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Judicial Review

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INTRODUCTION

Keeping abreast of decisions dealing with the law of judicial review is of vital importance to the bench and bar. This article is a survey of Florida court decisions concerning appeal and error and certiorari. It covers decisions from 132 So.2d 341 to 155 So.2d 403, inclusive.¹ Cases dealing with criminal law and workmen's compensation are not included.

I. COURTS

Jurisdiction of state court where act of congress limits area to federal supervision. When an Act of Congress purports to vest jurisdiction over a given area in a federal agency, thereby excluding initial state control, a state court does not have jurisdiction to grant relief pursuant to a state statute.²

Appellate court must adjudicate each case on its merits. A circuit court, acting as an appellate court, should not have affirmed a conviction on the sole ground that the opinion of the district court of appeal in the prosecution of another case settled all of the points raised on appeal. Therefore, the case must be remanded to the circuit court to decide the appeal on its own merits.³

Power of an appellate court to enter a trial court decree. An appellate court will not enter a decree which should have been given by the trial court, as authorized under section 59.34 of the Florida Stat-

¹ The material in this survey includes cases from March 16, 1961, through August 31, 1963.
² Scherer & Sons, Inc. v. International Ladies’ Garment Workers, 142 So.2d 290 (Fla. 1962).
³ King v. State, 143 So.2d 458 (Fla. 1962) (review by certiorari).
utes, in the absence of a showing that the trial court had refused to follow or would not readily comply with the mandate of the reviewing court. 4

**No direct appeal to supreme court from a municipal court.** Article 5, section 4(2) of the Florida Constitution provides that appeals may be taken directly to the supreme court from final judgment directly passing on the validity of a “state statute.” However, a municipal ordinance is not a “state statute” and, therefore, the supreme court did not have jurisdiction of a direct appeal by defendants from a judgment of a municipal court passing upon the validity of a municipal ordinance. The appellee’s motion to dismiss the appeal would be treated as a motion to transfer the appeal to the circuit court for appropriate disposition. 5

**Determination that the application of a statute is unconstitutional does not render that case fraught with great public interest.** Article 5, section 4(2) of the Florida Constitution provides that the supreme court may review by certiorari any decision of a district court of appeal that passes on a question certified by the district court to be of “great public interest.” A case is not fraught with “great public interest” when it involves the determination that the application of a statute is unconstitutional under the circumstances of the case. 6

**Jurisdiction of the supreme court on appeal.** Article 5, sections 4(2) and 5(3) of the Florida Constitution excepts from judgments and orders appealable to district courts of appeal those from which appeals may be taken directly to the supreme court. In *Dade County v. Kelly,* 7 this provision was held to preclude an interlocutory appeal to the district court when an appeal from the final decree was exclusively within the jurisdiction of the supreme court.

Pursuant to article V, section 4(2) of the Florida Constitution, which grants jurisdiction to the supreme court of a case where the constitutionality of a statute is questioned, the supreme court has jurisdiction of an appeal when the effect of the decision of the district court of appeal is to render doubtful the constitutionality of a statute affecting a class of constitutional officers. 8

An appeal from the final decision of a trial court directly passing upon the validity of a state statute should be brought directly to the supreme court under article 5, section 4 of the Florida Constitution. 9

The supreme court does not have jurisdiction of a direct appeal from a decree which merely holds a statute unconstitutional as applied

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5. Dresner v. City of Tallahassee, 134 So.2d 228 (Fla. 1961).
7. 149 So.2d 382 (Fla. 3d Dist. 1963).
8. Tyson v. Lanier, 154 So.2d 313 (Fla. 1963).
under the facts of the particular case at bar without determining the validity of the statute per se.  

The fact that a complaint prays for a decree directly passing upon the validity of state statutes and construing the alleged controlling provisions of the Florida Constitution does not mean ipso facto that the decree entered in such a cause has complied with the relief demanded therein for the purpose of determining whether it is directly appealable to the supreme court.  

Appellate court should state grounds for reversal. An appellate decision reversing a trial court should be supported by a majority opinion for guidance of the trial court upon remand. The rule does not apply where the trial court is affirmed because the necessity for guidance upon remand is not then present.  

Questions “certified” should be addressed to court having appellate jurisdiction. Florida Appellate Rule 4.6 authorizes a judge of the “lower court” to certify a question or proposition of law “to the court for instruction.” When a circuit court as a “lower court” seeks an answer to a certified question, the certificate should be addressed to the appellate court which would have jurisdiction to pass upon the question should it be presented in a regular appellate proceeding. Any contrary interpretation would make it possible to obtain from the supreme court a determination of a proposition which otherwise would fall within the jurisdiction of a district court of appeal. By such a device, jurisdiction of the courts of appeal could be effectively circumvented.  

Subsequent appeal; when cause reversed and remanded to court of appeal. An opinion of the supreme court, was properly adopted by a district court of appeal as its own opinion, in accordance with a mandate of the supreme court directing that the cause be remanded to the trial court for further proceedings and a decree consistent with the supreme court’s opinion. This opinion was held to operate on the trial court’s decree only under the mandate of the district court of appeal. Therefore, an appeal from the new final decree entered by the trial court would go directly to the district court of appeal and only then to the supreme court if such an appeal were proper.  

Supreme court rule prevails over conflicting statute. Pursuant to article 5, section 3 of the Florida Constitution, a rule adopted by the supreme court pursuant to the constitution supersedes any legislative  

10. Snedeker v. Vernmar Ltd., 139 So.2d 682 (Fla. 1962).  
12. State v. Leveson, 147 So.2d 524 (Fla. 1962).  
enactment governing practice and procedure to the extent that the statute and the rule may be inconsistent.\(^{15}\)

The supreme court will not exercise jurisdiction when the decision of the district court of appeal does not express a clear majority opinion. When two judges of a district court of appeal favored affirmance on entirely different grounds and one judge favored reversal, there was no majority opinion supporting the judgment of the lower court in order to enable the supreme court to adjudicate the appeal. Consequently, jurisdiction of the cause was relinquished to the district court of appeal so that it could clarify the majority view and eliminate the apparent ambiguities.\(^{16}\)

Supersedeas, power of trial court to modify an order for. Trial courts in Florida have the authority to modify an order for supersedeas and, consequently, to permit substitution of the collateral posted in connection with the supersedeas bond, prior to the filing of the record in the appellate court.\(^{17}\)

II. Appeals

Order denying writ of mandamus, not appealable. An order granting a motion for a peremptory writ of mandamus is an appealable “final judgment” although the peremptory writ was never shown to have been issued. The “final judgment” was issued when the court ordered the issuance of the peremptory writ and not when the clerk issued the writ.\(^{18}\) However, an order quashing an alternative writ of mandamus was held not to be a final judgment and therefore was not appealable.\(^{19}\)

“Rendition” of final decree. Pursuant to Florida Appellate Rule 2.1-(b), the final decree is not “rendered,” for purposes of computing the time to appeal, until the order denying the timely motion for a rehearing is entered.\(^{20}\)

Appeal from an order entered subsequent to a final decree. All orders entered subsequent to a final decree are not necessarily interlocutory. In a proper case an order entered after the final decree may of itself constitute an adjudication so final in nature as to partake of the character of a final decree, and may, therefore, sustain an appeal. Such an order may be reviewed according to procedure relating to an interlocutory or a final appeal.\(^{21}\)

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\(^{15}\) Jaworski v. City of Opa-Locka, 149 So.2d 33 (Fla. 1963).

\(^{16}\) Solomon v. Sanitarians’ Registration Bd., 147 So.2d 132 (Fla. 1962).

\(^{17}\) Dade-Commonwealth Title Ins. Co. v. Biscayne Kennel Club, 136 So.2d 669 (Fla. 3d Dist. 1962).

\(^{18}\) Volusia County v. Eubank, 143 So.2d 865 (Fla. 1st Dist. 1962).

\(^{19}\) State v. Fink, 140 So.2d 612 (Fla. 3d Dist. 1962).

\(^{20}\) Pilgrim v. Melvin, 141 So.2d 298 (Fla. 1st Dist. 1962).

\(^{21}\) Shannon v. Shannon, 136 So.2d 253 (Fla. 1st Dist. 1962).
Neither directed verdict nor ruling on admissibility of evidence is appealable. An order directing a verdict is not a final judgment from which an appeal would lie, notwithstanding that final judgment was rendered subsequent to the date of filing the notice of appeal. An order overruling an objection to the introduction of evidence is reviewable on an appeal taken from the final decree, but such a ruling is not an appealable interlocutory order.

Motion to quash the appeal; burden of movant. On a motion to quash and affirm upon the ground that the appeal is frivolous, the movant must point out clearly and concisely the exact matter on which he bases his conclusion that the questions raised are of no substance. To substantiate such a conclusion the movant must demonstrate that a bare inspection of the record will readily disclose that the appeal is devoid of merit.

Misprision in the notice of appeal is not grounds for dismissal. An error in stating in the notice of appeal filed by the plaintiff that the appeal was taken by the defendant (and designating the law firm which signed the notice as “attorneys for defendant”) constituted a harmless mistake since no prejudice or inconvenience resulted to either party. The purpose of the procedural rules—to effect the proper administration of justice—justified the denial of a motion to dismiss the appeal.

Weight given on appeal to findings of a probate judge. The findings of a probate judge are given the same weight on appeal as the findings of any other trier of fact. Such findings will not be disturbed on appeal unless there was a palpable misconception of the facts, or a manifest misapprehension or misapplication of the law.

When granting a mistrial equates granting of a new trial; grounds not specified. The trial court refused to accept the jury’s verdict and issued an order which granted the plaintiff’s motion for a mistrial, denied the defendant’s motion for a judgment on the verdict, and permitted the plaintiff to proceed to a new trial. On appeal, the district court reversed on the grounds that the order was in nature and effect an order granting a new trial which was appealable, requiring the trial judge to give reasons for granting a new trial.

Scope of review on appeal in chancery. An appeal in chancery opens the whole case for the consideration of the appellate court, and cross-

23. C. G. J. Corp. v. Engel, 135 So.2d 431 (Fla. 3d Dist. 1961).
26. In re Winslow’s Estate, 147 So.2d 613 (Fla. 2d Dist. 1962).
assignments of error are unnecessary to entitle an appellee to relief or reversal of a decree containing reversible error, provided that the reviewing court exercises its right to examine the entire case as presented by the record. 28

No interlocutory appeal from an advisory order of a probate court. An interlocutory appeal cannot be taken from an order of the county judge's court in a probate matter when the order was largely advisory and prescriptive of the course which the case should follow in the future. 29

Specific rule controls over general rule. When several rules pertain to the same subject, they are to be construed together and in relation to each other. An illustrative case reviewed a proceeding to remove an executor. Florida Appellate Rule 5.9 is a general rule which provides that if an order is in whole or in part other than a money judgment, order, or decree, elements to be regarded in fixing amount and conditions of supersedeas bond shall be the cost of the action, of the appeal, interest, damages for delay, use, detention, and depreciation. It was held in this situation that Rule 5.9 must yield to Appellate Rule 5.3(b), a specific rule governing supersedeas bond in an appeal from an order removing an executor. 30

A matter determined in a prior appeal is "law of the case." On its first appeal, the plaintiff objected to the trial of an issue which it claimed was not presented by the pleadings; the district court of appeal directed the issue to be tried. Plaintiff then raised the identical issue on a subsequent appeal, which was dismissed because a party is not permitted a second review of a question determined on a previous appeal. 31

Merger of appeals. When one defendant, after entry of summary final decree for the plaintiff, filed notice of appeal naming all parties, and when one week later the second defendant did likewise, the second defendant's appeal was treated as a joinder in the first defendant's appeal and was merged into and became part of the first appeal. 32

Payment of costs prior to appeal. When a city, as an original plaintiff in an action against a motorist for damage to city property, suffers a money judgment against it on a counterclaim, it must pay costs and assign error on the taxing of costs as a prerequisite to the right to appeal, subject to an exemption excusing municipalities from filing a supersedeas bond, notwithstanding article V, section 5(3) of the Florida Constitution providing that such judgment is appealable "as a matter of right." 33

28. City of Miami v. Lehman, 134 So. 2d 527 (Fla. 3d Dist. 1961).
29. In re Hortt's Estate, 149 So.2d 907 (Fla. 2d Dist. 1963).
30. In re Cleary's Estate, 135 So.2d 428 (Fla. 2d Dist. 1961).
32. Deerfield Beach Bank v. Mager, 140 So.2d 120 (Fla. 2d Dist. 1963).
33. City of Miami v. Murphy, 132 So.2d 361 (Fla. 3d Dist. 1961), cert. discharged, 137 So.2d 825 (Fla. 1962).
However, when an appellant failed to comply with Florida Appellate Rule 3.2(f), requiring the payment of taxed costs prior to the filing of an appeal, and the appeal was ripe for final determination, such failure did not require a summary dismissal of the appeal, and appellant was granted time within which to comply, pay costs and interest or face dismissal.84

Correct judgment erroneously reached. The judgment of an inferior tribunal will not be reversed on appeal because erroneous reasons were applied in reaching a correct decision.85

Notice of appeal prior to entry of final judgment. A notice of appeal filed by a party prior to the "rendition" by the trial court of a final judgment cannot confer jurisdiction on the appellate court, and the appeal will be dismissed ex mero motu.86

No direct appeal to the supreme court from an opinionless dismissal by a district court of appeal. A decision of a district court of appeal cannot be the subject of a direct appeal to the supreme court when the district court dismissed without opinion or comment. The appeal in this case was dismissed without prejudice to the appellant.87

Full appeal taken from an interlocutory order. Pursuant to Florida Appellate Rule 4.2(a), a post-decretal order was an "interlocutory decree," not a "final decree," and the appeal therefrom should have been taken under such a rule governing "interlocutory appeals."88

An interlocutory order, basic to the final decree, may support jurisdiction. A direct appeal was taken to the supreme court for review of a summary judgment in a cause when the trial judge by interlocutory order held a state statute unconstitutional. The appellee raised the jurisdictional issue that, since the summary judgment itself did not contain a finding regarding the statute's invalidity, no direct appeal to the supreme court lies under article 5, section 4(2) of the Florida Constitution. The court allowed the appeal on the ground that an appeal from a final judgment brings up for review all interlocutory orders entered as a necessary step in the proceedings below, when such interlocutory orders are assigned as error and are basic to the final judgment and furnish jurisdictional grounds therefor.89

III. Right To Review

Estoppel by accepting the benefits of a decree or judgment. In Carter v. Carter,40 a wife who accepted the benefits granted to her under a

36. Tom v. State ex rel. Tom, 143 So.2d 226 (Fla. 2d Dist. 1962).
37. State ex rel. Emmanuel v. Cooper, 152 So.2d 471 (Fla. 1963).
38. Finneran v. Finneran, 137 So.2d 844 (Fla. 2d Dist. 1962).
40. 141 So.2d 591 (Fla. 1st Dist. 1962).
settlement agreement incorporated into the husband’s divorce decree, subsequently appealed the granting of the decree. The husband moved to dismiss the appeal on the ground that the wife had accepted the benefits accruing to her under the final decree. The court dismissed the appeal, with the following language: “It is a well established principle of law prevailing in this state 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 appeal.”

Effect of trial court erroneously taking judicial notice. When the chancellor erroneously took judicial notice of a fact that was readily susceptible of proof, and through understandable inadvertence or oversight such proof was omitted during the formal presentation before him, the ends of justice would best be served by remanding the cause for further testimony on that single issue.

Filing of appeal prior to the adjudication of post-verdict motions. On the taking of an appeal from a final judgment rendered prior to the entry of a written order on the appellant’s post-verdict motions, such motions are waived or abandoned.

IV. Parties

A defendant cannot appeal a judgment in favor of a co-defendant. A cross-claim in and of itself does not constitute an exception to the general rule that a defendant cannot appeal a judgment in favor of a co-defendant and against the original plaintiff. The judgment must prejudicially affect the cross-claim between the defendants in order to permit this kind of appeal.

Duties of appellant in perfecting the appeal. Notwithstanding the ministerial duties that under the rules of appellate procedure are imposed on court officials, the party suing out the appeal has the overall duty to see that all things are done in due season to perfect the appeal in the manner prescribed by the rules.

Duty of counsel to file briefs for clients who are appellees. Counsel will be well advised to perform the service of filing briefs on appeal on behalf of appellee-clients. The trial judge is also entitled at least as a matter of courtesy to have the active support of his rulings by those who ostensibly influenced the result at the trial level.

41. Id. at 592-93.
42. R. Bernardo & Sons, Inc. v. Duncan, 147 So.2d 542 (Fla. 1st Dist. 1962).
43. Bannister v. Hart, 144 So.2d 853 (Fla. 2d Dist. 1962).
44. Otis Elevator Co. v. Fontainebleau Hotel Corp., 137 So.2d 19 (Fla. 3d Dist. 1962).
45. Moore v. Joseph, 137 So.2d 584 (Fla. 1st Dist. 1962).
Satisfaction of joint and several liability by one party. When judgments have been rendered against two parties who are jointly and severally liable on an obligation, a full satisfaction of one of the judgments operates to release and satisfy the judgment rendered against the other.  

V. MAKING AND SAVING GROUNDS FOR REVIEW

Evidence excluded without proffer not reviewable. When counsel for the appellant failed to proffer the testimony of a witness after objections to questions were sustained by the trial court, such matter is not reviewable on appeal.

Exclusion of evidence for erroneous reason. Even though the trial court's exclusion of testimony was based upon an erroneous reason, it will not be disturbed on appeal when the exclusion was proper on a ground other than that specified by the trial court.

VI. PROCEDURE AND LIMITATION OF TIME

Appeal time 60 days, and not 30 days, from interlocutory order granting new trial in eminent domain. The Appellate Rules do not authorize an appeal from an order granting a new trial; however, Florida Statutes section 59.04 does authorize an appeal from an order granting a new trial. Section 73.14 of the Florida Statutes fixes a limitation of 30 days for an appeal from a final judgment in an eminent domain proceeding, and section 59.08 of the Florida Statutes fixes a limitation of 60 days on the right to appeal. In Dean v. State Road Dept, the supreme court held that the 60-day appeal time provided by section 59.08 expressly governs the appeal time of orders granting motions for new trial in eminent domain proceedings.

Time for appeal commences to run from time of entry of nunc pro tunc order and not from the day it is entered "as of." When a timely motion for judgment n. o. v. is made with an alternative motion for a new trial, a denial of the motion for a new trial does not by implication overrule the n. o. v. motion. Thus, when the motion for judgment n. o. v. is denied by a nunc pro tunc order (as of the time of the order denying the motion for a new trial), the time for appeal commences to run from the day of the entry of the nunc pro tunc order.

49. Hancock v. McDonald, 148 So.2d 56 (Fla. 1st Dist. 1963).
50. 156 So.2d 649 (Fla. 1963). The supreme court quashed a decision of the district court of appeal, holding that an appeal from an interlocutory order granting a new trial in eminent domain must be taken within 30 days since FLA. STAT. § 73.14 (1961) limited the time to appeal from a final judgment in such proceedings to 30 days. Dean v. State Road Dept', 144 So.2d 857 (Fla. 3d Dist. 1962).
Untimely filing of a motion with the court will not stay appeal time. Florida Rule of Civil Procedure 1.4(d) provides that “All original papers, copies of which are required to be served upon parties, shall be filed with the court either before service or immediately thereafter.” The appellant served a motion for a new trial upon the adverse party within 10 days after the rendition of the verdict as prescribed by Florida Rule of Civil Procedure 2.8(b), but did not file a copy thereof with the court until two days after the last day of the prescribed period. However, the timely service of the motion for a new trial controls because the language of the rule is directory and not mandatory, and allows a reasonable time for filing with the court.52

VII. SUPERSEDEAS OR STAY

A timely motion for authority to appeal tolls time. In a habeas corpus proceeding, the judge vacated the judgment and sentence, and did not authorize an appeal as required by section 79.11 of the Florida Statutes. The state moved for authority to appeal. Such a motion, seasonably filed, operated as a stay which extended the time otherwise allowed for an appeal.53

Effect of a supersedeas or stay upon a mandatory and a prohibitive injunction. In Miami v. Cuban Vil-Age Co.,54 a prohibitive injunction was issued restraining the city from interfering with the appellee's business until further order of the court. Subsequently, the chancellor entered a final decree granting to the appellee a mandatory injunction directing the city to issue certain municipal licenses. After filing a notice of appeal, which, pursuant to Florida Statutes section 59.14, operated as an automatic stay of the decree appealed, the city threatened to arrest the appellee for conducting its business without the necessary municipal licenses. However, a supersedeas or stay of a final decree is effective to prevent the operation of an executory mandatory injunction but is ineffective to stay the operation of a self-executing prohibitive injunction. Therefore, appellee was entitled to a constitutional writ to preserve the status quo pending final determination of the appeal.

"Three additional days" when notice of hearing is mailed not applicable to “filing” of notice of appeal. Florida Appellate Rule 3.4(b), which grants an additional three days for the service of a notice of appeal on adverse parties when mail is used, does not apply to the strict jurisdic-
tional requirements of Florida Statutes section 59.04 for filing notices of appeal. Therefore dismissal of the appeal was required where the notice of appeal was filed 61 days after rendition of the final decree and the last day for filing and conferring jurisdiction was not a legal holiday.\footnote{55. \textit{In re Walker's Trust}, 143 So.2d 363 (Fla. 2d Dist 1962).}

VIII. RECORD ON APPEAL

\textit{Scope of appellate review}. Appellate review is confined to the record on appeal. Hence, those portions of the appellee’s brief which go outside the record should be stricken on motion.\footnote{56. Sheldon v. Tiernan, 147 So.2d 593 (Fla. 2d Dist. 1962).}

\textit{Presumption of completeness of the record on appeal}. Unless the record shows to the contrary, it shall be presumed that the record transmitted to a reviewing court contains all proceedings in the lower court material to the points presented. Therefore, pursuant to Florida Appellate Rule 3.6(e), those portions of the appellee’s brief which are dehors the record should be stricken on motion.\footnote{57. Maistrosky v. Harvey, 133 So.2d 103 (Fla. 2d Dist. 1961).}

\textit{Evidence to be included in record on appeal}. Upon request of attorneys for the appellant, all the evidence which is adduced before a trial judge should be included in the record sent up for review.\footnote{58. Mitchell v. State, 142 So.2d 740 (Fla. 2d Dist. 1962).}

\textit{Effect of an incomplete record on appeal}. An appellant who desires review of findings of fact must bring to the appellate forum the entire record of the proceedings below. When the record on appeal fails to include the entire testimony before the trial court, all findings of fact must be affirmed.\footnote{59. Phillips v. Blum, 139 So.2d 459 (Fla. 3d Dist. 1962).}

An appellate court is not authorized to consider and resolve assigned error when the record on appeal is deficient because testimony allegedly contrary to the holding below,\footnote{60. Widmeyer v. Olds, 144 So.2d 825 (Fla. 2d Dist. 1962).} or to the order appealed from,\footnote{61. Stuco Corp. v. Gates, 145 So.2d 527 (Fla. 2d Dist. 1962).} or to the instructions given or denied by the trial court,\footnote{62. Crosby v. Stubblebine, 142 So.2d 358 (Fla. 2d Dist. 1962).} was not sent up in the transcript of record.

\textit{Failure to provide the appellate court with a transcript of the record below}. A decree appealed from is accorded a presumption of correctness and will be affirmed unless the appellant successfully shows prejudicial error in the record of the proceedings below. The appellant does not satisfy the burden to make reversible error appear when it seeks review of a decree based partially or wholly on testimony which is not in the record on appeal.\footnote{63. Lyden v. DePiera, 147 So.2d 573 (Fla. 3d Dist. 1962); Downing v. Bird, 145}
Duty of appellant to avail the reviewing court of the record connected with the asserted errors. An appellant's contentions cannot be decided by the reviewing court when they require consideration of the record which was before the trial judge and there is a failure to bring the record before the appellate court.64

Insufficiency of record on appeal from an order granting a directed verdict. An order granting the defendant's motion for a directed verdict at the close of all the evidence must be affirmed on appeal when the transcript submitted to the appellate court contained only the testimony introduced by the plaintiff, since the record was inadequate to review the trial court's ruling that there was insufficient evidence of the defendant's negligence to take the case to the jury.65

IX. BRIEFS AND ASSIGNMENTS OF ERROR

Insufficient assignment of error not reviewable on appeal. Florida Appellate Rule 3.5(c) relating to assignment of errors has been amended66 to read:

c. Essentials. The assignments or cross assignments of error shall designate identified judicial acts which should be stated as they occurred; grounds for error need not be stated in the assignment.

The amended rule has been construed to mean that an assignment of error must be addressed to an identified judicial act, "that it is the judicial act which . . . should be assigned as error and not the reasons why the appellant considers the act to be legally erroneous . . ." and that grounds or reasons for the error assigned would be covered by the legal points raised in the brief.67

Failure to include assignments of error in the appendix to the brief. Errors allegedly committed by the lower court cannot be considered on appeal when the appendix to the brief contains nothing on which the reviewing court can consider an assignment of error.68

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64. Gilson v. Murphy, Fearnley & Yawn, Inc., 151 So.2d 447 (Fla. 2d Dist. 1963).
66. FLA. R. APP. P. 3.5(c) formerly provided:
Contents. The assignments of error shall point out clearly and distinctly all alleged errors of the lower court relied on for reversal. Where the alleged errors are based on orders, evidence or charges such matters shall be specifically referred to . . . .

Under this wording, an assignment of error merely complaining that the judgment below was contrary to the evidence and to the law, or that the trial court erred in entering its final decree, was insufficient under the rule and presented nothing for review.
See Gregg v. State Road Dep't, 140 So.2d 328 (Fla. 1st Dist. 1962); Hornsby v. Tingle, 134 So.2d 540 (Fla. 1st Dist. 1961).
68. Union Trust Co. v. Baker, 143 So.2d 565 (Fla. 2d Dist. 1962).
Unnecessary to include testimony in the appendix to the brief when a separate transcript of the testimony is supplied. Under Florida Appellate Rule 3.7(f)(5), an appellant is not required to include any part of the testimony in his appendix when the transcript of the testimony was bound and paged separately.69

Failure of appellant to furnish a copy of the transcript of record and to include an appendix in the brief. When a copy of the record was served after the filing of a motion to dismiss an appeal, no dismissal would lie when there was no showing that the appellee was prejudiced thereby. However, failure of the appellant to include an appendix in its brief required the brief to be stricken with leave granted to file a new brief.70

X. Review

Scope of Review on a certified question. Pursuant to article 5, section 4 of the Florida Constitution, the supreme court may explore the entire record in arriving at its conclusion when a decision has been certified to it by a district court of appeal.71

Refusal to determine “certified questions” already decided. When it appears that the trial court already has made a judicial determination of the primary questions certified to the district court of appeal, there is no basis for entertaining the certified questions and the certificate will be denied.72

Presumption of correctness on appeal of the proceedings below. Appellant must have all matter necessary to sustain its contentions on appeal included in the record because the reviewing court will presume that the order appealed from was properly entered unless the record presented demonstrates that it was not.73

Strong presumption of correctness of an interlocutory order denying motion to dismiss a complaint. The principle that all orders come to a reviewing court with a presumption of correctness is especially strong when applied to an interlocutory appeal from an order denying a motion to dismiss, when the progress of the cause is delayed pending a review of the trial judge’s decision. For an appellate court to reverse the denial of a motion to dismiss a complaint, it must appear clearly that the pleading entirely fails to state a cause of action.74

69. Morris v. Rabara, 145 So.2d 265 (Fla. 2d Dist. 1962).
73. Amphicar Corp. of America v. Gregstad Distrib. Corp., 138 So.2d 383 (Fla. 3d Dist. 1962).
Presumption of correctness on appeal of order granting a new trial. Although an order of the trial court granting a new trial is entitled to great weight by a reviewing court, it is not rendered impervious to appellate review by a statement of the trial judge that his judicial conscience was shocked by the alleged excessiveness of the jury's verdict. Therefore, such an order may be reversed by the reviewing court in an appropriate appellate proceeding.\textsuperscript{75}

Court order granting a new trial must state grounds therefor. Pursuant to section 59.07(4) of the Florida Statutes and Rule 2.6(d) of the Florida Rules of Civil Procedure, the requirement that the order granting a new trial shall state the grounds upon which the new trial is ordered is mandatory.\textsuperscript{76} For failure of the trial court to state the grounds upon which an order granting a new trial was based, an order was required to be reversed on appeal and remanded with directions to reinstate the verdict and enter judgment therein, unless a motion in arrest of judgment or a judgment n. o. v. be granted.\textsuperscript{77}

Scope of review on appeal from an order granting a new trial. Pursuant to section 59.07(4) of the Florida Statutes, a court reviewing an appeal from an order granting a new trial may consider only the grounds assigned by the trial judge as a basis for his order.\textsuperscript{78} Therefore, cross-assignments of error addressed to rulings of the trial court during the progress of the trial may not be considered on appeal under the statute's limited scope of review, and a review of grounds not designated by the trial judge as a basis for his order must await review on assignments of error in an appeal from a final judgment.\textsuperscript{79}

Motion for a new trial not a prerequisite to review of order denying motion for a directed verdict. A contention that the verdict is contrary to the manifest weight of the evidence cannot be reviewed on appeal in the absence of a motion for a new trial; however, such a motion is not necessary when the appellants question the complete absence of any evidence to support the verdict and judgment by a motion for a directed verdict at the close of all the evidence.\textsuperscript{80}

Non-appealability of an order denying a petition for rehearing. An order denying a petition for rehearing is in effect nonappealable when it presents no issue for review other than those finally determined by a decree from which no appeal was taken.\textsuperscript{81}

\textsuperscript{75} Russo v. Clark, 147 So.2d 1 (Fla. 1962) (on rehearing).
\textsuperscript{76} Hambett v. Lyte Lyne, Inc., 150 So.2d 235 (Fla. 1963).
\textsuperscript{77} Hutchins v. City of Hialeah, 153 So.2d 864 (Fla. 3d Dist. 1963); A & P Bakery Supply & Equip. Co. v. Hexter & Son, Inc., 149 So.2d 883 (Fla. 3d Dist. 1963); Webb's City, Inc. v. Lugerner, 138 So.2d 531 (Fla. 2d Dist. 1962); Ponte v. Lattin, 135 So.2d 260 (Fla. 3d Dist. 1961).
\textsuperscript{78} Kraus v. Osteen, 135 So.2d 885 (Fla. 2d Dist. 1961).
\textsuperscript{79} Messina v. Baldi, 135 So.2d 17 (Fla. 3d Dist. 1961).
\textsuperscript{80} Sheehan v. Allred, 146 So.2d 760 (Fla. 1st Dist. 1962).
\textsuperscript{81} Oxford v. Folk Fed. Sav. & Loan Ass'n, 147 So.2d 603 (Fla. 2d Dist. 1962).
An order setting aside on rehearing a summary final decree is not appealable. An order setting aside on rehearing a summary final decree is not an "appealable interlocutory order" within the purview of section 59.02 of the Florida Statutes because to determine the correctness thereof, the appellate court would be required to consider the final decree and record upon which it was predicated.\(^\text{82}\)

Appeal taken before determination of appellee's petition for rehearing. A reviewing court lacks jurisdiction over an appeal taken by the appellant while the appellee's petition for rehearing is pending. Such procedure would allow an appellant to deprive the appellee of a ruling on the petition for rehearing and of the incidental right to cross-assign error.\(^\text{83}\)

"Clearly erroneous" rule not fully applied when the decision below rendered solely on the pleadings and depositions. When the cause came on for a final hearing on the stipulation of the parties that the trial judge was to adjudicate the case solely on the pleadings and depositions, the reviewing court was in the same position in examining the record as was the trial judge. Consequently, presumptions as to the determination of evidentiary matters were not as strong on the record as on one which presented conflicting testimony heard by the trier of facts.\(^\text{84}\)

Court can review only the judgment explicitly appealed from. The trial court, with the consent of counsel, submitted separate verdict forms for a complaint and a counterclaim, and entered two judgments. When the plaintiff appealed only from the judgment on the complaint, the appellate court could not consider claims which went exclusively to the judgment on the counterclaim.\(^\text{85}\)

Notice of appeal transfers jurisdiction of the cause to the appellate court. The trial judge properly denied an application for leave to file an answer and for a rehearing, when the party who made the application had already appealed to the supreme court, because notice of appeal transferred complete jurisdiction in the cause to the supreme court, and the party who made the application abandoned the petition for rehearing by having filed a notice of appeal.\(^\text{86}\)

No appellate review of a decree not made the subject of the notice of appeal. An appellate court cannot determine the correctness of the denial of a motion to modify a decree if the final decree to be considered and the record upon which it is predicated have not been made the subject of a notice of appeal.\(^\text{87}\)

\(^{82}\) Jones v. Wilson, 146 So.2d 784 (Fla. 2d Dist. 1962).
\(^{83}\) Edelbut Constr. Co. v. Free, 149 So.2d 360 (Fla. 2d Dist. 1963).
\(^{84}\) L & S Enterprises, Inc. v. Miami Tile & Terrazzo, Inc., 148 So.2d 299 (Fla. 3d Dist. 1963).
\(^{85}\) Karden v. Hatfield, 143 So.2d 208 (Fla. 3d Dist. 1962).
\(^{86}\) State v. Florida State Turnpike Authority, 134 So.2d 12 (Fla. 1961).
\(^{87}\) Taborsky v. Mathews, 137 So.2d 880 (Fla. 2d Dist. 1962).
Appealability of a "split" judgment. When the plaintiff sues several defendants, a partial or "split" judgment dismissing the suit against less than all of the defendants without permitting the plaintiff to amend the complaint is an appealable final judgment. 88

Judgment of dismissal res judicata as to the complaint; not the cause of action. The court in Hardee v. Gordon Thompson Chevrolet, Inc., 89 construed amended Rule 1.35(b) of the Florida Rules of Civil Procedure. It held that in sustaining defendant's motion to dismiss for failure to state a cause of action, it was not error to dismiss the complaint "with prejudice" because the complaint was in fact insufficient, for the ruling was not on plaintiff's cause of action. The court in effect held that the judgment of dismissal was res judicata on the sufficiency of the complaint to state a cause of action, "but the dismissal does not constitute an adjudication on the merits of any other cause of action plaintiff may have on any separate or different theory of law." 90

XI. DISMISSAL

Dismissal as to a party is a final decree. A decree dismissing a cause as to named defendants with prejudice is a "final decree" as distinguished from an "interlocutory decree," because it terminates the litigation as to them. 91

Order sustaining motion to dismiss is not a dismissal or an appealable final judgment. When a motion to dismiss was granted upon the sole ground that the complaint did not state a cause of action and the only part that could be considered a judgment was the lower court's order granting the "motion" with prejudice, the appeal must be dismissed sua sponte for lack of a final judgment. 92

XII. CERTIORARI

Jurisdiction of the supreme court on a petition for certiorari. Pursuant to article 5, section 4(2) of the Florida Constitution, the supreme court has jurisdiction of a petition for certiorari to review the decision of a district court of appeal when such a determination conflicts with the rule of other supreme court cases. 93

"Class" of constitutional or state officers, construed. The purpose

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89. 154 So.2d 174 (Fla. 1st Dist. 1963).
90. For decisional law unimpaired by statute or rule of court see Rice v. White, 147 So.2d 204 (Fla. 1st Dist. 1962). See also Restatement, Judgments § 850(c); Barns & Mattis, Amendments to Florida Rules of Civil Procedure, 17 U. Miami L. Rev. 276, 286, n.33 (1963).
91. McMullen v. McMullen, 145 So.2d 568 (Fla. 2d Dist. 1962).
of article 5, section 4 of the Florida Constitution, giving the supreme
court jurisdiction to review by certiorari any decision of a district court
of appeal that affects a "class" of constitutional or state officers, is to
permit the supreme court to review a decision which directly affects one
state officer and in so doing similarly affects other state officers in the
same category. 84

Common law certiorari is available only where the appellate remedy
is inadequate. It is only in exceptional cases, when the remedy by appeal
will be inadequate, that an appellate court will exercise its discretionary
power to issue the common law writ of certiorari in an action at law. 85

Scope of review on common law writ of certiorari. Certiorari is a
discretionary writ, which may not be employed to reweigh or to reevaluate
evidence, but can be used by an appellate court to examine the record in
order to determine whether the lower tribunal had before it competent
substantial evidence to support its findings and judgment according to
the essential requirements of the law. 86

Certiorari: supreme court's scope of review, when granted. On
certiorari granted by the supreme court, its scope of review extends to a
determination of whether the opinion and judgment of the lower court
is correct, which may involve a consideration of non-jurisdictional
grounds. 87 Furthermore, the supreme court can examine the trial court
record and measure the correctness of the district court's decision by the
court's own conclusion based upon such an examination. 88

Certiorari will be denied when appellate review is available. A writ
of certiorari does not lie when an order dismissing plaintiff's cause for
improper venue could be reviewed by interlocutory appeal. Since the
petition for a writ of certiorari may not be treated as an appeal, it must
be dismissed for lack of jurisdiction. 89

An appeal of an interlocutory order may be treated as a petition for
certiorari. Section 59.45 of the Florida Statutes provides:

Misconception of remedy; supreme court. If an appeal be im-
providently taken where the remedy might have been more
properly sought by certiorari, this alone shall not be ground for
dismissal; but the notice of appeal and the record thereon shall
be regarded and acted on as a petition for certiorari duly pre-
sented to the supreme court.

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84. Florida State Bd. of Health v. Lewis, 149 So.2d 41 (Fla. 1963).
86. Cast-Crete Corp. v. Prater, 134 So.2d 813 (Fla. 2d Dist. 1961); Nugent v.
Florida Hotel & Restaurant Comm'n, 147 So.2d 606 (Fla. 2d Dist. 1962).
87. Giblin v. City of Coral Gables, 149 So.2d 561 (Fla. 1963); Pan Am. Bank of Miami
v. Alliegro, 149 So.2d 45 (Fla. 1963).
88. James v. Keene, 133 So.2d 297 (Fla. 1961); Confederation of Canada Life Ins. Co.
v. Vega y Arminan, 144 So.2d 805 (Fla. 1962).
89. Tel Service Co. v. Hendricks, 139 So.2d 436 (Fla. 2d Dist. 1962).
A district court has construed this provision to mean that appeals seeking review of an interlocutory order in a common law action may be treated as petitions for certiorari.\(^\text{100}\)

**Review of interlocutory orders at law by certiorari.** Ordinarily certiorari will not issue to review interlocutory orders at law which are reviewable on an appeal from a final judgment. However, certiorari is the proper remedy when the interlocutory order may reasonably be held to cause material injury throughout the subsequent proceedings for which a remedy by appeal will be inadequate.\(^\text{101}\)

**Effect of a denial of certiorari.** In the landmark case of *Maryland v. Baltimore Radio Show Inc.*,\(^\text{102}\) the United States Supreme Court established the rule that a denial of certiorari carries with it no implication whatever regarding the views of the Court on the merits of the case. The Florida supreme court followed this view in *Collier v. City of Homestead*.\(^\text{103}\)

However, the Florida court in *Hamel v. Danko*,\(^\text{104}\) decided subsequent to *Collier*, declared unconstitutional section 59.021 of the Florida Statutes, which provided that denial of a petition for certiorari shall have no greater force and effect than a denial of a further exercise of jurisdiction. It said this was an unconstitutional invasion by the legislature of functions exclusively vested in the judiciary, and held that a denial of certiorari establishes the law on the issues denied review.

However, in the subsequent case of *Southern Bell Tel. & Tel. Co. v. Bell*,\(^\text{105}\) the court followed *Collier* and implicitly adopted the United States Supreme Court view when it stated:

> While it is so well established as not to require explanation, we point out here again that denial of certiorari by an appellate court cannot be construed as a determination of the issues presented in the petition therefor and cannot be utilized as precedent or authority for or against the propositions urged or defended in such proceedings.

The most recent Florida decisions follow this rule.\(^\text{106}\)

**Denial of petition for certiorari appealable as final judgment.** The denial by a circuit court of a petition for a writ of certiorari to review

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\(^\text{100}\) Lovi v. North Shore Bank, 137 So.2d 585 (Fla. 3d Dist. 1962).

\(^\text{101}\) Suez Co. v. Hodgins, 137 So.2d 231 (Fla. 3d Dist. 1962).

\(^\text{102}\) 338 U.S. 912 (1949).

\(^\text{103}\) 81 So.2d 201 (Fla. 1955).

\(^\text{104}\) 82 So.2d 321 (Fla. 1955).

\(^\text{105}\) 116 So.2d 617, 619 (Fla. 1959).

\(^\text{106}\) Florida Real Estate Comm'n v. Harris, 134 So.2d 785 (Fla. 1961); Allen v. City of Miami, 147 So.2d 566 (Fla. 3d Dist. 1962); State v. Edwards, 135 So.2d 889 (Fla. 2d Dist. 1961).
the judgment of an administrative board is an appealable final judgment within the jurisdiction of the district court of appeal.\textsuperscript{107}

\textit{Certiorari to review a conflict created by an appellate court’s misinterpretation of the case at bar.} The supreme court will grant a writ of certiorari to the district court of appeal on the ground that a decision of the district court created a conflict by erroneously accepting an earlier supreme court decision as controlling.\textsuperscript{108}

\textbf{Procedure for obtaining certiorari when a conflict of decisions exists.} Under article 5, section 4(2) of the Florida Constitution, a petition for certiorari may be granted on the ground of a conflict between the decision sought to be reviewed and a decision of another district court of appeal or of the supreme court on the same point of law. However, the granting of the petition is not a commitment that the court has jurisdiction but rather indicates that the advice of counsel on the question of jurisdiction, as well as on the merits, is desired.\textsuperscript{109}

\textbf{Test used to determine the supreme court’s jurisdiction by certiorari in a conflict situation.} The test of the supreme court’s jurisdiction, under article 5, section 4(2) of the Florida Constitution, to review by certiorari a decision of a district court of appeal which allegedly conflicts with a prior decision of the supreme court on the same point of law, is not measured by the supreme court’s view regarding the correctness of the decision of the district court. Rather, it depends on whether the district court’s decision, if permitted to stand, would be out of harmony with a prior decision of the supreme court on the same point, thereby generating confusion and instability among precedents.\textsuperscript{110}

\textbf{Untimely petition for certiorari does not stay the proceedings below.} Although a petition for certiorari filed after the expiration of the required fifteen-day period was not timely filed, and therefore did not automatically stay the proceedings in the lower court, the supreme court ordered a stay when the district court of appeal certified that its decision passed upon a question of great public interest.\textsuperscript{111}

\begin{itemize}
\item\textsuperscript{107} Morris v. City of Hialeah, 140 So.2d 615 (Fla. 3d Dist. 1962).
\item\textsuperscript{108} McBurnette v. Playground Equip. Corp., 137 So.2d 563 (Fla. 1962).
\item\textsuperscript{109} Fusco v. Heymann, 139 So.2d 688 (Fla. 1962).
\item\textsuperscript{110} Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).
\item\textsuperscript{111} City of Coral Gables v. Burgin, 138 So.2d 512 (Fla. 1962).
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