁴ It is a legal maxim that "an act of the Court shall prejudice no man," *actus curide neminem gravabit*.

Dismissal for mootness. The appellate court will dismiss the appeal where appellant showed the litigation to be moot and the adverse party had not challenged the decree appealed from by cross assignments of errors.⁵⁵

Common-law certiorari, discretionary, not obligatory. "Common-law certiorari is a discretionary writ and ordinarily will not be issued by this

48. *Brenner v. Smullion*, 84 So.2d 44 (Fla. 1955).

49. *Reinhard v. Bliss*, 85 So.2d 131 (Fla. 1956); *First Atlantic Bank of Daytona Beach v. Cobbett*, 82 So.2d 870 (Fla. 1955).

50. 94 So.2d 854 (Fla. 1957).

51. 82 So.2d 147 (Fla. 1955).

52. 84 So.2d 40 (Fla. 1955).

53. 85 So.2d 593 (Fla. 1955).

54. *In re Kreck's Guardianship*, 85 So.2d 727 (Fla. 1956).

55. *Bahia Mar Caterers, Inc. v. Ft. Lauderdale*, 85 So.2d 591 (Fla. 1956).

court to review interlocutory orders in a suit at law, since such errors as are made may be corrected on appeal. It is only in exceptional cases, such as those where the lower court acts without or in excess of jurisdiction, or where interlocutory order does not conform to the essential requirements of law and may reasonably cause material injury throughout the subsequent proceedings for which the remedy by appeal will be inadequate, that this court will exercise its discretionary power to issue the writ."⁵⁶

XII

CERTIORARI

Grounds for granting common law certiorari. In *Huie v. State*⁵⁷ the court reiterated the oft-repeated standard governing the granting of a common law writ of certiorari:

Our consistent position has been that it is only in a case where it clearly appears that there has been a departure from the essential requirements of the law *and in addition* thereto that there is no full, adequate and complete remedy by appeal after final judgment available to the petitioner in certiorari that we will ever consider granting a writ of certiorari to review an interlocutory order in a law action. See *Wolf v. Industrial Supply Corp.*, Fla., 1952, 62 So.2d 30. In the case before us an appeal from a final judgment would afford full, adequate and complete relief.

In *Kaufman v. King*⁵⁸ the court in following the standard enunciated in the *Huie* case granted a common law writ of certiorari and quashed an order denying a motion for a change of venue, when the motion should have been granted, on the ground that the trial judge "departed from the essential requirements of the law."

Circuit court judgment affirming judgment of civil court of Record; reviewable by common law writ of certiorari. *Hilkmeyer v. Latin American Air Cargo Expeditors*⁵⁹ held that when circuit court on appeal affirms a judgment of the civil court of record such judgment is reviewable by the supreme court by the common law writ of certiorari and not by appeal and, as stated in *Nation v. State*⁶⁰ the common law writ will be issued under the following circumstances:

The common-law writ of certiorari issues, not to serve the purpose of an appeal, or to give an aggrieved party a second appeal, but to cause the record of an inferior court to be brought up in order that a superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction or has not

56. *Kauffman v. King*, 89 So.2d 54 (Fla. 1956).

57. 92 So.2d 264 (Fla. 1957).

58. See Note 56 *supra*.

59. 94 So.2d 821 (Fla. 1957).

60. 155 Fla. 858, 22 So.2d 219 (Fla. 1955).

proceeded in accordance with the essential requirements of law. . . . The writ being thus limited in function, the subject matter of a suit that has been tried in a court of competent jurisdiction and thereafter reviewed in an appropriate appellate tribunal will not be reinvestigated, tried and determined upon the merits generally when brought here by certiorari.

Judgment of reversal and remand not final judgment for purposes of certiorari. Where the circuit court on appellate review reverses a summary judgment of the civil court of record and remands the case to the lower court for a jury trial, it is not a sufficient basis for a common law writ of certiorari. Such action by the circuit court held not to constitute a final judgment.⁶¹

Common law certiorari for review of order of transfer to another court. The common law writ of certiorari is an appropriate method of determining whether there has been a departure from the essential requirements of the law when the court enters an order transferring a case from the circuit court to the civil court of record as authorized by rule of civil procedure 1.39(b).⁶²

Time limitation for petitioning for common law writ of certiorari; statutory limitation of thirty days or court rule limitation of sixty days, which governs? In denying a motion to quash a petition for certiorari on the ground that the petition to review a judgment of the circuit court affirming the judgment of the civil court of record in *Drahota v. Taylor Construction Co.*⁶³ the court held that supreme court rule 22 enlarging the time limitation to sixty days governed. The court stated:

The contention of respondent on its motion to quash is therefore without merit, for we have repeatedly held that the time within which to petition for common-law certiorari cannot be limited by statute to a period of 30 days after the judgment of the circuit court.⁶⁴

The court has generally held that the statutory limitation of thirty days contained in section 33.12 of the Florida Statutes was of no effect but that its sixty day limitation was effective.⁶⁵

Statute of limitations substantive or procedural; within or without the rule making power. Scope of rule making power. An interesting case on this point is found in *Perry v. Allen*,⁶⁶ which involved rule 25 of the Federal Rules of Civil Procedure which provides:

61. *Feiner v. Sun Ray Drug Co. of Fla.*, 86 So.2d 891 (Fla. 1956).

62. *Tantillo v. Miliman*, 87 So.2d 413 (Fla. 1956).

63. 89 So.2d 16 (Fla. 1956).

64. *Warshaw-Seattle, Inc. v. Clark*, 85 So.2d 623, 625 (Fla. 1956); *Brinson v. Tharin*, 99 Fla. 696, 127 So. 313 (1930); *Palmer v. Johnson Const. Co.*, 97 Fla. 479, 121 So. 466 (1929). And see *Atlantic Coast Line R.R. v. Mack*, 64 So.2d 304 (Fla. 1952); *Wyman v. Nussbaum*, 159 Fla. 813, 32 So.2d 824 (1947).

65. See *Atlantic Coastline R.R. v. Mack* *supra* note 63.

66. 239 F.2d 107 (5th Cir. 1956).

"(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. . . ."

The district court dismissed the action and denied the plaintiff's motion to substitute the administrator of the deceased defendant, applying the quoted language as mandatory. But the court of appeals reversed, holding; "For the substantive law of limitations on the rights of substitution we must look to the general law, federal or state, governing such matters."

In holding that the Supreme Court of the United States was not competent to place an absolute time limit upon the assertion of a right, the opinion in the *Perry case*⁶⁷ relative to rule making states:

We are unable to agree with the position of appellee that 'Rule 25(a) operates . . . as a statute of limitations upon revivor . . . A 'statute' must, under well settled principles and as the word connotes, be the act of a legislative body. The placing of an absolute time limit upon the assertion of a right goes to the substance of the right even though such an Act is catalogued as relating to remedy alone. Such a limitation may be placed solely by the legislature and is beyond the competence of a court exercising its power to formulate rules of procedure. The Supreme Court spelled out its own concept of the rule-making power many years before the steps culminating in the federal rules of civil procedure had their inception. *Washington Southern Navigation Co. v. Baltimore and Philadelphia Steamboat Co.*, 263 U. S. 629, 635 (1924).

"The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a *principle of substantive law which has been established by statute or decisions*. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. . . ." [Emphasis added.]

For an interesting case touching on the distinction between substantive and procedural law in respect to a statute of limitations see *Ragan v. Merchants Transfer & Warehouse Co.*⁶⁸ where Federal Rule of Civil Procedure Rule 3 specifying the manner of commencement of a suit in the federal district courts was in conflict with a state statute specifying that for purposes of limitations of actions, the suit was to be commenced when the process is served.

67. *Ibid.*

68. 337 U.S. 530 (1946).

Effect of denial of petition for certiorari. In *Collier v. Homestead*⁶⁹ the court in denial of a petition for certiorari to review an interlocutory decree stated: "this denial of the petition for certiorari shall not be construed as passing on any of the issues in the litigation" but made no reference to *Hamel v. Danko*,⁷⁰ holding to the contrary. Doubtless the *Danko* case was not intended to be overruled. The *Danko* case held that "certiorari denied" has the effect of "decree affirmed."

The *Danko* case was adhered to in *Joseph T. Miller Construction Co. v. Borak*,⁷¹ when the court reaffirmed dictum in *Hunter v. Tyner*⁷² to the effect that a denial of certiorari "was an adjudication of the propriety of the order involved and it could not again be questioned in this appeal" i.e. a negative act was positive in effect.

Denial of petition for common law certiorari, not an affirmance. The mere denial of a petition for a common-law writ of certiorari is not to affirm the order or judgment of which review is sought. *Ruth v. United Fidelity & Guaranty Co.*,⁷³ *Contra* when on petition for certiorari in equity for review of interlocutory order or decree *Hamel v. Danko*,⁷⁴ but application of this latter doctrine is obviated by the new rules effective July 1, 1957. See Florida appellate rule 4.2. Denial of a petition for a common law certiorari is to be distinguished from petition for certiorari under court rule.⁷⁵

Petition for certiorari, reasons for granting, argument in support of. In seeking a common law writ of certiorari, to review the award of the Industrial Commission in a Workmen's Compensation case, pursuant to *Wilson v. McCoy Mfg. Co.*,⁷⁶ cite the court held in the case of *Moses v. R. H. Wright & Son, Inc.*,⁷⁷ that the "cause and reasons relied in for granting the writ" exacted by supreme court rule 22, correspond and are analogous to "assignments of error on appeal." The *Moses* case further held that it was inappropriate for the petitioner to consolidate his petition and brief in support thereof in one document since such procedure violates supreme court rules 16, 22 and 36 subdivision 6 and (e), and that the petition and brief in support thereof should be separated documents; and that the petition should contain an appendix of the material parts of the record in conformity with supreme court rule 16, subdivision 4, and rule 36, subdivision 6. The petitioner in the *Moses* case was doubtless influenced by

69. 81 So.2d 201 (Fla. 1955).

70. 82 So.2d 321 (Fla. 1955).

71. 82 So.2d 147 (Fla. 1955).

72. 151 Fla. 707, 10 So.2d 492 (1942).

73. 83 So.2d 769 (Fla. 1955).

74. See note 69 *supra*.

75. *Ibid.*

76. 69 So.2d 659 (Fla. 1954).

77. 90 So.2d 330 (Fla. 1956).

the new rules of the Supreme Court of the United States wherein rule 23 provides:

"1. The petition for certiorari shall contain in the order herein indicated . . .

* * *

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail * * *

3. All contentions in support of a petition for certiorari shall be set forth in the body of the petition, etc."