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Civil Procedure

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CIVIL PROCEDURE

M. MINNETTE MASSEY* AND MARION WESTEN**

Rule amendments,¹ effective January 1, 1966, and judicial activity accounted for substantial changes in the field of Civil Procedure during the period of this *Survey*.² The adoption of third party practice,³ the absolute right of one dismissal without prejudice (nonsuit?),⁴ provision for depositions in foreign countries,⁵ and reform re substitution⁶ illustrate several of the major areas of change which took place through the recent amendments to the Florida Rules of Civil Procedure. These and other important amendments and judicial interpretations are contained herein.

The style of this article follows that of the Florida Rules of Civil Procedure and of previous *Survey* articles, with the subject matter being divided into three principal headings and appropriate sub-headings, to wit:

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1. *In re Fla. Rules of Civil Procedure, 1965 Revision*, 178 So.2d 15 (Fla. 1965) [hereinafter cited as 1965 REVISION].

On June 15, 1966, the Supreme Court of Florida, 187 So.2d 598 (Fla. 1966), adopted the Rules of Civil Procedure 1967 Revision, effective after midnight December 31, 1966. The major thrust of the Revision is the procedural consolidation of Law and Equity. Rule 1.040 provides that "[t]here shall be one form of action to be known as a civil action." The State of Florida now will be truly a code pleading jurisdiction.

The statutorily styled numbering system of the rules leaves much to be desired. Its contribution will be negative and leads to unnecessary confusion.

The committee notes are also inadequate. There is a general absence of cross-referencing between the prior Florida Rules and those most recently adopted. In addition thereto, there are all too few references to the corresponding Federal Rules.

Well might the bench, bar and law students cry out like Queen Gertrude:

"One woe doth tread upon
another's heel,
so fast they follow."

2. This article considers the cases reported in Volumes 156-177 So.2d, inclusive.

3. FLA. R. CIV. P. 1.41.

4. FLA. R. CIV. P. 1.35(a).

5. FLA. R. CIV. P. 1.23(b).

6. FLA. R. CIV. P. 1.19.

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I. LAW AND EQUITY

A. Process

1. RIGHT OF PROCESS

A trial judge does not have discretion to refuse to permit process to issue. In *Linning v. Duncan*⁷ the judge refused to issue process based upon his belief that he was statutorily required to hear the claim “not more than twenty-one (21) days from the date of mailing such notice. . . .”⁸ The appellate court construed the statute in light of the requirements of due process of law, and held that the prompt and expeditious issuance of process and service thereof is required in every instance as soon as an action is commenced.

If, because of the congested condition of the trial calendar, a hearing cannot be held upon the return date of process as provided by the statute, the court may of its own motion enter an order continuing the trial date until such time as its calendar will permit the trial to be scheduled.⁹

7. 169 So.2d 862 (Fla. 1st Dist. 1965).
 8. Fla. Laws 1957, ch. 57-961, § 3.
 9. *Supra* note 7, at 865.

2. CONSEQUENCES OF INSUFFICIENT OR NO PROCESS

a. Setting Aside Default Judgment

One month after the entry of the judgment, the appellant-corporation moved to set aside a default judgment, and for leave to file its answer.¹⁰ Service of process had been attempted on the corporation by serving, as president, an individual co-defendant who had no connection with the corporation at the time of suit. The Secretary of State had incorrectly advised the plaintiff's counsel that the named individual was the president, and that no designation of resident agent had been made. The appellate court¹¹ held that under the facts the trial court grossly had abused its discretion in refusing to set aside the judgment.

b. Dissolving Temporary Injunction

In *Pascal v. George Davis & Co.*,¹² after the trial court entered a temporary injunction, the defendant moved to dismiss the complaint and dissolve the injunction for lack of jurisdiction over his person. There was no service of process upon the defendant. The appellate court affirmed the denial of motion to dismiss the complaint, but reversed the denial of the motion to dissolve the temporary injunction. The chancellor has the power to issue the temporary injunction prior to service of process; however, it is then incumbent upon the plaintiff to cause service to be made upon the defendant within a reasonable time after the institution of the suit.

[T]he mere fact that the temporary injunction is dissolved [because of the failure to secure service of process upon the defendant] will not remove the defendant from the effect thereof in the event a permanent injunction should be entered after service of process and subsequent to final hearing.¹³

3. ACTING WITHIN JURISDICTION—NON-RESIDENTS

A competent court cannot render an enforceable judgment unless the party seeking it obtains judicial jurisdiction over the defendant. Several recent cases in this area touched upon the peculiar problems concerning non-residents, individual and corporate. Traditionally the problems lend themselves to classification in the conflict of laws field. Such problems involving non-residence, viz, motorists, corporations, business

10. The motion also stated a meritorius defense. See *North Shore Hosp., Inc. v. Barber*, 143 So.2d 849, 852 (Fla. 1962); *Florida Civil Practice Before Trial*, § 18.6 (1963).

11. *Holiday Ranch, Inc. v. Roudabush*, 171 So.2d 558 (Fla. 2d Dist. 1965).

12. 170 So.2d 466 (Fla. 3d Dist. 1965).

13. *Id.* at 467. In dissent Judge T. Pearson stated:

I cannot agree that the defendant will be bound by *the terms* of the temporary injunction in the event a permanent injunction is subsequently entered. (Emphasis added.)

ventures, insurance companies, and property owners have been carefully analyzed in this issue as part of the *Survey of Conflicts of Law*.

4. RULE AMENDMENTS

Subsections (b), (d), (e) and (g) of Rule 1.3¹⁴ have been amended by adding (or, where more appropriate, by substituting) the general term "process" to (or for) summons in these subsections so as to make it more clear that the appropriate original process is to be issued by the clerk.¹⁵

5. LEGISLATION

a. Aircraft and Watercraft Operators

The statute enacted in 1959 applicable to non-resident operators of watercraft was expanded in 1965 to include operators of aircraft. Under the statute, they are deemed to have appointed the Secretary of State as their agent for service in any action against them "growing out of any accident or collision in which such non-residents . . . may be involved while . . . operating, navigating or maintaining an aircraft . . . in the state."¹⁶

b. Nonresident Charitable Organizations

Charitable organizations which have their "principal place of business without the state, or are organized under and by virtue of the laws of a foreign state" and "solicit contributions from people in this state" are not only subject to the provisions of this act, but also "shall be deemed to have irrevocably appointed the Secretary of State" as their agent for service of process in "any action or proceeding brought under the provisions of [. . . the Solicitation of Charitable Funds Act]."¹⁷

c. Personal Representatives

Whoever shall be issued letters of administration of a decedent's estate must designate some resident of the county as his agent or attorney for the service of process, which designation

shall be taken to constitute the consent of the person so designated that service of any process upon the designated agent or attorney shall be sufficient to find the person so designating in any suit or action against such personal representative, either in his representative capacity or personally; provided that such personal action must have accrued in the administration of such estate.¹⁸

14. FLA. R. CIV. P. 1.3, as amended, 1965 REVISION, at 17.

15. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132 (1965).

16. FLA. STAT. § 47.162 (1965).

17. Fla. Laws 1965, ch. 65-218, § 12.

18. FLA. STAT. § 732.45(2) (1965).

This rule applies to any personal representative, resident or non-resident of Florida, but not to corporate fiduciaries.

B. Venue

1. NON-RESIDENTS

Under the common law, venue of a transitory action was proper in any county where jurisdiction over the person of the defendant could be secured, but service of process could not be obtained outside of the county of issuance. Florida's general venue statute¹⁹ had been held to remove non-residents from its scope and was regarded as a limitation on the common law right to bring an action in any county where the defendant could be found.²⁰ The 1963 Legislature eliminated the second paragraph of the statute,²¹ eliminating the provisions requiring the filing of an affidavit of good faith and establishing the non-applicability of the venue statute to non-residents. The revisor's notes attached to the statute indicate that the good faith requirement is considered obsolete and superfluous in view of Rule 1.5(a) of the Rules of Civil Procedure.²²

In *Jones v. Christina*,²³ the plaintiff sued Massachusetts defendants in the Dade County Circuit Court for injuries arising out of an automobile accident in Sumter County. The defendants moved to dismiss or to transfer on the ground that the venue was improperly laid in Dade County since the cause of action had not arisen there. The defendants' contention was based upon the 1963 amendment of section 46.01 which eliminated "[t]his section shall not apply to suits against non-residents."²⁴

The trial court held that the amending section was enacted contrary to article III, section 16 of the Florida Constitution, and denied the defendants' motion. On March 23, 1965, the Third District Court of Appeal affirmed and then certified the case to the Supreme Court of Florida as one dealing with a question of "great public interest."

Subsequently, the 1965 Legislature adopted the Omnibus Bill, re-

19. FLA. STAT. § 46.01 (1965):

Where suits may be begun.—Suits shall be begun only in the county (or if the suit is in the justice of the peace court in the justice's district) where the defendant resides, or where the cause of action accrued, or where the property in litigation is located.

If brought in any county or justice district where the defendant does not reside, the plaintiff, or some person in his behalf, shall make and file with the complaint, an affidavit that the suit is brought in good faith, and with no intention to annoy the defendant. *This section shall not apply to suits against non-residents.* (Emphasis supplied.)

20. State *ex rel.* Bernhart v. Barrs, 152 Fla. 631, 12 So.2d 576 (1943).

21. Fla. Laws 1963, ch. 63-572, § 12; FLA. STAT. § 46.01 (1963).

22. Fla. Laws 1963, ch. 63-572, § 12.

23. *Jones v. Christina*, 172 So.2d 855 (Fla. 3d Dist. 1965).

24. *Supra* note 19.

enacting the 1963 statutes. This bill was signed by the governor on April 19, 1965, and was filed in the Secretary of State's office on the following day. It took effect immediately upon becoming law. By section 6 of this statute²⁵ the Legislature re-inserted the provision rendering venue provisions of the statute inapplicable to non-residents. Thus the confusion created by the 1963 enactment was remedied.²⁶

2. VENUE IN CAUSES OF ACTIONS ARISING FROM CONTRACTUAL RELATIONS

A contract which requires the payment of money in its fulfillment, but which does not specify the place of payment, will be construed to imply that the place of residence or place where offices are maintained by the payee is the contemplated place of payment.²⁷ Three recent decisions adhere to this previously established position.²⁸ In one of the three, the supreme court²⁹ reaffirmed the stated doctrine in an action in general assumpsit on an implied contract for reasonable value for a broker's service:

The law appears settled that an action of this kind may be maintained in the county of plaintiff's residence. Several sessions of the Florida legislature have elapsed since the interpretation of F.S. § 46.01, in *Croker v. Powell*, occurred without modification thereof by the legislative branch. No good purpose would be served to judicially change this rule of venue long established and followed in this state.³⁰

The plaintiff, a domestic corporation with its principal place of business in Duval County brought an action there to rescind a purchase of securities consummated in Orange County. The sale was alleged to be in violation of the statute.³¹ The defendant maintained no office nor trans-

25. Fla. Laws 1965, ch. 65-2, § 6: FLA. STAT. § 46.01 (1961), is amended to read: 46.01 *Where suits may be begun*.—Suits shall be begun only in the county (or if the suit is in the justice of the peace court in the justice's district) where the defendant resides, or where the cause of action accrued, or where the property in litigation is located. *This section shall not apply to suits against non-residents.*

(*Reviser's note.* The above amendment to section 46.01, Florida Statutes, 1961, removes only that provision of said section which has been superseded by the Florida Rules of Civil Procedure and retains all the provisions of the section relating to venue.)

26. On certiorari the supreme court reversed the holding that the subject statute was unconstitutional and affirmed the district court of appeal's action in refusing to apply FLA. STAT. 46.01 to non-residents. *Jones v. Christina*, 184 So.2d 181 (Fla. 1966).

27. *Massey, Civil Procedure*, 16 U. MIAMI L. REV. 599 (1966); *Massey & Westen, Civil Procedure*, 18 U. MIAMI L. REV. 750 (1964).

28. *Duggan v. Tomlinson*, 174 So.2d 393 (Fla. 1965); *Ryder Leasing, Inc. v. Jorge*, 168 So.2d 548 (Fla. 3d Dist. 1964); *Brunswick Goldenrod Corp. v. Downsborough*, 156 So.2d 670 (Fla. 3d Dist. 1964).

29. *Duggan v. Tomlinson*, 174 So.2d 393 (Fla. 1965).

30. *Id.* at 395.

31. FLA. STAT. § 517 (1963).

acted any business in Duval. In reversing and remanding, the appellate court held³² that the statutory remedy³³ for the alleged unlawful sales of securities does not override the statutory enactments as to venue, hence venue was proper where the cause of action accrued,³⁴ Orange County.³⁵

3. ACTIONS AGAINST STATE AGENCIES

Venue in actions brought against the state agencies with headquarters at the seat of government are to be brought, as a matter of preference which is discretionary with the agency involved, in seat in situations involving construction of the rules or regulations of the agency.³⁶ In a suit for damages, interlocutory appeals were taken from orders entered by the circuit court of Dade County, which denied a motion to dismiss made by the defendant, State Road Department. The grounds for motion to dismiss were improper venue and failure to state a cause of action. The trial court rejected the attack on the merits, but ordered the cause to be transferred to Leon County.³⁷ In modifying the trial order, the appellate court opined:³⁸

We think the trial judge was eminently correct in concluding that the cause had been filed in the wrong circuit, but upon such a finding, he should have limited his order to the transfer as provided by § 53.17, Fla. Stat., without ruling upon the legal sufficiency of the allegations of the complaint.

In a contract action against the State Road Department instituted in Dade County, the trial court granted the defendant's motion to dis-

32. *Orlando Auto Auction, Inc. v. Crown Capital Corp.* (Fla. 1st Dist. 1965).

33. FLA. STAT. § 517.21 (1963).

34. FLA. STAT. § 46.01 (1963).

35. See FLA. R. CIV. P. 1.39 (governing transfer of causes).

36. *Star Employment Serv., Inc. v. Florida Industrial Comm'n*, 122 So.2d 174, 177 (Fla. 1960); *Massey, Civil Procedure*, 16 U. MIAMI L. REV. 599 (1962).

37. FLA. STAT. § 53.17 (1965). Transfer of cases laid in a wrong venue.—(1) Any court in this state in which is filed a case (including actions at law, suits in equity and statutory proceedings) laying venue in a wrong court or district may transfer such case to the proper court in any county or district of this state where it might have been brought in accordance with the venue statutes of this state. Where the venue of the case might have been brought under the venue statutes in two or more counties or districts the person bringing such case may select the county or district to which the case may be transferred; but if no such selection be made the matter shall be determined by the judge of court.

(2) Where a case is laid in a wrong venue and no timely objection is made thereto by one or more of the parties the court may proceed to a final disposition of the cause which shall be binding on the parties.

(3) The fees earned by the clerk or judge of the court wherein a case is laid in the wrong venue shall, upon the transfer thereof hereunder, be retained by him. Where a court is operating under a flat fee system, the fee received by the clerk or judge upon the filing of the case shall be deemed earned by him as of the time of filing, and another fee shall be required of the person filing the cause, in accordance with the statutes applicable in county or district to which transferred, which if not paid within thirty days from the said transfer, shall justify dismissal without prejudice of the cause.

(4) Nothing herein shall apply to any criminal prosecution.

38. *Reed Constr. Corp. v. State Road Dept.*, 165 So.2d 816 (Fla. 3d Dist. 1964).

miss on the ground of improper venue. On appeal³⁹ the court rejected the plaintiff's contention that the trial court erred because the action was *ex contractu*, but agreed the cause should be transferred rather than dismissed for improper venue.

4. CONTRACTS CONCERNING REAL PROPERTY

The plaintiffs brought suit in Palm Beach County for the construction of agreements to purchase land, for an accounting and to compel the defendant to execute releases. The defendant counterclaimed for an order construing the agreement in his favor and for foreclosure of the mortgage, and also moved to transfer the cause to Citrus or Levy County, the counties wherein the land was located. One of the defendants resided in Palm Beach County. The lower court denied the motion to transfer and dismissed the foreclosure counterclaim. In affirming, the appellate court held:⁴⁰

The court below had proper jurisdiction of the parties and of the subject matter because the cause of action accrued in Palm Beach County and one of the defendants . . . was a resident of and maintained his office in Palm Beach County.

The cause of action alleged in the counterclaim is local in nature. The Circuit Court of Palm Beach County did not have jurisdiction of the subject matter of the counterclaim because the action of a mortgage foreclosure is quasi in rem and local and must be brought in the county where the land lies.

In *Baum v. Corn*⁴¹ a trustee bought land with funds belonging to himself and others, and took title under a trust for a group, without any instrument defining the duties or rights of the parties. The beneficiaries sued the trustee for an accounting and innocent mortgagees were joined as additional defendants. The court held that the action sought was not a legal determination of title to the land, but was rather a transitory action in equity for which proper venue is determined by the residence of the parties to the action.

A Brevard County plaintiff brought a suit in the county of his residence for seeking specific performance against an Illinois trustee, whom he served by publication.⁴² The defendant moved to dismiss, *inter alia*, on the grounds of lack of jurisdiction and venue. Publication was found not to give the court personal jurisdiction over the non-resident defendant; its only jurisdiction was to enter a judgment affecting the land which was located in Brevard. "This proceeding, although in the form of a personal

39. *Foy v. State Road Dept.*, 166 So.2d 688 (Fla. 3d Dist. 1964).

40. *Cohen v. Century Ventures, Inc.*, 163 So.2d 799, 801 (Fla. 2d Dist. 1964).

41. 167 So.2d 740 (Fla. 2d Dist. 1964).

42. FLA. STAT. § 48.01 (1965).

action, is in fact only a proceeding quasi in rem operating upon the property on some interest therein."⁴³

An action upon an insurance policy is transitory in nature and may be maintained in the county where the defendant resides. In *Firemen's Ins. Co. v. Olson*,⁴⁴ the trial and appellate courts rejected the defendant's contention that a suit upon a fire insurance policy is local in nature and must be brought where the alleged loss was sustained. The defendant had also contended that even if the action were transitory, a motion to dismiss founded upon improper venue should have been granted because the plaintiff failed to sustain his burden of showing venue. This contention was rejected by the appellate court. "The burden of pleading and proving that venue was improper is upon the defendant."⁴⁵

5. GUARDIANSHIP

The Supreme Court of Florida ruled⁴⁶ that venue, pursuant to the guardianship statute,⁴⁷ was improper⁴⁸ in any county other than that of the incompetent's residence. Jurisdiction and venue are not synonymous.⁴⁹ Jurisdiction in guardianship matters is vested in both the county judge's court of the county where the incompetent, resides as well as in the county in which he may be found.⁵⁰ After regaining sanity one may not collaterally attack adjudication of incompetency entered by the county judge of the county where the incompetent was found, even though venue was proper only where he resided.⁵¹

6. CHANGE OF VENUE—FAIR AND IMPARTIAL TRIAL

Not to be confused with the doctrine of forum non conviens,⁵² the statutes provide for a change of venue "upon either party presenting a sufficient application praying for such change."⁵³ In a case of first impression, the first district held⁵⁴ that the statute⁵⁵ providing that eminent domain actions shall be tried in the county in which the land is located,

43. *Grammer v. Roman*, 174 So.2d 443, 445 (Fla. 2d Dist. 1965).

44. 176 So.2d 594 (Fla. 3d Dist. 1965).

45. *Supra* note 44, at 596.

46. *In re Guardianship of Mickler*, 163 So.2d 257, 258 (Fla. 1964).

47. FLA. STAT. § 744.11(1) (1965).

48. Justice Caldwell dissented on the ground that actual presence, albeit temporary, of the incompetent in Taylor County should be sufficient. The decision was yes. *Supra* note 46, at 261.

49. 152 So.2d 205 (Fla. 1st Dist. 1963).

50. FLA. STAT. § 394.01 and 394.22(1) (1963).

51. *Bambrick v. Bambrick*, 165 So.2d 449 (Fla. 2d Dist. 1964).

52. See *Massey & Westen, Civil Procedure*, 18 U. MIAMI L. REV. 745, 752 (1964); *Bayitch, Conflict of Laws in Florida 1957-1963*, 8 U. MIAMI L. REV. 269, 292 (1963); Note, 15 U. MIAMI L. REV. 420 (1961).

53. FLA. STAT. § 53.02 (1963).

54. *Choctawhatchee Elec. Co-op, Inc. v. Major Realty Co.*, 161 So.2d 837 (Fla. 1st Dist. 1964).

55. FLA. STAT. § 73.01 and 73.21 (1963).

does not prohibit a change of venue in order to secure a fair and impartial trial. The court reasoned that the Legislature could not have intended to so proscribe the procedure relating to eminent domain proceedings as to deprive a property owner of due process⁵⁶ by refusing him the opportunity of a trial before a fair and impartial jury.

The basic concepts of our jurisprudence require that the courts be ever vigilant to protect the rights of the individual to the extent of making sure that at every judicial trial involving his liberty or property, his rights shall be determined by fair and impartial jurors. The importance of preserving this right for transcends the additional cost or inconvenience of the parties which may result from a change of venue in an eminent domain proceeding when granted under circumstances authorized by law. We therefore hold that the trial court was empowered by F.S. § 53.01 to order that the venue of this action be changed. . . .⁵⁷

Where adverse public sentiment is contended to have precluded a fair trial in the situs where the action was brought, the scope of the trial court's discretion is broad. The burden of showing abuse of discretion is on the movant, and this burden is heightened by a general appellate court conclusion that the trial court is better able to rule on such matters of local fact than is the appellate court.⁵⁸

C. Judge's Power to Reassign Cases

The plaintiff brought a "massive attack," challenging the validity of all acts of the legislature affecting Broward County adopted since 1944. The judge to whom the cause was assigned, who happened to be the presiding judge of the circuit, transferred the cause to a judge who was not a resident of Broward County. That judge dismissed the complaint with prejudice. Among the issues ultimately placed before the appellate court was the authority of a presiding judge to assign the cause to a judge of the same circuit residing in another county. The district court held that Rule 1.1(c)(1) provides "ample authority for presiding judges of a circuit to assign cases to a particular judge for the efficient and speedy disposition of the business of the court."⁵⁹ Subsection 1 of Rule 1.1(c) provides that:

The presiding judge shall be the administrative officer of the court and shall be responsible for the efficient and speedy disposition of the business of the court.⁶⁰

56. FLA. CONST. art. 16 § 29.

57. *Supra* note 54, at 840. A strong dissent urges that the issue was properly raised as to whether a proper showing had been made by the defendant that a change of venue was necessary to insure a fair trial. He believed that no adequate showing had been made.

58. *Florida E. Coast Ry. v. Hardee*, 167 So.2d 68 (Fla. 3d Dist. 1964).

59. *Peters v. Meeks*, 171 So.2d 562, 563 (Fla. 2d Dist. 1964).

60. FLA. R. CIV. P. 1.1(c)(1).

D. Commencement of Action: Statute of Limitations

A civil action, except an ancillary proceeding, is deemed commenced⁶¹ and the statute of limitations tolled⁶² when the complaint is filed. Where the suit is against a decedent's estate, however, the plaintiff must be certain not only that he has commenced his action within the permissible period, but also that he has complied with the requirements of the non-claim statute.⁶³ In *Hayes v. Thomas*,⁶⁴ the second district affirmed a summary judgment for the defendant, in a wrongful death action where no claim was filed against the estate within the period required by the non-claim statute, although the wrongful death action had been brought within the requisite two-year period.⁶⁵ The statute of limitations does not refer to actions against a decedent's estate, the validity and enforceability of which are controlled by the expressly applicable provisions contained in the Florida probate law.

An interesting situation occurs when a judgment for the plaintiff in a suit which has been timely commenced is reversed on appeal. Section 95.06⁶⁶ provides:

If an action shall be commenced within the time prescribed therefore, and a judgment therein for the plaintiff be reversed on appeal or writ of error, the plaintiff . . . may commence a new action within one year after the reversal.

The one-year period begins to run from the date the appellate court issues its mandate, not from the date that the appellate decision is filed with the clerk of the appellate court.⁶⁷

E. Service of Pleadings and Papers

1. AMENDMENTS

The recent amendments to the rules⁶⁸ have produced several changes in Rule 1.4.⁶⁹ Subsection (a) has been broadened in two respects. It now requires service upon all parties of all papers "unless the court otherwise orders," and has relieved the attorney of the responsibility of deciding who is affected by his pleading, as was previously required when service of papers was to be made "on each party affected thereby." Subsection (d) has also been broadened to require either the original or a certified copy of all papers to be placed in the court file, so that that file will be complete.

61. FLA. R. CIV. P. 1.2(a).

62. *Hayes v. Thomas*, 161 So.2d 545 (Fla. 2d Dist. 1964).

63. FLA. STAT. § 733.16 (1963).

64. 161 So.2d 545 (Fla. 2d Dist. 1964).

65. FLA. STAT. § 95.11(6) (1963).

66. FLA. STAT. § 95.06 (1963).

67. *Levin v. Brooks*, 159 So.2d 914 (Fla. 3d Dist. 1964).

68. 1965 REVISION.

69. *Id.* at 17-18.

Subsection (e) now expressly requires that the clerk file papers, originally filed with the judge as of the date they were filed with the judge. This express provision in Rule 1.4(e) is intended to eliminate an apparent conflict with section 28.21(2), which requires the clerk of the circuit court "to note the filing by each party to any cause . . . of any appearance or pleading therein, and of any step taken in the clerk's office in connection with said cause, *such noting to be at the time of such filing* and of taking such step."⁷⁰

Although the committee suggested⁷¹ the repeal of subsection (f)(2) of Rule 1.4 as unnecessary, the rules, as amended, have retained subsection (f) in its entirety. Subpart (2) of subsection (f) provides that where practicable, the certificate of service (of the paper upon the other parties to the litigation) of counsel shall be endorsed on the face of the paper filed. It was the committee's view that the place of the notation of the certificate of service should be a matter of convenience.

2. SERVICE OF NEW AND ADDITIONAL CLAIMS ON DEFAULTING PARTIES

In a case of first impression in Florida,⁷² the plaintiff filed a complaint in which she alleged certain acts of misconduct by the defendant, which, if proved, would constitute grounds for divorce. While noting her possible right to that relief, the plaintiff, nevertheless, expressly prayed only for separate maintenance, unless an absolute divorce be prayed for prior to the entry of the final decree. The defendant filed no pleadings, although he had been personally served with process. A decree pro confesso⁷³ was entered against him. On the day following the final hearing, the plaintiff moved for entry of a final decree of divorce on the ground that the defendant had allegedly brought suit against her for divorce in Oklahoma after the plaintiff had commenced her suit for separate maintenance in Florida. The court granted the plaintiff's motion and entered a final decree of divorce, without notifying the defendant of the plaintiff's motion for an absolute divorce. The defendant appealed and obtained a reversal notwithstanding that the allegations and proof required in the suit for separate maintenance were identical with those which would have been required in a suit for divorce, and also notwithstanding the fact that the complaint contained a prayer for general relief. Rule 1.4(a) which formed the basis for the opinion expressly requires "that pleadings asserting new or additional claims for relief against [parties against whom a decree pro confesso has been entered] shall be served in the manner provided by law for service of summons." The rule is predicated upon salutary considerations of procedural due process, which, at the very least,

70. (Emphasis added.)

71. *Committee Notes.*

72. *Kitchens v. Kitchens*, 162 So.2d 539 (Fla. 3d Dist. 1964).

73. *FLA. R. CIV. P.* 3.9.

"would require that notice be given to a party who had suffered a default, or decree pro confesso where the complaint has been amended in a matter of substance after the entry of such default."⁷⁴

3. TIME

a. Computation

Rule 1.6(a) has been amended⁷⁵ to exclude from the computation of time prescribed or allowed by the rules, by statute or by court order, Saturdays and half-holidays as well as Sundays and legal holidays. The change was made in recognition of the fact that so many offices are closed on Saturdays.⁷⁶ As amended, the computation of time is now the same under both Florida Rule 1.6(a) and Federal Rule 6(a). The Rule, as written, might raise some doubts as to whether half-holidays were to be excluded from the computation, as prior to the amendment of Rule 1.6, it was expressly provided that they were not exempt from inclusion in the computation of the applicable time period. That sentence has been deleted from the amended Rule, which is completely silent respecting the status of half-holidays⁷⁷ but the committee notes state that together with Saturdays, Sundays and legal holidays, half-holidays are excluded from computation.

b. Extending Time

As a general rule, when an act is required or allowed to be done within a specified time, the court, for good cause shown, has discretionary power to enlarge the period for performance. If the request therefor is made before the expiration of the prescribed period, the extension may be granted with or without notice,⁷⁸ but if the motion for an extension is made after the prescribed period, notice must be given to the other parties and an extension may be granted if failure to act was the result of excusable neglect.⁷⁹

However, the newly amended Rule 1.6(b) has expanded the areas in which the court is without power to grant an extension of time to include motions to alter or amend judgments under Rule 2.8(g), as amended, and for relief from judgments under Rule 1.38(b).⁸⁰ The exception to the court's discretionary power to extend time is also applicable

74. *Kitchens v. Kitchens*, *supra* note 72, at 541.

75. 1965 REVISION, at 18.

76. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132 (1965).

77. 1965 REVISION.

78. *Houston Corp. v. Hofmann*, 161 So.2d 243 (Fla. 3d Dist. 1964).

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

80. "When rules 2.8(g) and 1.38(b) were adopted in 1962, rule 1.6(b) was not amended to take cognizance of the changes." Committee Notes. For a discussion of the purpose and effect of the addition of rules 1.38(b) and 2.8(g) see *Barns & Mattis, 1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, at pp. 289-97 and 299-301.

under Rule 3.16, as amended,⁸¹ to petitions for a rehearing on motion of the parties, and to orders for a rehearing when the court is acting *sua sponte*. These exceptions, of course, are in addition to those previously contained in Rule 1.6(b), and which are still retained—specifically, a court may not extend the time for making a motion for a new trial, or for taking an appeal, or for making a motion for a directed verdict. As amended, Florida Rule 1.6(b) is now substantively identical with Federal Rule 6(b), with the exception that time cannot be extended under the Florida rule for a motion *non obstante verdicto*.

F. Attorneys

1. AMENDMENTS

Amended Rule 1.5⁸² now provides, in part, that:

Every pleading and *other paper* of a party represented by an attorney shall be signed by at least one attorney of record in his individual name.

The words "other papers" were added to pleading because of the 1962 amendment to Rule 1.7(a)⁸³ limiting the meaning of pleading.⁸⁴ The only other substantive change in Rule 1.5 was the deletion of subsection (e), in conformity with the committee's suggestion⁸⁵ that a provision relating to proceedings for disciplining or disbaring attorneys was inappropriately included among rules of civil procedure. Transfer to the Integration Rule was recommended.

2. STIPULATIONS

Rule 1.5(d) provides, in part:

No private agreement or consent between the parties or their attorneys in respect to the proceedings in a cause shall be of any force before the court, unless the evidence thereof shall be in writing, subscribed by the party or his attorney, against whom it is alleged.

The mandate of this rule has reference only to agreements affecting judicial proceedings, and it is inapplicable to settlement agreements between the parties arising out of the cause of action on which the litigation is based. Thus, in *Coe v. Diener*,⁸⁶ the district court found that there was no statute requiring a settlement agreement to be in writing and that

81. 1965 REVISION, at 30.

82. 1965 REVISION, at 18.

83. See Barns & Mattis, *1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 277.

84. See *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132 (1965).

85. *Ibid.*

86. 159 So.2d (Fla. 2d Dist. 1964).

Rule 1.5(d) was inapplicable to settlement agreements. The rule only has reference to permissible procedural modifications between the parties and their attorneys.

G. Pleadings

1. PLEADINGS REQUIRED OR ALLOWED

The pleadings which are allowed are: a complaint or a petition when so designated by statute or rule; an answer; an answer to a counterclaim, denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned as a third party defendant; a third party answer, if a third party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third party answer.⁸⁷

As amended, Rule 1.7(a) provides for third party pleadings, consistently with the newly permitted third party practice under amended Rule 1.8(b).⁸⁸ The committee reports indicate that the term "reply to a counterclaim" has been re-worded for clarity, to read "*answer* to a counterclaim"; reply refers only to affirmative matter directed to an answer.⁸⁹

Provision for a *petition*, in lieu of a complaint, where so designated by statute or rule has also been made to accurately denominate the initial pleading required in special statutory proceedings,⁹⁰ and by Rules 1.22(a), 2.17, 2.19, etc.

Subsections (b) and (e) of Rule 1.7 have been retained, but subsection (e) has been re-designated as subsection (d) since subsection (d) of the 1962 rules is no longer necessary after the amendment to Rule 1.7(c). Subsection (c) now reads:

(c) *Contents*. Every pleading and other paper shall contain a caption, setting forth the name of the court, the title of the action, the file number, and a designation as in (a) or (b) of this rule. The caption of the pleading or paper shall also state the name of the first party on each side with an appropriate indication of the other parties.

The words "other papers" have been added to pleadings because of the 1962 amendment to subsection (a) which limited the meaning of "pleading." The addition of the file number comports with the requirement of Federal Rule 10(a), and is intended to assist clerks in filing.

87. 1965 REVISION, at 18.

88. See the discussion of amended rule 1.8(b) *infra* note 99 and accompanying text.

89. 39 FLA. B.J., 1132 (1965).

90. *E.g.*, FLA. STAT. § 176.16 (1963).

The purpose of the pleadings is to "present, define and narrow the issues,"⁹¹ and to form the foundation of, and to limit the proof to be submitted on the trial."⁹² The objective sought in the present rules is to reach the issues of law in one affirmative and one defensive pleading.⁹³ Under existing rules, the only instance in which legal issues not raised in the pleadings may be tried and decided are those where the issue, although not pleaded, is tried by the consent of the parties.⁹⁴

Where a claim or a defense is based upon a bond, note, bill of exchange, contract, account or document, the instrument, or a copy thereof, or a copy of the material portions of the instrument must be attached to the pleading. Exhibits attached to a pleading are considered a part thereof for all purposes.⁹⁵

Subsection (b) of Rule 1.10, as amended,⁹⁶ now provides that:

. . . Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.

Federal Rule 10(c) contains this same provision, which recognizes and authorizes a common practice.⁹⁷

2. THE COMPLAINT

a. Methods of Attack

The rules abolish technical forms of seeking relief.⁹⁸ The complaint should simply "set forth a short and plain statement of the ultimate facts on which the pleader relies,"⁹⁹ and if it informs the defendant of the nature of the cause against him, it shall be held sufficient."¹⁰⁰ The com-

91. See, e.g., *Wise v. Quina*, 174 So.2d 590 (Fla. 1st Dist. 1965); *Staskiewicz v. Krause*, 159 So.2d 476 (Fla. 3d Dist. 1964).

92. 71 C.J.S. *Pleading* § 1 (1961).

93. See *Hart Properties, Inc. v. Slack*, 159 So.2d 236, 239 (Fla. 1963), discussed *infra*, note 94 and accompanying text.

94. FLA. R. CIV. P. 1.15(b), *Hart Properties, Inc. v. Slack*, *supra* note 93.

95. FLA. R. CIV. P. 1.10(a), as amended, 1965 REVISION, at 19. Subsection (a) now uses the word "pleading" instead of listing the various pleadings. FLA. R. CIV. P. 1.10(b).

96. 1965 REVISION.

97. See *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B. J. 1132, 1133 (1965).

98. FLA. R. CIV. P. 1.8(a).

99. FLA. R. CIV. P. 1.8(b). In *Ellison v. City of Fort Lauderdale*, 175 So.2d 198, 200 (Fla. 1965), the Supreme Court of Florida said,

To plead ideas or conclusions are permissible when applied to stated facts. Conclusions do not make a pleading bad, but they serve no useful purpose unless supported by facts shown in support of the conclusion. When appropriate facts are alleged, conclusions serve a useful purpose in pointing out the inferences intended to be relied on by the pleader, and the point of law upon which the court may make its conclusion of law as applied to the facts.

See also, *Central & So. Fla. Flood Control Dist. v. Scott*, 169 So.2d 368 (Fla. 3d Dist. 1964); *Loving v. Viecelli*, 164 So.2d 560 (Fla. 3d Dist. 1964).

100. FLA. R. CIV. P. 1.8(b); *Richardson v. Sams*, 166 So.2d 468 (Fla. 1st Dist. 1964);

plaint "must state a cause of action and must contain allegations of fact sufficient to show the jurisdiction of the court."¹⁰¹

[T]he test of the sufficiency of a complaint is whether, if the factual allegations of the complaint are established by proof or otherwise, the plaintiff will be legally or equitably entitled to the claimed relief against the defendant.

A different rule, however, uniquely applies in declaratory judgment proceedings. All the appellate courts of Florida have recognized the rule that in such proceedings, the test of the sufficiency of the complaint is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all.¹⁰²

Nevertheless, even in a complaint seeking a declaratory decree, "the rules of pleading require that sufficient facts be stated in a complaint to apprise the defendant of what it is that the plaintiff complains so that he may make such defense as he may have."¹⁰³ Thus, it would seem that in a declaratory judgment proceeding,¹⁰⁴ the complaint will be immune from successful attack, if under any theory of the facts as alleged in the complaint, the plaintiff is entitled to declaratory relief. It is submitted that this result does not differ from that which would obtain in other actions at law or suits in equity since Rule 1.8(b) states, "Every complaint shall be considered to pray for general relief."¹⁰⁵ This provision is analogous to one contained in Federal Rule 54(c).¹⁰⁶

If the allegations in the complaint are sufficient to inform the de-

Tims v. Orange State Oil Co., 161 So.2d 844 (Fla. 2d Dist. 1964); *Beikirch v. City of Jacksonville Beach*, 159 So.2d 898 (Fla. 1st Dist. 1964). In *Neville v. County of Sarasota*, 158 So.2d 534 (Fla. 2d Dist. 1963), the defendant was charged with violation of FLA. STAT. ch. 253 (1963), and the plaintiff sought a mandatory injunction. In affirming the trial court's order denying the defendant's motion to dismiss the complaint for failure to state a cause of action, on the ground that the plaintiff did not set forth the ultimate facts on which it relied, but paraphrased the language of the statute, the Second District Court of Appeal concluded at p. 536 that in stating a statutory right of action, it is safe to follow the language the statute prescribes.

[W]hile the complaint might not meet the niceties of the situation, it nevertheless states in clear and unambiguous language that appellants have done and are doing certain acts for which a temporary injunction should issue. The Rules provide that if the complaint informs the defendant of the nature of the cause against him, it shall be held sufficient. . . .

101. FLA. R. CIV. P. 1.8(b).

102. *Hankins v. Title & Trust Co.*, 169 So.2d 526, 528 (Fla. 1st Dist. 1964).

103. *Saks v. Smith*, 145 So.2d 895, 896 (Fla. 3d Dist. 1962), followed in *American Fid. Fire Ins. Co. v. Clark*, 174 So.2d 106 (Fla. 3d Dist. 1965).

104. FLA. STAT. ch. 87 (1963).

105. *Oster v. Krause*, 168 So.2d 558 (Fla. 3d Dist. 1964); *Winchester v. Florida Elec. Supply, Inc.*, 161 So.2d 668 (Fla. 2d Dist. 1964); *Arcade Steam Laundry v. Bass*, 159 So.2d 915 (Fla. 2d Dist. 1964), discussed *infra* note 128 and accompanying text.

106. FED. R. CIV. P. 54(c) provides that ". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

fendant of the nature of the cause of action against him,¹⁰⁷ "it is not necessarily ground for dismissal that the allegations are so vague or ambiguous [that] a party cannot reasonably be required to frame a responsive pleading thereto without their amplification."¹⁰⁸ In these circumstances a defendant may properly move for a more definite statement¹⁰⁹ or avail himself of the discovery procedures provided by the rules.¹¹⁰

One of the basic purposes of a motion to dismiss a complaint for failure to state a cause of action¹¹¹ is to test the legal sufficiency of the complaint to state a claim upon which relief can be granted and it is essentially analogous to Federal Rule 12(b)(6).¹¹²

The motion to dismiss under Rule 12(b)(6) performs substantially the same function as the old common law general demurrer. A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. For the purpose of the motion well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.

A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in the absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.* Pleadings are to be liberally construed. . . .¹¹³

107. In *Johnson v. Southern Bell Tel. & Tel. Co.*, 169 So.2d 36, 37 (Fla. 3d Dist. 1964), the court noted that "[i]t is established that under the law of this State, it is only necessary for the complaint to state facts sufficient to indicate that a cause of action exists and not to anticipate affirmative defenses."

108. *Oster v. Krause*, 168 So.2d 558, 560 (Fla. 3d Dist. 1964).

109. FLA. R. CIV. P. 1.11(e).

110. FLA. R. CIV. P. 1.21, 1.22, 1.24, and 1.25 (Depositions), 1.27 (Interrogatories to Parties), 1.28 (Production of Documents), 1.29 (Examination of Parties and Property), 1.30 (Admission of Facts and Genuineness of Documents).

111. FLA. R. CIV. P. 1.11(b)(6).

112. The federal rule is differently stated in that the motion is denominated as failure to state a "*claim upon which relief can be granted.*" (Emphasis added.) This language is, of course, a definition of "cause of action." Both the federal and the Florida rules mean the same thing. *Martin v. Highway Equip. Supply Co.*, 172 So.2d 246 (Fla. 2d Dist. 1965).

113. 2 MOORE, FEDERAL PRACTICE, § 12.08 at 2244-45 (2d ed. 1965). Where a plaintiff sought a mandatory injunction it was not a sufficient averment to establish the jurisdiction of a court of equity to allege generally that the plaintiff seeks the relief to prevent irreparable harm to himself. Mandatory injunctions are looked upon with disfavor by the courts and are granted but sparingly and cautiously. The remedy at law must be inadequate, and the complainant in alleging irreparable injury must state facts which will enable the court to judge whether the injury will in fact be irreparable, and mere general allegations of irreparable injury will not suffice. *First Nat'l Bank v. Ferris*, 156 So.2d 421 (Fla. 2d Dist. 1963).

Similarly, in actions grounded upon the Florida Guest Statute, FLA. STAT. § 320.59 (1963),

When a complaint is tested by this rule of law, conclusions of law are ignored.¹¹⁴ Thus, a motion to dismiss is not a proper method of attacking a complaint that is only insufficient in that it alleges improper elements of damage or insufficiently alleges proper elements of damage. If the complaint states a claim upon which at least nominal damages may be awarded, a motion to dismiss may not be granted,¹¹⁵ but in such case, the defendant's remedy is to move to strike¹¹⁶ the surplusage, or for a more definite statement.¹¹⁷

The adequacy of an initial pleading may also be challenged by a motion for judgment or decree on the pleadings,¹¹⁸ by a motion for summary judgment,¹¹⁹ or by a motion for involuntary dismissal.¹²⁰

In *Rubin v. Gordon*,¹²¹ the plaintiff unsuccessfully attempted to circumvent the customary procedural channels for testing the sufficiency of a complaint in a libel action by writing the trial judge a letter, asking the court to dismiss his complaint with prejudice so that he might appeal the final order and have the district court determine whether or not the complaint in its entirety stated a cause of action for libel per se.

In dismissing the appeal, the third district held that the plaintiff could not challenge the correctness of an order that was entered at his instance, and further concluded

that the procedure employed circumvented the normal channels of pleading, and, in effect, attempted to make the appellate court the first court to consider and rule upon the sufficiency of the plaintiff's complaint. Such a procedure would, in effect, permit the plaintiff to do indirectly what he could not do directly under the Florida Rules of Civil Procedure.¹²²

Where an order granting a motion to dismiss a complaint for failure to state a cause of action is properly before an appellate court, the complaint is there construed most strongly against the pleader, and the appellate

in which a defendant's liability is predicated upon a showing of gross negligence, "[t]he burden of pleading is accordingly more meticulous than in ordinary negligence cases, which permit a more general mode of pleading." It must fairly appear internally, from the complaint itself, that the defendant's course of conduct was of the gross or wilful or wanton character sought to be charged. *Frank v. Lurie*, 157 So.2d 431, 433 (Fla. 2d Dist. 1963).

114. *Ellison v. City of Fort Lauderdale*, 175 So.2d 198 (Fla. 1965).

115. *Arcade Steam Laundry v. Bass*, 159 So.2d 915 (Fla. 2d Dist. 1964).

116. FLA. R. CIV. P. 1.11(f) provides the ". . . court may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter." *Hodges v. Buckeye Cellulose Corp.*, 174 So.2d 565 (Fla. 1st Dist. 1965).

117. FLA. R. CIV. P. 1.11(e); *Wajay Bakery, Inc. v. Carolina Freight Carriers Corp.*, 177 So.2d 544 (Fla. 3d Dist. 1965).

118. FLA. R. CIV. P. 1.11(c); *Hammond v. Times Publishing Co.*, 162 So.2d 681 (Fla. 2d Dist. 1964); *Kahl v. Board of County Comm'rs*, 162 So.2d 522 (Fla. 3d Dist. 1964).

119. FLA. R. CIV. P. 1.36(b); *Hart Properties, Inc. v. Slack*, 159 So.2d 236 (Fla. 1963).

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

121. 165 So.2d 824 (Fla. 3d Dist. 1964).

122. *Id.* at 825.

court will not supply an essential allegation by inference.¹²³ Perhaps it can be argued that counsel invited his own error in *Rubin v. Gordon*.¹²⁴ However, this was not the case in *Pegg v. Bertram*.¹²⁵ At common law, pleadings were construed most strongly against the pleader. This rule is "unquestionably extinct in jurisdictions governed by the federal rules or their counterparts."¹²⁶

b. Pleading Multiple or Inconsistent Causes of Action

Under Rule 1.8(f), as amended,¹²⁷

[A]ll averments of claim or defense shall be made in consecutively numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. . . . Each claim founded upon a separate transaction or occurrence and each defense, other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

Under Rule 1.8(g), a pleader may set up in the same action as many claims or causes of action in the same right as he may have. One may plead two or more statements of claim alternatively in one count or in separate counts. This rule is substantially analogous to Federal Rule 10(b). In *Arcade Steam Laundry Co. v. Bass*,¹²⁸ the second district held that failure to comply with the formal requirements of Rule 1.8(f) and (g) does not subject a complaint to dismissal upon motion of an adverse party where the allegations of the complaint are otherwise sufficient to state a claim upon which the defendant is entitled to relief. The defendant's proper remedy is by motion to compel separate statement of claim.¹²⁹

If a plaintiff with multiple claims against a single defendant decides to consolidate those claims and to litigate them in a single action, he must be careful to adequately allege and prove the damages to which he is entitled under each of his claims. Otherwise, he may find that he has been barred from future prosecution of a claim previously dismissed for failure to state a cause of action. In *Carol Management Corp. v. Maxwell Co.*,¹³⁰ the plaintiff sought to recover the balance due under ten purchase

123. *Pegg v. Bertram*, 176 So.2d 918 (Fla. 3d Dist. 1965).

124. *Supra* note 121.

125. *Supra* note 123.

126. JAMES, CIVIL PROCEDURE, § 2.12 (1965); 2 MOORE, FEDERAL PRACTICE ¶ 1.13(1) (2d ed. 1965).

127. 1965 REVISION, at 18. Rule 1.8(f) was more succinctly restated to refer to all averments of the "claim or defense" instead of listing the various pleadings individually.

128. 159 So.2d 915 (Fla. 2d Dist. 1964).

129. This is the result reached by the cases under analogous federal rule 10(b). See 2 MOORE, FEDERAL PRACTICE, § 10.04, p. 2011 (2d ed. 1965).

130. 156 So.2d 773 (Fla. 3d Dist. 1963).

order agreements made with the defendant on different dates for furniture and fixtures. As to nine of the agreements, the court found in favor of the plaintiff. With respect to the tenth purchase order agreement, the judgment permitted the plaintiff to institute subsequent litigation, as there was an apparent inadequate tender of proof in that regard. The appellate court held that the judgment below was inconsistent with the spirit, if not the letter of Rule A, in that it permitted piecemeal litigation analogous to splitting a cause of action, rather than the just, speedy and inexpensive determination of every action. The court should dispose of all of the issues in a cause where the plaintiff chooses to bring one action to recover the full amount allegedly due under several separate agreements.

c. Pleading Special Matters

"Where fraud, mistake or condition of mind are alleged in a complaint, the circumstances constituting fraud or mistake are required to be stated with such particularity as the circumstances permit."¹³¹ In testing the sufficiency of a complaint, which charges the defendant with fraudulent misconduct against a motion to dismiss, "the court must take as true all material well pleaded allegations. Those allegations are then viewed in light of the applicable substantive law to determine the existence of a cause of action."¹³²

Florida procedure requires that "[w]hen items of special damage are claimed, they shall be specifically stated."¹³³ In *Wajay Bakery, Inc. v. Carolina Freight Carriers Corp.*,¹³⁴ the plaintiff assigned as error on appeal the trial court's order granting the motion to strike the plaintiff's claim for special damages. In reversing, the third district held, "If the only reason for striking this claim for special damages was because sufficient facts to support the claim were not alleged, defendants' proper remedy was a motion for more definite statement pursuant to Rule 1.11(e)."¹³⁵

3. DEFENSES

a. Waiver of Defenses

Although a defendant may be held to have waived a defense which he has failed to assert either by motion or in his answer, the mere fact

131. *Williams v. Guyton*, 167 So.2d 7, 9 (Fla. 3d Dist. 1964); FLA. R. CIV. P. 1.9(b). See also *Kutner v. Kalish*, 173 So.2d 763 (Fla. 3d Dist. 1965) and the cases cited therein at 765, n.1.

132. *Kutner v. Kalish*, *supra* note 131, at 765, together with the cases cited in nn.5-6 therein.

133. FLA. R. CIV. P. 1.9(f).

134. 177 So.2d 544 (Fla. 3d Dist. 1965).

135. *Wajay Bakery, Inc. v. Carolina Freight Carriers Corp.*, *supra* note 134, at 546. See also, *Arcade Steam Laundry v. Bass*, 159 So.2d 915 (Fla. 2d Dist. 1964), which held that a claim for special damages is sufficient if it notifies the defendant of the nature of the special damages claimed. A motion to dismiss is not a proper method of attacking a complaint that is only insufficient in that it inadequately alleged proper elements of damage.

that the attorneys for the parties enter into a stipulation¹³⁶ extending the time in which the defendant may answer a complaint will not constitute sufficient grounds upon which to find that the defendant has waived the defenses of insufficiency of service of process¹³⁷ or of lack of jurisdiction over his person.¹³⁸ Under the Florida Rules of Civil Procedure, "[t]he former distinction between general and special appearances has been abolished."¹³⁹ Rule 1.11(b) provides, *inter alia*, "that no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."

b. Raising Affirmative Defenses by Motion

Under Florida practice, affirmative defenses may generally be asserted only in answer to a complaint or counterclaim.¹⁴⁰ It is reversible error for a court to consider these defenses in determining whether or not to grant a motion to dismiss.¹⁴¹ However, a limitation on the general rules exists where the complaint shows on its face that it is invalid.

In *Martin v. Highway Equip. Supply Co.*,¹⁴² a case of first impression in Florida, the complaint alleged breach of an *oral* agreement, to lease certain equipment for a five-month rental period, with provisions for purchase and credit at purchase, for prior rental payments. The complaint contained no averments which would remove the agreement from the application of the statute of frauds relating to the sale of personal property.¹⁴³ In sustaining the defendant's motion to dismiss, the court held:

When the complaint affirmatively shows that the claim is based on an oral contract, the defense of the statute of fraud may be raised by a defendant by motion to dismiss under Rule 1.11(b), Rules of Civil Procedure. . . . Rule 1.11(b) is like Rule 12(b), Federal Rules of Civil Procedure, except that clause (6) of the federal rule reads "(6) failure of the pleading to state a

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

137. FLA. R. CIV. P. 1.11(b)(5).

138. FLA. R. CIV. P. 1.11(b)(2).

139. *Paulson v. Faas*, 171 So.2d 9, 10 (Fla. 3d Dist. 1965).

140. FLA. R. CIV. P. 1.8(d). The recent revision of the Florida Rules substantially changes this statement. The new Revision provides:

[a]ffirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under Rule 1.140(b); provided that this shall not limit amendments under Rule 1.190 even if such ground is sustained. *In re Florida Rules of Civil Procedure*, 1967 Revision, 187 So.2d 598, 604 (Fla. 1966).

141. *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 172 So.2d 248 (Fla. 3d Dist. 1965); *Preston v. Grant Advertising, Inc.*, 166 So.2d 219 (Fla. 3d Dist. 1964); *United States Rubber Co. v. Lucky Nine, Inc.*, 159 So.2d 874 (Fla. 3d Dist. 1964) (On rehearing). This rule was enunciated in *Fletcher v. Williams*, 153 So.2d 759 (Fla. 1st Dist. 1963). That case contained a strong dissent. For a resume and comments on the case, see *Massey & Westen, Civil Procedure Survey*, 18 U. MIAMI L. REV. 745, 762, n.145 and accompanying text.

142. 172 So.2d 246 (Fla. 2d Dist. 1965).

143. FLA. STAT. § 725.02 (1963).

claim upon which relief can be granted. . . ."¹⁴⁴ Both rules mean the same.

"A [complaint] may be dismissed on motion if clearly without any merit, and this want of merit may consist . . . in the disclosure of some fact which will necessarily defeat the claim." Since the plaintiff's alleged oral contract comes within the scope of the statute of frauds, it is *not good*. . . . *If the complaint had merely alleged the contract without disclosing whether it was oral or written, then with a liberal construction of the complaint, on motion to dismiss the court could not rightfully hold that it failed to state a claim on which relief could be granted and it would have been error to have sustained the motion to dismiss.*¹⁴⁵

c. Pleading Affirmative Defenses

The distinguishing characteristic of affirmative defenses is that "[t]hey don't deny the facts of the opposing party's claim, but they raise some new matter which defeats the opposite party's otherwise apparently valid claim."¹⁴⁶ Among the affirmative defenses enumerated in Rule 1.8(d) are assumption of the risk, contributory negligence, estoppel, failure of consideration, *res judicata*, statute of frauds, statute of limitation, waiver "and any other matter constituting an avoidance." The listed affirmative defenses are intended as illustrative rather than exclusive.¹⁴⁷

144. FLA. R. CIV. P. 1.11(b) also differs from FED. R. CIV. P. 12(b) in that the federal rule provides for the interchangeability of a motion to dismiss for failure to state a cause of action pursuant to 12(b)(6) with a motion for summary judgment, where "matters outside the pleadings are presented and not excluded by the court."

145. *Martin v. Highway Equip. Supply Co., Inc.* *supra* note 142, at 247-48 (Emphasis added.) See also *Jackson Grain Co. v. Kemp*, 177 So.2d 513 (Fla. 2d Dist. 1965). See also *Petite v. Welch*, 167 So.2d 20 (Fla. 3d Dist. 1964) in which the plaintiff sued the owner of an automobile for damages arising from the negligent operation of the automobile by a third person on the premises of a service station where the defendant had left the car in the possession of the service station operator. The plaintiff's action was grounded on the dangerous instrumentality doctrine recognized in Florida. In affirming the order granting the defendant's motion to dismiss the complaint pursuant to 1.11(b)(6), the appellate court held that under prior Florida decisions, the vicarious liability of the owner for injuries arising from the negligent operation of his automobile by a third person had been limited to those situations in which the injury occurred while the car was being operated on a public highway with the owner's consent and in the instant case the complaint affirmatively showed that it was being operated on private premises while in the possession of the service station operator.

Under the provisions of FLA. STAT. § 51.12 (1963) the complaint would have been legally sufficient with respect to the element of the owner's liability for the driver's negligence if it had alleged merely the operation of the driver and the name of the owner without the necessity of alleging the relationship existing between the owner and the driver.

However, where the complaint affirmatively showed ". . . that the automobile was not being operated by an agent or servant of the defendant owner, but on the contrary that it was being operated by a person under the direction and control of the filling station operator," *id.* at 22, so that the statute was inapplicable, the complaint was subject to a motion to dismiss by the defendant for failure to state a cause of action.

146. *Tropical Exterminators, Inc. v. Murray*, 171 So.2d 432, 433 (Fla. 2d Dist. 1965).

147. *Ibid.*, *Preston v. Grant Advertising, Inc.*, 166 So.2d 219 (Fla. 3d Dist. 1964).

and not infrequently the admissibility of evidence either at the hearing on a pre-trial motion¹⁴⁸ or on final hearing¹⁴⁹ will turn upon whether or not the inferences to be drawn from the offered proof relate to an unpleaded affirmative defense. This is so because Florida practice permits the filing of a general denial¹⁵⁰ in answer to a complaint and because under the rules,

A party shall be deemed to have waived all defenses and objections which he does not present either by motion as herein before provided, or if he has made no motion in his answer or reply.¹⁵¹

*Tropical Exterminators, Inc. v. Murray*¹⁵² provides an illustration of the problem of characterizing a defense, to wit: blackout. The second district concluded "that evidence of a sudden loss of consciousness goes to the general issue of negligence"¹⁵³ and if proved, would negate the alleged negligence of the defendant's employee truck driver. The cogent

148. *Whitfield v. Whitfield*, 161 So.2d 256 (Fla. 3d Dist. 1964).

149. On the defendant's appeal from an adverse judgment in an action to recover for goods sold, the district court sustained the lower court's ruling sustaining the plaintiff's objection to the admission of evidence relating to the alleged quality of goods delivered and to the strength of the concrete delivered on the ground that the defendant's answer had consisted of a general denial and "never was indebted," and contained no affirmative defenses raising an issue of set-off for inferior goods. *Clutter Constr. Co. v. Naples Bldrs. Supply Co.*, 166 So.2d 813 (Fla. 3d Dist. 1964).

150. FLA. R. Civ. P. 1.8(c). General denials are not favored and should not be used [u]nless the pleader intends in good faith to controvert all of the averments of the preceding pleading . . . but when he does so intend to controvert *all* of its averments, including averments of the grounds upon which the Court's jurisdiction depends, he may do so by general denial. (Emphasis added.)

151. FLA. R. Civ. P. 1.11(b). The rule contains three exceptions to its waiver provisions. A party may at any time raise:

- (1) the defense of failure to state a cause of action (or the objection of failure to state a legal defense to a claim),
- (2) the defense of failure to join an indispensable party, or
- (3) the defense that the court lacks subject matter jurisdiction.

In the following cases decided during the Survey period, failure to adhere to the pleading requirements of FLA. R. Civ. P. 1.8(d) resulted in a judicial determination of waiver pursuant to FLA. R. Civ. P. 1.11(h): *Wingreen Co. v. Montgomery Ward & Co.*, 171 So.2d 408 (Fla. 3d Dist. 1965); *Gordon Internat'l Advertising, Inc. v. Charlotte County Land & Title Co.*, 170 So.2d 59 (Fla. 3d Dist. 1964).

In *Houston Corp. v. Hofmann*, 161 So.2d 243, 247 (Fla. 3d Dist. 1964), the concurring justice suggested,

The question may arise as to whether the defense of res judicata which has arisen after the institution of a suit may be pleaded in bar in the same cause of action. I find that such a defense is permitted and the courts seem to draw no distinction between the pleading of one action in bar of a second action and pleading an order in the same proceeding as a bar to subsequent proceedings or recovery in the same cause.

152. *Supra* note 146.

153. *Tropical Exterminators, Inc. v. Murray*, 171 So.2d 432, 433 (Fla. 2d Dist. 1965). But see, *Goodrich v. Malowney*, 157 So.2d 829 (Fla. 2d Dist. 1963), in which, in an action for conversion of stock, a defendant who had filed in answer to the complaint a general denial was held to have established no basis in his defense pleadings for the admission of evidence either with respect to the plaintiff's alleged duty to render an accounting or with respect to a debt allegedly owed by the plaintiff to the corporation. See also *Staskiewicz v. Krause*, 159 So.2d 476 (Fla. 3d Dist. 1964).

dissent would have characterized the defense of "sudden blackout" as a matter constituting avoidance within the meaning of Rule 1.8(d):

A litigant and the courts ought not to be left to the processes of discovery to ascertain the issues to be tried, but one relying upon the defense of sudden blackout should declare his defenses as explicitly as the plaintiff declares his grounds for relief. To hold otherwise invites strong probabilities of a plaintiff being "bushwacked" at trial.¹⁵⁴

d. Waiver of Irregularities in Pleading Affirmative Defenses

Unless a plaintiff is alert to the pleading and procedural irregularities practiced by his opponent, he may find that he has forfeited his right to object to those defects on appeal either from an interlocutory order¹⁵⁵ or from a final order, judgment or decree.¹⁵⁶ *Hack v. Great Am. Ins. Co.*¹⁵⁷ is a case in point. The court there held that the plaintiff cannot argue for the first time on appeal that the defendant waived his right to set up an arbitration award by virtue of his failure to plead it as an affirmative defense. Proper procedure required the plaintiff to object when the defendant raised his affirmative defense by motion prior to hearing.

e. Res Judicata and Its Kindred

Certain purchasers of several lots in a subdivision brought suit in equity against their grantor and the purchasers of one-half of one lot known as Beach Block 7, seeking a declaration that they were entitled to recreational rights in Beach Block 7, and seeking injunctive and other equitable relief.¹⁵⁸ The chancellor held "that the plaintiffs had 'acquired by implied covenant a private easement in said Beach Block 7 . . .'"¹⁵⁹ and that the plaintiffs' grantors thus became bound not to use that property other than for the purposes stated in their representations. However, the court, also concluded that the defendant buyers of a portion of Beach Block 7 were innocent purchasers for value and that their conveyance was unencumbered by the plaintiff's easement. The court granted injunctive relief against the grantors, but concluded that the suit should be dismissed as to the buyers and that cancellation of the deed to them should also be denied. Subsequently thirteen of the original fifteen plaintiffs¹⁶⁰ brought an action at law to recover damages for their loss of

154. *Id.* at 434.

155. Although this *Survey* is primarily concerned with civil procedure in the trial courts, it seems appropriate to note in passing that interlocutory appeals may be taken in an equity suit from any order or decree and in actions at law from orders relating to venue or jurisdiction over the person. FLA. APP. R. 4.2, 1962 Revision.

156. FLA. APP. R. 4.2, 1962 Revision.

157. 175 So.2d 594 (Fla. 3d Dist. 1965).

158. *Wise v. Quina*, 174 So.2d 590 (Fla. 1st Dist. 1965).

159. *Id.* at 594.

160. Later all but one of these plaintiffs withdrew leaving in the law action only a single plaintiff, who had also been a party plaintiff to the equity suit.

recreational rights. The circuit court held that since the plaintiff might have sought damages as alternative relief in the equity suit on the possible basis of that court's inability to grant full equitable relief due to the intervention of the rights of innocent third parties,¹⁶¹ he was estopped by judgment from bringing a law action because he had had his day in court in the equity suit, and he should not be permitted to split his cause of action.

The plaintiffs in both cases appealed from the summary final judgment and the cases were consolidated for hearing and appeal. The district court held that the summary judgment was erroneously entered since the complaint contained no prayer for damages, or for any other relief in law.

The nature of the relief prayed for in the equity suit is, of course an important consideration in determining whether the final decree is *res judicata* as to the action at law. Furthermore, the said final decree fails to provide for, or even to refer to, the assessment of damages against any of the defendants. . . . The doctrine of *res judicata* means that the judgment of a court of competent jurisdiction directly rendered upon a particular issue is conclusive as to the parties and the issue so decided in the same or any other controversy. . . . That doctrine is to be differentiated from the doctrine of estoppel by judgment, under which, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding or verdict was rendered.¹⁶²

Res judicata is an affirmative defense which must be asserted by proving the following essential factors:

1. Identity of the thing sued for;
2. Identity of the cause of action;
3. Identity of the persons and parties to the action; and
4. Identity of the quality in the person for or against whom the claim is made.

The test used for determining the identity of the thing sued for and the identity of the cause of action is the identity of the facts essential to the maintenance of the suit.¹⁶³ As a concession to the ancient historic rivalry between the Chancellor and the Chief Justice, equity declined to take jurisdiction unless the plaintiff alleged and proved that he was

161. Under the Equitable Maxim that "Equity does not do justice by halves," when a court of equity has once acquired jurisdiction in a case, but finds it impractical in a case to award the relief prayed for, it will retain its jurisdiction and assess and award damages.

162. *Wise v. Quina*, *supra* note 158, at 594-595. See also *Mease v. Daley*, 165 So.2d 415 (Fla. 2d Dist. 1964) for a decision predicated upon a situation "analogous to estoppel by judgment."

163. *State Road Dept. v. Lewis*, 156 So.2d 862 (Fla. 1st Dist. 1963).

threatened with irreparable harm for which he had no adequate remedy at law. The facts necessary to be proved in an action at law and in a suit in equity were not identical. The burden of proof in the equity suit was greater and the chancellor's relief discretionary. Therefore, the cause of action was said not to be *merged* in a final decree, in which no money had been awarded. "Since the original cause of action is not merged in a decree in favor of the plaintiff, which is not for the payment of money, the plaintiff is not thereby precluded by the doctrine of *res judicata* from maintaining an action at law or a suit in equity upon the original cause of action."¹⁶⁴

The salutary purpose of the doctrine of *res judicata* is predicated upon considerations of comity and upon the desirability of an end to litigation. The plaintiff who has had his day in court ought not to harass the defendant with multiple suits and the prior judgment or decree should be determinative not only of those issues which were actually litigated but also of those issues which might have been litigated.¹⁶⁵

Akin in spirit and in purpose to the doctrine of *res judicata* is the prohibition against splitting a cause of action. In *Bowie v. Reynolds*,¹⁶⁶ the plaintiff had previously brought a wrongful death action against the same defendant for his wife's wrongful death as the result of an automobile collision in which he had sought funeral expenses and loss of consortium. In a subsequent action he sought to recover damages and for damage to his car arising from the same collision. On appeal the district court held that the statutory wrongful death action¹⁶⁷ created a right of action where none previously existed since a husband could not claim damages at common law for loss of consortium resulting from his wife's death caused by another's wrongful act. Although it was the identical tortious act of the defendant that caused the death of the plaintiff's wife and injuries to the plaintiff's body and property, such act gave rise to two separate and distinct causes of action. Since two separate causes of action existed in the plaintiff's favor, his attempt to seek recourse in two separate independent actions did not constitute splitting a single cause of action.

In another recent case, arising in the third district, the plaintiff sued the defendants in Texas to foreclose a chattel mortgage.

164. RESTATEMENT, JUDGMENTS § 46, comment a (1942).

165. *E.g.*, in *Simons v. Miami Beach First Nat'l Bank*, 157 So.2d 199 (Fla. 3d Dist. 1963), the plaintiff had filed suit against the executor of her deceased ex-husband's estate to set aside an *ex parte* divorce decree previously obtained on constructive service of process on the ground that her ex-husband was not a bona-fide resident of Florida for the requisite statutory period at the time that he obtained the divorce decree. The wife neither appeared nor submitted herself to the court's jurisdiction in the divorce proceedings. In affirming the trial court, the district court held that by choosing not to appear in the divorce suit, the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit.

166. 161 So.2d 882 (Fla. 1st Dist. 1964).

167. FLA. STAT. §§ 768.01-.02 (1963).

The Texas judgment of foreclosure adjudicated the balance due on the promissory note secured by the chattel mortgage, rendered judgment in favor of the plaintiff and against the defendants for the unpaid balance of the note, plus interest and attorney's fees, described the chattels subject to the adjudication of foreclosure and authorized the seizure and sale of the property by a sheriff or any constable of the state of Texas to satisfy the judgment.¹⁶⁸

While the Texas suit was still pending, the plaintiff sued the defendants in Florida to recover on the note which had allegedly been endorsed by the defendants. On the plaintiff's appeal from an adverse summary judgment, the court, *sua sponte*, considered the effect on the status of the Florida action of the pending Texas litigation. *Held*: Reversed.

The pendency of a prior action in a foreign jurisdiction is not grounds for abatement of a subsequent action in Florida However, the state courts . . . have recognized the power to stay a proceeding until the determination of a prior pending action The general rule as to stay of later actions in one jurisdiction on account of the pendency of a prior action in another jurisdiction contemplates that the cause of action on which the two actions are predicated or the issues involved are identical.¹⁶⁹

Here they were identical. The court reversed the summary judgment for the defendants and remanded the case to the trial court with instructions to stay the proceedings until the conclusion of the Texas proceedings.¹⁷⁰ It further said that it would be premature to consider the defendants' appellate argument that the plaintiff was precluded by the doctrine of election of remedies¹⁷¹ from maintaining its action in Florida.

f. Joinder and Misnomer of Defenses

Rule 1.8(g) provides:

A party may also state as many separate . . . defenses as he has, regardless of consistency, and whether a defense be based on legal or on equitable grounds, or on both. All pleadings shall be construed so as to do substantial justice.¹⁷²

Thus, under this provision the traditionally equitable defenses of "waiver or estoppel" may be asserted and relied upon, in actions at law as well as

168. *A. J. Armstrong Co. v. Romanach*, 165 So.2d 817, 818 (Fla. 3d Dist. 1964).

169. *Id.* at 818-819.

170. *Id.* at 819.

171. The doctrine of election of remedies, like those of *res judicata*, estoppel by judgment and merger, is predicated upon the same considerations of public policy that induced the court to stay the Florida proceedings in the principal case.

172. *FLA. R. CIV. P.* 1.8(g).

in suits in equity.¹⁷³ In *Frank v. Levine*,¹⁷⁴ the appellate court reversed an order of dismissal, and held *inter alia*, that

the trial judge may have been motivated by an assumption that equitable considerations which could limit recovery of a deficiency when sought in equity in a foreclosure suit, were not available as equitable defenses or partial defenses in a law action for such a deficiency. However, equitable defenses may be pleaded in law action, . . . and there would appear to be no reason why equitable considerations sufficient to limit a deficiency award in equity should not serve equally when pleaded and proved in an action at law to recover a mortgage foreclosure sale deficiency.¹⁷⁵

Similarly, in the interest of preferring substance over form, the rules provide¹⁷⁶ that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation." Thus, in *Tischler v. Tischler*,¹⁷⁷ the second district held, on appeal from an adverse decree in a suit to domesticate an Illinois divorce decree awarding permanent alimony and support money, that the trial court had erroneously stricken certain defenses mistakenly designated as a counterclaim, which went to the equities between the parties and might influence the decision with respect to the allowance or imposition of costs.

4. COUNTERCLAIMS

a. Amendments

The committee notes¹⁷⁸ explaining the amendments to Rule 1.13¹⁷⁹ state:

This rule has been changed to provide for third party practice and to make the rule shorter. There is no other change in substance.

This is not so. Subpart (a) (previously subpart (1) of amended Rule 1.13 has been restated so that it is now substantially identical with Federal Rule 13(a). Both rules now exempt a defendant from the necessity of pleading a compulsory counterclaim if:

(1) at the time the action was commenced, the claim was the subject of another pending action, or (2) the opposing party

173. *Enfinger v. Order of United Commercial Travelers*, 156 So.2d 38 (Fla. 1st Dist. 1963).

174. 159 So.2d 665 (Fla. 3d Dist. 1964).

175. *Id.* at 666.

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

177. 173 So.2d 769 (Fla. 2d Dist. 1965).

178. 39 FLA. B.J. 1132, 1133 (Dec. 1965).

179. 1965 REVISION, at 20-21.

brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on the claim, and the pleader is not stating a counterclaim under this rule.¹⁸⁰

These exceptions to the necessity of pleading a counterclaim arising out of the transaction or occurrence that is the subject of the principal suit were not previously contained in Rule 1.13(1). Except for amendment of Rule 1.13, recognizing third party practice¹⁸¹ and modifying the conditions under which a cross-claim may be brought, differences are in choice of language merely.

b. Statutory Replevin

The unequivocal mandate of Rule 1.13(1), which requires the defendant to file as a counterclaim any claim that he has against the plaintiff "arising out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction," must be read *in pari materia* with the provision of Rule A making the rules applicable

to all suits of a civil nature and all special statutory proceedings . . . with the exception that the form, content, procedure and time for pleading in all special statutory proceedings shall be as prescribed by the statutes providing for such proceedings, unless these rules shall *specifically* provide to the contrary.

Recent cases, involving the defendant's right to assert a counterclaim in an action of replevin indicate that the parties' rights in the area of replevin will be governed by the exception of Rule A rather than by the order of priority announced both by legislative fiat¹⁸² and judicial order,¹⁸³ requiring that the rules of civil procedure, adopted by the Supreme Court of Florida, as authorized by the Florida Constitution,¹⁸⁴ supersede existing conflicting rules and statutes, or parts thereof.

In *National Leasing Corp. v. Bombay Hotel, Inc.*,¹⁸⁵ the third district concluded that the non-joinder provisions of section 46.08 are substantive and therefore not subject to modification, repeal or change under the supreme court's rule-making power. The court further held that the Supreme Court of Florida should not be held to have impliedly repealed either the joinder provisions of section 46.08, or the procedural provisions

180. 1965 REVISION, at 20.

181. See part 6, Third Party Practice, of this Section, *infra*.

182. FLA. STAT. § 25.371 (1963) provides:

When a rule is adopted by the supreme court concerning practice and procedure and such rule conflicts with a statute, the rule supercedes the statutory provision.

183. *In re Florida Rules of Civil Procedure*, 139 So.2d 129 (Fla. 1962).

184. FLA. CONST. art. V, § 3.

185. 178 So.2d 730, 731 (Fla. 2d Dist. 1965).

of chapter 78 of the Florida Statutes. It humbly suggested that any other construction would constitute judicial legislation.

It is arguable that the third district's interpretation of the effect of Rule 1.13(1) upon Florida Statute 46.08 is inconsistent with the announced purpose of the rules "to secure the just, speedy and inexpensive determination of every action," and likewise inconsistent with the purpose of 1.13(1) to require all claims arising out of the same transaction or occurrence between the same parties to be finally litigated in a single suit. However, this construction appears to be well established and two other cases reaching the appellate courts during the survey period were similarly decided.

In *First Nat'l Bank v. First Bonded Warehouse*,¹⁸⁶ where the defendant-warehouse's counterclaim against the plaintiff, holder of a retain title contract, for storage costs due on the chattels which were the subject of the retain title contract was dismissed "without prejudice to the defendant to bring and maintain said cause of action in a separate suit." In *Van Hoose v. Robbins*,¹⁸⁷ a landlord's counterclaim for rent arrearages in a replevin action brought by a tenant to recover certain personalty was also dismissed. The court noted that replevin is a possessory action, which by statutory prescription cannot be joined with other causes of action. It further said that

Although a counterclaim may be allowed in some instances, the present "counterclaim" was properly dismissed because it did not plead anything to offset the right of the plaintiff to recover the described property nor did it assert a specific charge against the property sought to be replevied.¹⁸⁸

Both of these decisions relied in part on the authority of the *National Leasing Corp.* case; it is submitted that they are all anachronistic.

c. Anti-Trust

In the area of anti-trust violations, Florida courts have shown a more progressive attitude. They give effect to Rule 1.13(1) by permitting a defendant to counterclaim for damages resulting from the plaintiff's alleged violation of Florida's anti-trust laws.¹⁸⁹ The defendant in *Har-drives Co. v. East Coast Asphalt Corp.*,¹⁹⁰ a contract action to recover for goods sold to the defendant on open account, had attempted to assert such a counterclaim, but the trial court granted the plaintiff's motion to dismiss the counterclaim, which was reversed on appeal. At common law,

186. 174 So.2d 606 (Fla. 3d Dist. 1965).

187. 165 So.2d 209 (Fla. 2d Dist. 1964).

188. *Id.* at 211.

189. FLA. STAT. ch. 542 (1963).

190. 166 So.2d 810 (Fla. 2d Dist. 1964).

agreements in unreasonable restraint of trade were not unlawful in the sense of being criminal, but were merely void and unenforceable. They did not give rise to a civil action for damages in favor of one injured thereby. "Statutes such as our anti-trust acts have the effect of rendering such contracts unlawful in an affirmative or positive sense and punishable as a crime."¹⁹¹ By the weight of authority subsequent to the passage of these acts, one harmed by illegal anti-trust activities is entitled to recover damages in a proper case, and the absence of an express statutory remedy does not preclude such action. The Florida court concluded that the federal courts which disallow such a counterclaim base their decision upon the fact that Congress had provided an independent treble damage action that precluded the counterclaim. Since Florida's anti-trust laws contain no express, exclusive remedy, our Rule 1.13(1) requires that a claim based on alleged anti-trust violations arising out of the same transaction or occurrence be asserted.

d. Omitted Counterclaims

Rule 1.13(f), as amended, provides that:

When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he *may* set up the counterclaim by amendment with leave of the court.¹⁹²

As the language of the rule indicates, the right to assert omitted counterclaims is not absolute, but rests in the sound discretion of the court to be exercised after it has considered all the relevant facts and circumstances involved in the particular case. Thus, it was held in *Aydelott v. Greenheart (Demerara) Inc.*¹⁹³ that the trial court did not err in denying the defendant's motion for leave to file a counterclaim long subsequent to the entry of a summary judgment for the plaintiff. Although the proposed counterclaim was in the nature of a compulsory counterclaim, it appeared that the matters which it attempted to raise were essentially within the defendant's knowledge when he answered the complaint, and the defendant was unable to show an abuse of judicial discretion.

5. CROSS-CLAIMS

Rule 1.13(7), unlike Federal Rule 13(g), expressly requires a cross-claim to be within the jurisdiction of the court. If the venue in a local action is considered jurisdictional¹⁹⁴ (in that it relates to the power of the court to entertain the suit) then if the cross-claim is characterized as local, it cannot properly have been maintained where venue is improper.

191. *Id.* at 812.

192. FLA. R. CIV. P. 1.13(f), as amended, 1965 REVISION, at 20. (Emphasis added.)

193. 162 So.2d 286 (Fla. 2d Dist. 1964).

194. See WRIGHT, FEDERAL COURTS, § 42, pp. 134-35 (1963).

On the other hand, if it were considered that the venue, even in local actions, only relates to the place where a suit may be brought, then improper venue would not go to the power of the court to entertain the cross-claim, but would merely constitute a defense to be asserted either by motion¹⁹⁵ or in the answer¹⁹⁶ to the cross-claim, and the defense would be deemed waived¹⁹⁷ if not asserted in either manner. If cross-claims are treated as ancillary there probably could be no venue objection.

Another interesting problem raised by the recent amendment to 1.13(g), which was formerly designated as 1.13(7), and not commented upon in the committee notes, is the effect of restating the rule in substantially the identical language as is contained in Federal Rule 13(g) by dropping the clause requiring the cross-claim to be within the jurisdiction of the court.

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of either the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. The cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.¹⁹⁸

The federal courts treat cross-claims as within their ancillary jurisdiction, since by definition they must be closely related to existing action, and, therefore, independent jurisdictional grounds are not required *nor can there be any venue objection*.¹⁹⁹

Of course, Rule 1.13(g), as amended, must be read *in pari materia* with Rule 1.13(j) (formerly designated as Rule 1.13(10)) as amended.²⁰⁰ This rule provides for the transfer of any action involving a counterclaim or cross-claim exceeding the jurisdictional limits of the court to the court in the same county having jurisdiction of the demand in the counterclaim or cross-claim. But suppose the jurisdictional question arises not out of the amount involved, but out of the venue of a local action? Generally, where the Florida rule is substantially identical with the corresponding federal rule, Florida courts have followed federal precedent. But since under the Florida rules, jurisdiction is not entirely ancillary, it is not clear whether the Florida courts will—or should—follow federal precedent in this area.

195. FLA. R. CIV. P. 1.11(b)(3).

196. FLA. R. CIV. P. 1.8(c).

197. FLA. R. CIV. P. 1.11(h). However, the opinion in the *Baum* case indicates that the defendants had properly raised the venue objection in the trial court.

198. 1965 REVISION, at 21.

199. The federal view characterizing cross-claims as ancillary is succinctly discussed in WRIGHT, FEDERAL COURTS, § 80, p. 307 (1964).

200. 1965 REVISION, at 21.

6. THIRD PARTY PRACTICE COMES TO FLORIDA

One of the most significant modifications to Florida procedure results from the addition to the Florida Rules of Civil Procedure of Rule 1.41 which permits third party practice.

Rule 1.41. Third Party Practice

(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defendant as a third party plaintiff may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third party plaintiff need not obtain leave to make the service if he files the third party complaint not later than twenty days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rules 1.8 and 1.11 and his counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in Rule 1.13. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff and the third party defendant thereupon shall assert his defenses as provided in Rules 1.8 and 1.11 and his counterclaims and cross-claims as provided in Rule 1.13. Any party may move to strike the third party claim or for its severance or separate trial. A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third party defendant.

(b) *When Plaintiff May Bring in Third Party.* When a counterclaim is asserted against the plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.²⁰¹

This rule is substantially identical with Federal Rule 14, "except it allows a 20-day period within which the third party complaint may be filed without leave of court instead of 10 days."²⁰² Florida Rule 1.41 also ex-

201. 1965 REVISION, at 27.

202. *Notes of the Subcommittee on Civil Procedure*, 39 FLA. B.J. 1132, 1136 (Dec. 1965).

pressly provides for defenses to a third party complaint to be asserted either by answer or by appropriate motion, whereas Federal Rule 14 expressly provides only for defenses by motion pursuant to Federal Rule 12. However, the defensive pleadings required under either rule are, in fact, the same since both Florida Rule 1.7(a), as amended,²⁰³ and Federal Rule 7(a) provide "There shall be . . . a third party answer, if a third party complaint is served."

Third party practice "is intended to avoid circuitry of action, and to dispose of the entire subject matter arising from one set of facts in one action thus administering complete and even-handed justice, expeditiously and economically."²⁰⁴

Other rules amended to reflect the introduction of third party practice include: 1.4(a), requiring the service on all parties of all papers; 1.8(b), relating to the requirements for stating a claim for relief; 1.11(a), which provides for the time within which defenses may be made; and 1.13(a), (b) and (f), relating to the assertion of counterclaims.²⁰⁵

7. STRIKING SHAM, IRRELEVANT AND IMMATERIAL PLEADINGS

The complaint alleged that the plaintiff, in a personal injury action, had served written notice of her claim upon the City Attorney in compliance with the pertinent provisions of the city charter.²⁰⁶ As a matter of fact, the person whom the plaintiff had notified was the director of the city's department of water and sewers, whose reply lulled the plaintiff into believing that adequate notice had been given. The city answered by way of general denial, and also alleged affirmatively that any injuries suffered by the plaintiff resulted from her own negligence. The city then moved for judgment on the pleadings²⁰⁷ and to strike a sham pleading,²⁰⁸ attached to which was the city attorney's affidavit that he had not received a written notice of the claim.²⁰⁹ On appeal it was held that the trial court's dismissal could not be sustained on the basis of a finding that the pleading was a sham. Since the city's answer was by general denial, the plaintiff was not precluded from asserting that the city was estopped from denying it had received the requisite notice, although she had not pled the facts giving rise to the alleged estoppel.²¹⁰ As the same court

203. 1965 REVISION, at 18.

204. WRIGHT, FEDERAL COURTS, § 76, at 287 (1963). See also 1A BARRON & HOLTZOFF, FED. PRACTICE & PROCEDURE § 422 (Wright ed. 1960).

205. 1965 REVISION, at 19-20.

206. CITY OF MIAMI CHARTER, § 93.

207. FLA. R. CIV. P. 1.11(c).

208. FLA. R. CIV. P. 1.14.

209. "The motion to strike shall be sworn to and shall set forth fully the facts on which the movant relies and may be supported by affidavit. . . ." FLA. R. CIV. P. 1.14(b).

210. Brooks v. City of Miami, 161 So.2d 675 (Fla. 3d Dist. 1964).

remarked in another case, "It cannot be said that the falsity of the (plaintiff's) allegations clearly appears and that (her) complaint is a mere pretense set up in bad faith."²¹¹

8. AMENDED AND SUPPLEMENTAL PLEADINGS

a. Amendments

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may amend it at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within twenty days after service of the amended pleading unless the court otherwise orders; provided that if a motion or pleading has been served in response to the original pleading and a party does not plead or move in response to the amended pleading, the original response shall be considered as pleaded to the amended pleading.²¹²

Subsection (a) of Rule 1.15 has been amended to enlarge the time within which a party may respond to an amended pleading from ten to twenty days, and to resolve a conflict between the districts created by the recent decision of the Second District Court of Appeal in the case of *Scarfone v. Denby*.²¹³ The *Scarfone* case involved an original answer which was not permitted to stand over as an answer to an amended complaint. The second district upheld the trial court, basing its conclusions upon the mandatory language of Rule 1.15(a) and upon the omission from Rule 1.15(a) of the express provision, contained in former equity Rule 3.6, which permitted an answer to an original complaint to stand over to an amended complaint. The decision conflicted directly with that of the third district in *Ramalgi Realty Co. v. Craver*.²¹⁴ As is clear from the amendment to Rule 1.15(a), the Florida Supreme Court disagreed with the second district and resolved the resulting conflict in favor of the decision reached by the Third District Court of Appeal in the *Ramalgi* case.²¹⁵

Florida courts are committed to the concept that leave to amend

211. *Becker v. Dulberg*, 176 So.2d 583, 584 (Fla. 3d Dist. 1965).

212. FLA. R. CIV. P. 1.15(a), as amended, 1965 REVISION, at 21.

213. 156 So.2d 694 (Fla. 2d Dist. 1963).

214. 109 So.2d 187 (Fla. 3d Dist. 1959).

215. The *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1133 (1965) state: "The last clause has been added . . . to overrule *Scarfone v. Denby* The subcommittee believes the rule in *Ramalgi Realty Co. v. Craver* . . . is preferable." The language was derived from 1950 Equity Rule 36.

should be freely granted,²¹⁶ and that "the trial courts should always afford reasonable opportunity to amend a pleading if there is likelihood that such may operate to cure prior defects."²¹⁷ Thus on a hearing of a motion for summary judgment the court may pierce the curtain of the paper issues made by the pleadings and examine the affidavits for the purpose of determining whether there is any genuine issue of fact that ought to be tried.²¹⁸ "[W]here facts appear in affidavits upon motion for a summary judgment which would justify an amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment."²¹⁹ The proper procedure is to grant the motion to enter the summary judgment with leave to amend.²²⁰ Similarly, "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . ."²²¹ Thus, where the plaintiff sought recovery in a negligence action alleging that he was a passenger for hire, and the court announced its intention of directing a verdict against him at the conclusion of the plaintiff's case on the ground that the evidence was legally insufficient to establish his status as a passenger for hire, the court, nevertheless, properly permitted the plaintiff to amend his complaint in order to include allegations of gross negligence, so as to conform to the proof required by the guest statute.²²² Amendments to conform the evidence to the pleadings may be made at any time, even after judgment or decree, and failure to amend does not affect the result of the trial of these issues.²²³ The evidence which went to the jury was the same under either theory upon which the plaintiff contended he was entitled to recover.²²⁴

Whenever the claim or defense asserted in an amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.²²⁵

In *Keel v. Brown*,²²⁶ it appeared that the original complaint had been filed within the requisite one-year period of the statute of limita-

216. *McSwiggan v. Edson*, 172 So.2d 490 (Fla. 3d Dist. 1965); *Davis v. Major Oil Co.*, 164 So.2d 558 (Fla. 3d Dist. 1964).

217. *Gates v. Utsey*, 177 So.2d 486, 489 (Fla. 1st Dist. 1965).

218. *Curley v. Finest Homes, Inc.*, 167 So.2d 739, 740 (Fla. 2d Dist. 1964).

219. 6 MOORE, FEDERAL PRACTICE, § 56.10, at 2054 (2d ed. 1960).

220. *Hart Properties, Inc. v. Slack*, 159 So.2d 236, 240 (Fla. 1963); *Curley v. Finest Homes, Inc.*, *supra* note 218.

221. FLA. R. CIV. P. 1.15(b); *Reliance Mut. Life Ins. Co. v. Booher*, 166 So.2d 222 (Fla. 2d Dist. 1964).

222. FLA. STAT. § 320.59 (1963).

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

224. *Raggs v. Gouse*, 156 So.2d 882 (Fla. 2d Dist. 1963); see also, *Richardson v. Sams*, 166 So.2d 468 (Fla. 1st Dist. 1964).

225. FLA. R. CIV. P. 1.15(c). See *McNayr v. Cranbrook Investments, Inc.*, 158 So.2d 129 (Fla. 1963).

226. 162 So.2d 321 (Fla. 2d Dist. 1964).

tions,²²⁷ but that the amended complaint in the cause, which had been transferred to the law side, had been filed after the twelve-month period. In reversing the trial court, the district court held that the plaintiff's amended complaint related back to the date of the filing of his original complaint in chancery.

[T]he proper test of relation back of amendments is not whether the cause of action stated in the amended pleading is identical to that stated in the original (for in the strict sense almost any amendment may be said to be a change of the original cause of action), but whether the pleading as amended is based upon the same specific conduct, transaction or occurrence between the parties upon which the plaintiff tried to enforce his original claim. If the amendment shows the same general factual situation as that alleged in the original pleading, then the amendment relates back—even though there is a change in the precise legal description of the rights sought to be enforced, or a change in the legal theory upon which the action is brought.²²⁸

Once the period has passed during which a party has an absolute right to amend, granting leave to amend is discretionary with the court. The proper exercise of a court's discretion is measured by "the standard of justice."²²⁹ Such discretion is very broad, though not unlimited.²³⁰ Thus, it has been held that a trial court did not abuse its discretion in denying a plaintiff's motion to amend her complaint in a malpractice action to add three additional counts to the original complaint where the motion to amend was filed only four days before a scheduled pre-trial conference²³¹ and hearing on the defendant's motion for summary judgment.²³²

A trilogy of cases during the survey period suggests the difficulties that may arise concerning the continuing jurisdiction of the trial court, the choice of the proper appellate route by which to challenge the propriety of an order entered "with leave to amend," and the timeliness of the means chosen. If an order dismissing a complaint, or entering a summary judgment or decree, "with leave to amend," is characterized as interlocutory, then appeal is proper only if the suit is in equity.²³³ In

227. FLA. STAT. § 95.11(7) (1963).

228. *Kell v. Brown*, *supra* note 226, at 323.

229. FLA. R. CIV. P. 1.15(a), (e).

230. *Corbett v. Eastern Air Lines, Inc.*, 166 So.2d 196 (Fla. 1st Dist. 1964).

231. FLA. R. CIV. P. 1.16.

232. *Dunn v. Campbell*, 166 So.2d 217 (Fla. 2d Dist. 1964). It is significant that the court thought that the same evidence relating to the defendant's alleged negligence in his representing hospital costs would be admissible under the general allegations of negligence already contained in the complaint, as would be admissible if the court had permitted the complaint to be amended to include the additional counts. See also, *Green v. Manley Const. Co.*, 159 So.2d 881 (Fla. 2d Dist. 1964).

233. FLA. APP. R., 1962 Revision, 4.2. Interlocutory appeals at law are appropriate only

this area, the language in which such an order is couched may well be controlling.

In *Hancock v. Piper*,²³⁴ for example, the defendants took an interlocutory appeal from an order denying their motion to dismiss a complaint on the ground of lack of jurisdiction over the parties and the cause. The briefs and the appendix on appeal revealed that the defendants' prior motion to dismiss the plaintiffs' amended complaint had been granted in the following language:

ORDERED, ADJUDGED and DECREED that the said motion be and the same is hereby granted, and this *cause* be, and the same hereby is dismissed, and it is further, ORDERED, ADJUDGED and DECREED that the plaintiffs be granted twenty (20) days within which to file their amended complaint in the above styled cause.²³⁵

On the nineteenth day, the plaintiffs mailed their second amended complaint to the defendants and to the clerk of the circuit court, but this complaint was not filed until the twenty-first day after entry of the order dismissing the prior complaint. The district court found that the order was merely an interlocutory one dismissing the complaint, but not the *cause*, and that the order "lacked the requisite finality to relieve the court of further judicial labor in the case."²³⁶ Finally, the court distinguished the case from *Stevens v. Metropolitan Dade County*,²³⁷ cited and relied on by the defendants, in which "the complaint was dismissed by an order which provided that if an amended complaint were not filed within fifteen days 'this *cause* shall stand dismissed *with prejudice*.'"^{237a}

H. Pre-Trial Conference

Rule 1.16 has been amended²³⁸ to enlarge the notice time for a pre-trial conference from ten to twenty days. The purpose of a pre-trial conference is to simplify the issues. If the conference progresses to the point of eliminating all questions of fact, then the court may give judgment according to the law on the facts before him.²³⁹ Thus, when noticed for a pre-trial conference, counsel should recognize and prepare for the possibility that at the conference the issues of fact may be simplified to the point of elimination.²⁴⁰ The notice period required to be given prior to holding a pre-trial conference is the same as that required before holding

from orders relating to venue or jurisdiction over the person. An appeal may be taken from any interlocutory appeal in equity.

234. 175 So.2d 207 (Fla. 2d Dist. 1965).

235. *Id.* (Emphasis added.)

236. *Id.*

237. 164 So.2d 273 (Fla. 3d Dist. 1964).

237a. *Ibid.*

238. 1965 REVISION, at 21-22.

239. Hillsborough County v. Sutton, 150 Fla. 601, 603, 8 So.2d 401, 402 (1942).

240. Cook v. Navy Point, Inc., 88 So.2d 532 (Fla. 1956).

a hearing on a motion for summary judgment.²⁴¹ Thus, in *Green v. Manley Constr. Co.*,²⁴² the second district, in affirming a summary judgment on oral motion made at the conclusion of the pre-trial conference, remarked that where sufficient notice has been given, the litigants are charged with knowledge that the court may, of its own motion, enter a summary judgment during a pre-trial conference.

In *Stager v. Florida E. Coast Ry. Co.*,²⁴³ the plaintiff in an FELA action appealed from a favorable judgment. Between the date of the injury and the trial, the plaintiff underwent several operations by two doctors and was examined by several other doctors of his own choosing and by a court-appointed physician. Among the errors assigned on appeal was an order of the trial court limiting to two the number of doctors who could testify at the trial.²⁴⁴ In sustaining the order, the district court noted that

a trial judge is charged with the conduct of a trial and only such conduct on the part of the trial judge as would result in an abuse of discretion, depriving a party of due process of law, would warrant an appellate court directing a trial judge as to the manner of conducting his courtroom.²⁴⁵

Conversely, where the trial court, over the defendant's objection, permitted the testimony of a witness, whose name was not included on a witness list filed by the plaintiff at the pre-trial conference, the appellate court also sustained the trial court's action on the ground that the defendant, this time, had failed to demonstrate an abuse of judicial discretion.²⁴⁶ In this case, the witness whose testimony was allowed was a physician who examined the plaintiff after the date of the pre-trial conference.

I. Parties

1. NECESSARY AND INDISPENSABLE PARTIES

"Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."²⁴⁷ Failure to join an indispensable party constitutes grounds for dismissal,²⁴⁸ and is a nonwaivable defense.²⁴⁹ In determining whether a party is indispensable, it is necessary to decide whether the omitted party is jointly or jointly and severally liable to the complainant. A party who is jointly and

241. FLA. R. CIV. P. 1.36, as amended, 1965 REVISION, at 26-27.

242. 159 So.2d 881 (Fla. 2d Dist. 1964).

243. 163 So.2d 15 (Fla. 3d Dist. 1964).

244. FLA. R. CIV. P. 1.16(4).

245. *Stager v. Florida E. Coast Ry. Co.*, *supra* note 243, at 17.

246. *Henningsen v. Smith*, 174 So.2d 85 (Fla. 2d Dist. 1965).

247. FLA. R. CIV. P. 1.17(a).

248. FLA. R. CIV. P. 1.11(b)(7).

249. FLA. R. CIV. P. 1.11(h)(1).

severally liable with those who have been made defendants is not an indispensable party to a pending cause of action;²⁵⁰ a plaintiff has a right to elect whom he will sue.

In an action against the estate of a truck driver for indemnity, it was held on appeal²⁵¹ that the trial court had erroneously dismissed²⁵² the complaint for non-joinder of an allegedly indispensable party, the lessee of the truck. The lessee, like the plaintiff lessor, was only vicariously liable for the defendant's negligence, and, therefore jointly and severally liable with the named defendant. The plaintiff had the option of suing either or both.

So also, the executrix is not an indispensable party to an action by the administrator de bonis non against the surety on her bond for damages resulting from the executrix' alleged mismanagement of the estate.²⁵³ Notwithstanding the use of the conjunctive in the statutes providing for a devastavit action,²⁵⁴ the statute providing for the form of the bond to be procured by the executor of an estate requires that such bonds be joint and several.²⁵⁵ Similarly, the personal representative and his surety are severally liable in a devastavit action because the claim against the representative is for breach of duty in his office, and the claim against the surety is on the bond contract.

In a suit to void a mortgage on corporation property, a corporation was held not to be an indispensable party where all of the shareholders were parties, either as plaintiffs or defendants, and the person who procured the mortgage was also a party, both individually and as trustee for the corporation, in which capacity he acquired and held title to the real property involved.²⁵⁶ However, where an officer and the principal shareholder of a corporation sues the defendants, individually and as trustees of the corporation, for the alleged conversion of his stock, the defendants could not counterclaim to recover for the alleged indebtedness of the plaintiff to the corporation, where the corporation had not been made a party to the suit pursuant to either Rule 1.17(a) or 1.18.²⁵⁷

In a case of first impression in Florida, the plaintiff in an action

250. *Dixon v. Travelers Indem. Co.*, 174 So.2d 53 (Fla. 3d Dist. 1965).

251. *Fincher Motor Sales, Inc. v. Lakin*, 156 So.2d 672 (Fla. 3d Dist. 1963).

252. FLA. R. CIV. P. 1.18 provides that "[M]isjoinder of parties shall not be grounds for dismissal of an action."

253. *Dixon v. Travelers Indem. Co.*, *supra* note 250.

254. FLA. STAT. § 733.52-.53 (1963).

255. FLA. STAT. § 732.61 (1963).

256. *Baum v. Corn*, 167 So.2d 740 (Fla. 2d Dist. 1964).

257. *Goodrich v. Malowney*, 157 So.2d 829 (Fla. 2d Dist. 1963). The second amended counterclaim was stricken during the pre-trial phase of the litigation with leave to the corporation or any one legally representing its rights to file such pleadings as it or they may be advised within 20 days. No such pleadings were filed.

against the three surviving joint obligors on a promissory note appealed from an adverse judgment which had been entered apparently on the ground that the plaintiff had failed to timely join²⁵⁸ an indispensable party, the estate of the deceased joint obligor. The district court reversed.²⁵⁹

The common law concept of a joint contract gave the obligee a single cause of action against all of the obligors. Each joint obligor was liable for the entire debt but was not bound by himself alone; and yet, upon the death of a joint obligor only the surviving obligors could be sued and the estate of the deceased joint obligor was not liable. The estate of the last surviving obligor, however, could be sued.²⁶⁰

Although section 45.11 of the Florida Statutes²⁶¹ has modified the common law rule by providing for the survival of causes of action, it does not follow that all who can be sued on a joint obligation, including the estate of a deceased obligor, must be sued. The court concluded that section 45.11 was merely intended to afford a creditor an additional remedy that he did not have at common law, but that it was not designed to affect the common law liability of surviving joint obligors. To hold otherwise would impose burdens on a creditor which were not imposed by the common law and

would wrongfully enable joint obligors to escape liability by taking advantage of the passive inactivity of the creditor as to the estate of a deceased joint obligor. The death of a joint debtor should not place the creditor, as to the efficacy of his remedy, in a worse position than if death had not occurred. It would be a strange sense of justice if the unfortunate demise of one obligor should contribute as a windfall to joint obligors who are also presumptively liable for the entire joint debt which may or may not yet be due.²⁶²

The responsibility for protecting their right to contributions rests with the other joint obligors. Under the broad provisions of the nonclaim statute²⁶³ a surviving obligor can file his claim for contribution against the estate of a deceased joint obligor even if the obligation is contingent and unmaturred.²⁶⁴

258. Pursuant to the provisions of Florida's Nonclaim Statute, FLA. STAT. § 733.16 (1963).

259. *Phillippi Creek Homes, Inc. v. Arnold*, 174 So.2d 552 (Fla. 2d Dist. 1965).

260. *Id.* at 554.

261. FLA. STAT. § 45.11 (1963).

262. *Phillippi Creek Homes, Inc. v. Arnold*, *supra* note 259, at 555-56. This view comports with the decisions of other state courts which have been squarely confronted with the problem.

263. FLA. STAT. § 733.16 (1963).

264. *Fillyau v. Laverty*, 3 Fla. 72 (1850), cited in *Phillippi Creek Homes, Inc. v. Arnold*, *supra* note 259, at 556.

2. INTERVENTION AT LAW

Under Florida procedure, provision for the right to intervene is included in that section of the rules governing the conduct of suits in equity.²⁶⁵

There is no special provision permitting intervention in law cases, although it is arguable that the language of Fla. R. Civ. P. 1.17 could be interpreted to be broad enough to allow an outside party to move for his being joined as a party in the cause if the grounds stated in the rule were met. The Supreme Court of Florida has rejected this view and held that intervention in a lawsuit was not permissible without a statute or rule of court expressly allowing it.²⁶⁶

Florida has created a right of statutory intervention in eminent domain proceedings for persons not expressly made parties, but interested in or having a lien upon the property described in the petition.²⁶⁷ The statute has been construed to mean that only persons who will be directly damaged by condemnation of the particular property, and not those who may only be consequentially damaged by its taking, have an absolute right to intervene.²⁶⁸

. . . [n]o rigid definition of "consequential damage" has been attempted; the inclusion or exclusion of particular cases has been governed largely by the terminology used in the opinions. As a very rough standard, the question whether the land owned by those seeking to intervene was expressly included, by description, in the original petition for condemnation has been kept in mind; if the land was not so included, it has been assumed that the damage apprehended by the attempting intervenors was consequential.²⁶⁹

Miller v. Townhouse Dev. Corp.,²⁷⁰ creates an exception to the general rule that in Florida there is no right of intervention in actions at law. In that case the appellate court reversed a trial court order denying the appellant's petition to intervene in a replevin²⁷¹ action on the ground that it would result in a waste of judicial effort unless the appellant were permitted to intervene as a party defendant as the plaintiff could have no

265. FLA. R. CIV. P. 3.4:

Anyone claiming an interest in pending litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

266. Florida Bar's Manual, *Florida Civil Practice Before Trial*, Ch. 11, Joinder of Parties and Actions (by the Honorable Paul E. Raymond, former Dean of Stetson University College of Law), at 322.

267. FLA. STAT. § 73.05 (1963).

268. *Lee County v. Charlotte County*, 174 So.2d 108 (Fla. 2d Dist. 1965).

269. Annot., 61 A.L.R.2d 1292, 1293 (1956).

270. 178 So.2d 730 (Fla. 2d Dist. 1965).

271. FLA. STAT. Ch. 78 (1963).

relief as to the property in the petitioner's possession, unless she was a party to the action, so that her rights in the property as against the plaintiff could be determined.

3. MISJOINDER OF PARTIES

Section 734.24,²⁷² which deals with suit on the bond of a personal representative of a decedent's estate, requires that suit for breach of said bond be brought in the name of the governor of the state for the use of the party damaged, and the statute requiring such a bond by a personal representative²⁷³ provides that the bond shall be made payable to the governor. Where the plaintiff fails to comply with the statutory requirements by bringing suit in the governor's name for the use of the party damaged, proper procedure requires not that the suit be dismissed, but that the court permit the plaintiff to correct the misjoinder by amending his complaint²⁷⁴ on such "just terms" as the trial court deems necessary.²⁷⁵

4. DROPPING OR ADDING PARTIES

In an action to recover for personal injuries resulting from a gas explosion alleged to have been caused by the defendant's negligence, the plaintiff appealed from an order dismissing her complaint. Originally, the complaint had been filed against four defendants, whose liability to the plaintiff, if any, under the facts of the case would have been joint and several. The district court reversed.²⁷⁶ The mere fact that the plaintiff elected to proceed severally and separately against the remaining defendant did not justify dismissal of the entire cause. Rule 1.35 concerns dismissal of an entire cause and is inapplicable when it is sought to dismiss individual parties or claims against one or more but less than all of the defendants. Although Rule 1.18 permits dropping parties "[up]on such terms as are just," "it would not appear to be a 'just term' to require as a condition of permission to drop three of four defendants whose liability is several, that the entire cause should be dismissed."²⁷⁷

5. SUBSTITUTION OF PARTIES

Unlike Rule 1.18, permitting amendment to add or to drop parties, "substitution is meant to cover only those cases where the proper parties have been joined, but because of death, incompetency, etc., of a party, another may be substituted."²⁷⁸ Prior to the amendment of the federal

272. FLA. STAT. § 734.24 (1963).

273. FLA. STAT. § 732.61 (1963).

274. FLA. R. CIV. P. 1.18.

275. *Dixon v. Travelers Indem. Co.*, 174 So.2d 53 (Fla. 3d Dist. 1965).

276. *Salcedo v. Southeastern Natural Gas Co.*, 171 So.2d 398 (Fla. 3d Dist. 1965).

277. *Salcedo v. Southeastern Natural Gas Co.*, *supra* note 276, at 399.

278. 4 MOORE, FEDERAL PRACTICE, ¶ 25.02, at 512 (2d ed. 1963).

rules in 1963, Federal Rule 25(a),²⁷⁹ which was identical to Florida Rule 1.19(a) prior to the recent amendments, was severely criticized on the ground that the Rule operated both as a statute of limitations upon revivor, and as a mandate to the court to dismiss an action not revived within the two-year period as required by the Rule. Moore described Rule 25 as "easily the poorest of all the federal rules."²⁸⁰ It was questioned whether a statute of limitations may validly be prescribed by rule of court.²⁸¹

As a result of the recent amendments subsection (a)(1) of the Florida Rule has been amended to conform to the present Federal Rule 25(a) by deleting the requirement that the order for substitution be made within two years following the death of a party, and substituting a requirement that the motion be made within ninety days after death is suggested upon the record. As amended, Florida Rule 1.19(a)(1) now reads:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on all parties as provided in Rule 1.4 and upon persons not parties in the manner provided for the service of a summons. Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.²⁸²

The advisory committee notes to amended Federal Rule 25(a) state:

The amended rule establishes a time limit for the motion to substitute based not upon the time of death, but rather upon the time information of the death is provided by means of a suggestion of death on the record. . . . The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to rule 6(b), as amended. . . .²⁸³

A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or the representative of a deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record.

279. FED. R. CIV. P. 25(a).

280. 4 MOORE, FEDERAL PRACTICE, ¶ 25.01(a), at 44 (Supp. 1965).

281. *Perry v. Allen*, 239 F.2d 107 (5th Cir. 1956).

282. 1965 REVISION, at 22.

283. The time for filing such a motion could also be extended under Florida practice, pursuant to FLA. R. CIV. P. 1.6(b), as amended, 1965 REVISION, at 18.

A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ("the court may order") it may be denied by the court in the exercise of a sound discretion if made long after death . . . and circumstances have arisen rendering it unfair to allow substitution. . . . Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute.²⁸⁴

Subsection (d) of Rule 1.19 has also been amended to conform to Federal Rule 25(d) and now reads:

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.²⁸⁵

As amended, "[s]ubsection (d)(1) automatically substitutes a successor public officer without the necessity of an order. Subsection (d)(2) provides for suit against public officers by title thus avoiding substitution when vacancies occur and simplifying practice with public officers as parties.²⁸⁶

Notwithstanding that the amendment to Rule 1.19(a)(1) has been amended since the decision of *Field v. Newsom*,²⁸⁷ by the third district and *Cloer v. Shawver*,²⁸⁸ by the first district, the caveat sounded by these cases to litigants who wish to substitute a personal representative for a deceased party still rings loud and clear. In seeking to effect such a substitution of parties, the litigant must be diligent not only to comply with the requirements of Rule 1.19, but also to satisfy the requirements of Florida probate law, with special regard for the provisions of section 733.18(2).²⁸⁹

In the *Field* case an action was pending to recover a claimed real estate commission at the time of the defendant's death. The plaintiff filed

284. Advisory Committee Notes on the Amendments to Federal Rules of Civil Procedure Adopted by the Supreme Court of the United States on January 21, 1963.

285. 1965 REVISION, at 22.

286. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1134 (1965).

287. 170 So.2d 50 (Fla. 3d Dist. 1964).

288. 177 So.2d 691 (Fla. 1st Dist. 1965).

289. Relating to the procedure for handling objections to claims asserted against an estate.

a timely claim against the defendant's estate,²⁹⁰ and the executrices thereafter caused an objection to the claim to be served on the plaintiff pursuant to section 733.18, the terms of which required a claimant to bring appropriate suit action or proceedings upon his claim within two months of the date of service of the objections upon him. In affirming a summary judgment for the defendant, the appellate court held that the plaintiff forfeited his right to maintain a previously filed action when he did not file his motion for substitution of parties or bring suit against the estate within two months after the service.

In the *Cloer* case, the plaintiff filed his suggestion of the defendant's death and motion to substitute the executrix of the defendant's estate in his pending negligence action in the circuit court eight days after filing his claim against the estate in the probate court. A copy of this motion was served by mail upon the attorneys of record for the deceased defendant, but the plaintiff did not at this time give notice to the executrix of such substitution of parties. Eleven days after the plaintiff had filed suggestion of death and motion for substitution in the circuit court, the executrix filed her objections to the plaintiff's claim in the probate court. The circuit court granted the plaintiff's motion for substitution, but subsequently vacated the order of revival at the plaintiff's request to permit service of the suggestion and motion for substitution on the executrix more than two months after she had filed her objections to the plaintiff's claim. Subsequently proceedings terminated in a summary judgment dismissing the complaint, on the mistaken premise that the suggestion of death and motion for substitution were filed more than two months after objections to the plaintiff's claim had been filed by the executrix. On plaintiff's appeal, he obtained a reversal. A civil suit is deemed commenced when the complaint is filed.²⁹¹ By analogy where a suit is pending prior to the defendant's death, "the *filing* of the suggestion and the motion for substituting the representatives of the estate as party defendants is equivalent to the *filing* of a *complaint* against the estate."²⁹² Where substitution proceedings are already pending against the estate at the time objections to a claim are filed in the probate court, the two-month provisions of section 733.18 are inapplicable, and the suit should not be dismissed without determining the merits of the motion made pursuant to Rule 1.19(a)(1).

J. *Dismissal of Actions*

1. "SPECIAL DEMURRER PRACTICE" REVIVED²⁹³

Rule 1.11(b), under which a party may elect to present certain enumerated defenses²⁹⁴ by motion prior to filing his answer, has been

290. Pursuant to FLA. STAT. § 733.16 (1963).

291. FLA. R. CIV. P. 1.2(a).

292. *Cloer v. Shawver*, 177 So.2d 691, 694 (Fla. 1st Dist. 1965).

293. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 507 (2d ed. 1947).

294. The enumerated defenses include:

amended²⁹⁵ to require that the motion or responsive pleading in which any of these defenses is asserted state with specificity the grounds upon which the defense is based. The motion, or responsive pleading, should also state specifically and with particularity the substantial matters of law intended to be argued. "Any ground not so stated shall be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time."²⁹⁶

2. EXPANSION OF PLAINTIFF'S RIGHT TO VOLUNTARILY DISMISS AN ACTION

As a result of the recent amendment of Rule 1.35(a)(1),²⁹⁷ substantial changes have been effected in the plaintiff's right to voluntarily dismiss the action he has begun. Rule 1.35(a)(1) now reads:

Except in actions wherein property has been seized or is in the custody of the court, an action may be dismissed by plaintiff without order of court (i) by serving a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served, or if such motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim.

Under amended Rule 1.35(a)(1), a plaintiff may now take a voluntary dismissal as of right at any time before hearing on a motion for summary judgment, or if none is served or if the motion for summary judgment is denied, before retirement of the jury in a jury case, or before submission of a non-jury case to the court for decision. The new rule represents a substantial departure from its federal counterpart and the prior Florida rule by giving the plaintiff absolute control over the con-

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1. lack of jurisdiction over the subject matter
 2. lack of jurisdiction over the person
 3. improper venue
 4. insufficiency of process
 5. insufficiency of service of process
 6. failure to state a cause of action
 7. failure to join indispensable parties.

295. 1965 REVISION, at 20.

296. Rule 1.11(b), as amended, *supra* note 295, conflicts with 1.11(h)(1). The *Notes of the Subcommittee*, 39 FLA. B.J. 1132, 1133 (1965), point out that the language of the amended subsection was taken from rule 1.7(b) which details the requirements for a motion. The Notes further indicate that the amendment to subsection (b) of rule 1.11 was intended to serve the dual function of discouraging dilatory motions and of eliminating "shot gun" motions that "do not enable counsel to properly prepare for hearings with consequent delays, memorandum briefs and the like. . . . A motion reciting only the words of this subsection should receive no consideration unless it appears that lack of jurisdiction of the subject matter is involved."

297. 1965 REVISION, at 25-26.

tinuation of the litigation up to either the hearing on a motion for summary judgment, the retirement of the jury, or the submission of a non-jury case to the court for decision. This benefit inures notwithstanding any possible inconvenience and expense to a defendant. Insofar as the plaintiff is concerned, he may exercise this control whether his action at law is a jury or a non-jury case, and the power also extends to suits in equity²⁹⁸ where the plaintiff's power is even broader under amended Rule 1.35(a)-(1) than it was at common law where he enjoyed the right of nonsuit. Although the first voluntary dismissal is without prejudice to a plaintiff's right to reinstitute the litigation at a more opportune time, voluntary dismissal of the second suit operates as an adjudication on the merits which bars a future action on the same claim.²⁹⁹ The "two dismissal rule" is only applicable where the dismissal of the prior action was voluntarily made by the plaintiff. Thus, institution of a third suit is not foreclosed where one of the earlier dismissals was by order of the court.³⁰⁰ There is a question whether a notice dismissal followed by a dismissal by stipulation would bar another action.³⁰¹

The amendment appears to have created a new ambiguity. It is no longer clear whether the plaintiff may be absolutely entitled to dismiss his action even though the defendant has filed a counterclaim which would not be entitled to remain pending if the principal action was dismissed. Under prior practice the period of the plaintiff's absolute right was so brief that it disappeared once an answer was filed, and as previously stated, under Rule 1.35(a)(2) which remains unchanged, the court could not grant a voluntary dismissal over the defendant's objections where a counterclaim had been filed unless the counterclaim could remain pending. With respect to voluntary dismissals upon order of the court, at least one Florida appellate court³⁰² has espoused the federal view that granting such dismissals is discretionary with the court, and the plaintiff has no absolute right to require the court to grant a voluntary dismissal by setting such terms and conditions as it deems proper.³⁰³

298. "The rules in Section I are applicable to both actions at law and suits in equity." FLA. R. CIV. P. Because of the language of FLA. STAT., § 54.09 (1963), the right of a plaintiff to take a statutory nonsuit in Florida was held to be limited to actions at law without a jury, and in classical equity practice the right of nonsuit was unknown. See *Peaslee v. Michalski*, 167 So.2d 242, 244 (Fla. 2d Dist. 1964); Note, 20 U. MIAMI L. REV. 204, 212, nn. 41-42 and accompanying text.

299. Rule 1.35(a)(1), as amended, 1965 REVISION, *supra* note 297.

300. *Rowe v. Silver*, 166 So.2d 238 (Fla. 3d Dist. 1964).

301. For a discussion of this question in relation to the analogous federal rule, see *Barns & Mattis, 1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 282, n.20.

302. See the concurring opinion of Associate Judge *Barns* in *Gregg v. Gray*, 176 So.2d 520 (Fla. 2d Dist. 1965). This is also the clear implication of the decision by the Third District Court of Appeal in *Continental Aviation Corp. v. Southern Bell Tel. & Tel. Co.*, 173 So.2d 750 (Fla. 3d Dist. 1965), although the issue on appeal in that case was whether or not the trial court had abused its discretion in dismissing an action without prejudice, rather than whether a dismissal by the court was a discretionary or an absolute right.

303. For a case interpreting as absolute the plaintiff's right to require the court to grant

3. STATUS OF THE NONSUIT

Presumably, the recent affirmance by the Florida Supreme Court³⁰⁴ of the decision of the First District Court of Appeal in *Dobson v. Crews*,³⁰⁵ has laid to rest the confusion that abounded in the area of the nonsuit. That case held that the continued existence of a right to voluntary nonsuit was inconsistent with the spirit and purpose of Rule 1.35, as it existed after the 1962 revision³⁰⁶ of the Rule, which deleted from subsection (b) the reference to the plaintiff's right to take a nonsuit pursuant to any applicable statute.³⁰⁷ Prior to that decision, the districts were split not only as to the continued existence *vel non* of the nonsuit under the rules, but also as to the essential nature,³⁰⁸ incidence³⁰⁹ and proper method of judicially reviewing an order of nonsuit.³¹⁰

a voluntary dismissal "upon such terms and conditions as the court deems proper," see *Bolten v. General Motors Corp.*, 180 F.2d 379 (7th Cir. 1950), subsequently overruled by *Grivas v. Parmalee Transp. Co.*, 207 F.2d 334 (7th Cir. 1953), *cert. denied*, 347 U.S. 913 (1964). See also *Barns & Mattis*, *supra* note 301, at 283, n.22 and accompanying text; Note, 20 U. MIAMI L. REV. 204, 206, n.18 and accompanying text.

304. *Crews v. Dobson*, 177 So.2d 202 (Fla. 1965); Note, 20 U. MIAMI L. REV. 204 (1965).

305. 164 So.2d 252 (Fla. 1st Dist. 1964), discussed in *Massey & Westen, Civil Procedure*, 18 U. MIAMI L. REV. 745, 774-76 (1964).

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

307. The Second District Court of Appeal has said in *Gregg v. Gray*, 176 So.2d 520 (Fla. 2d Dist. 1965) that FLA. STAT. § 54.09 only acts as a statute of limitations on the time during which a plaintiff may take a nonsuit, and did not itself grant the right to a nonsuit, any more than the provision deleted from 1.35(b) in 1962 conferred the right. The statute and the rule alike merely recognized the existence of the right.

However, granting that the nonsuit was a common law procedural right, nevertheless in Florida it could be considered a statutory right since FLA. STAT. § 2.01 (1965) provides:

The common and statute laws of England which are of a general and not a local nature . . . down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States, and the acts of the legislature of this state.

FLA. STAT. § 25.371 (1965) abrogates all statutes inconsistent with the rules. Therefore, if the continued existence of a right of nonsuit is inconsistent with the express purpose of the rules to achieve the speedy, just and inexpensive determination of every action, FLA. STAT. § 2.01 should be deemed abrogated to the extent that it purports to adopt into Florida law the common law right of nonsuit. (For an opinion reaching the contrary conclusion on the basis of the same facts, see the dissent in *Thoman v. Ashley*, 170 So.2d 332 (Fla. 2d Dist. 1964), *cert. denied*, 177 So.2d 205 (Fla. 1965).

308. The separate district courts have, for example, differently defined an involuntary nonsuit so that cases from different districts both purportedly dealing with involuntary nonsuits may in fact be dealing with different concepts. In the *Crews* case, *supra* note 304, the supreme court referred to a nonsuit taken by the plaintiff under the compulsion of an imminent adverse ruling as involuntary, but the Second District Court of Appeal considered that only voluntary nonsuits existed under Florida law, and defined a voluntary nonsuit as one affirmatively sought by the plaintiff, whereas it considered an involuntary nonsuit to be one entered on plaintiff's default in a common law action. (Presumably, the function of a common law involuntary nonsuit is now served by the rules permitting a default judgment, FLA. R. CIV. P. 2.9, and a decree pro confesso, FLA. R. CIV. P. 3.9). See *Gregg v. Gray*, *supra* note 307, at 521; *Peaslee v. Michalski*, 167 So.2d 242 (Fla. 2d Dist. 1964).

309. That is, whether the plaintiff's right to a nonsuit in Florida existed as an absolute right or only in the exercise of a sound judicial discretion. Compare *Thoman v. Ashley*, *supra* note 307 with *Cook v. Lichtblau*, 176 So.2d 523, 530 (Fla. 2d Dist. 1965) and *Union Trust Co. v. Fields*, 176 So.2d 339 (Fla. 2d Dist. 1965).

310. See, e.g., *Florida E. Coast Ry. Co. v. Lewis*, 177 So.2d 334 (Fla. 1965); *Gregg v. Gray*, 176 So.2d 520 (Fla. 2d Dist. 1965); *Thoman v. Ashley*, 170 So.2d 332 (Fla. 2d Dist.

Twenty-one days after its decision in the *Crews* case, the Florida Supreme Court adopted amended Rule 1.35(a). Although the amended rule has liberalized the plaintiff's right under Florida law to a voluntary dismissal, in comparison with his previous right to such a dismissal and with his right to do so in federal courts, the resemblance of the plaintiff's new right to the old common law nonsuit is limited.³¹¹ Further, under the *Crews* decision, it appears that his right under the rule to seek a voluntary dismissal will be the sole remedy available to a plaintiff who wishes for one or another reason to discontinue his action.³¹²

Since it is possible that cases may still reach the appellate courts in which review is sought of the propriety of granting a nonsuit because the cases were decided before the supreme court handed down its decision in the *Crews* case, the authors feel compelled to re-register³¹³ their objections to the disposition of the *Dobson* case in which the district court remanded the case to the trial court with directions to vacate the judgment of nonsuit and costs, and to grant the defendant's motion to dismiss the action with prejudice. Interpreting the language then used in Rule 1.35(b), and giving to it its ordinary meaning, dismissal for failure to prosecute would ordinarily be without prejudice, and in view of the confusion and disagreement surrounding the right of nonsuit at the time, such a dismissal would appear to have been more equitable. In any event, the court was not required to order the trial court to dismiss the complaint with prejudice.³¹⁴

4. CHANGES IN THE PROVISIONS FOR INVOLUNTARY DISMISSAL

Subsection (b) of Rule 1.35 has been amended³¹⁵ to conform to Federal Rule 41(b) as amended in 1963,³¹⁶ except that provision for

1964), *cert. denied*, 177 So.2d 205 (Fla. 1965); *Bennett v. Fratus*, 168 So.2d 792 (Fla. 3d Dist. 1964), *cert. denied*, 177 So.2d 334 (Fla. 1965), *petition dismissed*, 177 So.2d 702 (Fla. 3d Dist. 1965).

311. *Supra* notes 299-301 and accompanying text.

312. *Supra* notes 304-307 and accompanying text.

313. See Massey & Westen, *Civil Procedure*, 18 U. MIAMI L. REV. 745, 776 (1964).

314. In *St. Johns River Co. v. Pickett*, 176 So.2d 214 (Fla. 1st Dist. 1965), the First District Court of Appeal followed the same procedure that it had previously adopted in the *Dobson* case. However, where the facts have permitted, the courts have showed a tendency to avoid the harshness of the *Dobson* decision by basing their decision on a different premise. In *Florida E. Coast Ry. Co. v. Lewis*, 167 So.2d 104 (Fla. 1st Dist. 1964), the same First District Court of Appeal affirmed the action of the trial court in striking an affirmative defense of *res judicata* on the ground that the defendant was estopped from challenging the propriety of an order of nonsuit because it had neither objected to the plaintiff's motion in the trial court nor moved to dismiss the complaint with prejudice pursuant to Rule 1.35(b). In *Cook v. Lichtblau*, 176 So.2d 523 (Fla. 2d Dist. 1965), the court circumvented the *Dobson* decision by finding that the trial court's action in dismissing the jury prior to ruling on the pending motions of the plaintiffs and defendants had resulted in a mistrial since it had not left itself in a position where it could deny both motions and order the trial to continue.

315. 1965 REVISION, at 26.

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

dismissal for failure to prosecute is omitted because this is the subject of newly added subsection (e).³¹⁷ Florida Rule 1.35(b) now reads:

Any party may move for dismissal of an action or of any claim against him for failure of an adverse party to comply with these rules or any order of court. After a party seeking affirmative relief in an action tried by the court without a jury has completed the presentation of his evidence, any other party may move for a dismissal on the ground that upon the facts and the law the party seeking affirmative relief has shown no right to relief without waiving his right to offer evidence in the event the motion is not granted. The court as trier of the facts may then determine them and render judgment against the party seeking affirmative relief or may decline to render any judgment until the close of all the evidence. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Under amended Florida Rule 1.35(b), as in amended Federal Rule 41(b), a motion to dismiss at the close of the case of the party seeking affirmative relief is now available only in non-jury trials, and is no longer interchangeable with a motion for a directed verdict made at the conclusion of the adverse party's case in an action heard by a jury. "The court as trier of the facts may then determine them and rendered (sic) judgment against the party seeking affirmative relief. . . ."³¹⁸

The test for reviewing the propriety of an order granting an involuntary dismissal at the conclusion of the case of the party seeking affirmative relief differs in a non-jury trial from the test for determining the correctness of a trial court's order granting a motion for a directed verdict at the close of the case of a party seeking affirmative relief. Where appellate review is sought of an order granting a motion for a directed verdict, the proper test of the correctness of the order is

. . . when the evidence, when considered in its entirety, and the reasonable inferences which may be drawn therefrom, failed to prove the plaintiff's case under the issues made by the pleadings³¹⁹

In these circumstances it is the duty of the court

. . . to weigh the evidence, resolve the conflicts, and pass upon the credibility of witnesses. If it finds that plaintiff's evidence is

317. See the *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1135 (1965).

318. FLA. R. CIV. P. 1.35(b), as amended, 1965 Revision, *supra* note 315.

319. *Gibson v. Gibson*, 180 So.2d 388, 389-90 (Fla. 1st Dist. 1965).

insufficient to warrant a judgment or decree granting the relief prayed, it may render judgment on the merits for the defendant.³²⁰

Where . . . the trial court, sitting without a jury, determines the facts from the plaintiff's evidence and concludes that, upon the facts and the law, the plaintiff has shown no right to relief, its order dismissing a plaintiff's cause should be affirmed, unless "clearly erroneous" Stated differently, the only question properly before (an appellate court on appeal from an order granting a motion for involuntary dismissal in a non-jury case) . . . is whether the evidence supports the Chancellor's finding³²¹

The paragraphing of subsection (b) has been rearranged to conform to the federal rule. The clause "any dismissal not provided for in this rule" has been added to the sentence dealing with when involuntary dismissals are with prejudice. This amendment was added to conform to the Florida rule prior to the 1962 amendment to Rule 1.35(b)—when the same phrase was deleted from the Rule.³²² It was intended to overrule the decision of the First District Court of Appeal in *Hardee v. Gordon Thompson Chevrolet, Inc.*,³²³ in which the effect of a dismissal for failure to state a cause of action depended upon whether the claimant had failed to allege sufficient facts to entitle him to recover or whether there existed no legal right to recovery under any view of the facts alleged. If the former, the dismissal was ordinarily without prejudice, but in the latter the dismissal was in effect an adjudication on the merits and with prejudice.³²⁴ Presumably dismissals pursuant to Florida Rule 1.11(b), except the expressly excepted³²⁵ dismissals for lack of jurisdiction or for improper venue or for lack of an indispensable party, are now with prejudice unless the order of dismissal otherwise indicates. The subcommittee notes³²⁶ also indicate that the amendment was intended to restore the rule of *Hinchee v. Fisher*.³²⁷ In that case, the first action by the assignor of a lease against the assignees had been dismissed because of the assignor's failure to pay into the court registry a monetary sum as required by court order. It was held that the second action based on the identical claim and between the same parties was barred. Another consequence of the newly included phrase is to require that a dismissal for failure to appear at a duly noticed deposition hearing, or for failure to answer properly served

320. *Id.* at 391.

321. *Tampa Wholesale Co. v. Foodtown, U.S.A., Inc.*, 166 So.2d 711, 712 (Fla. 2d Dist. 1964).

322. *In re Fla. R. Civ. P.*, 1962 Revision, 142 So.2d 725 (Fla. 1962). For a discussion of the effect of the deletion, see Barns & Mattis, *1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 284-287 (1963).

323. 154 So.2d 174 (Fla. 1st Dist. 1963).

324. See Massey & Westen, *Civil Procedure*, 18 U. MIAMI L. REV. 745, 773 (1964).

325. FLA. R. CIV. P. 1.35(b), as amended, 1965 Revision.

326. 39 FLA. B.J. 1132, 1135 (1965).

327. 93 So.2d 351 (Fla. 1957).

interrogatories,³²⁸ be with prejudice unless the order of dismissal otherwise specifies.

In *Rashard v. Cappiali*,³²⁹ the Third District Court of Appeal held that the trial court erroneously dismissed a complaint with prejudice after the plaintiff failed to answer interrogatories duly propounded more than a year before entry of the order of dismissal appealed.

. . . [A] dismissal based upon a violation of the rules cannot be upon the merits even though it might act as an adjudication of the merits. We hold that . . . where dismissal is to be with prejudice and thus act as an adjudication on the merits it must be for a violation of an order of the court and not for a mere failure to abide by a notice of a procedural step. We think that it is important that in case an order of court is violated or disregarded, the party moved against knows at the time of the order that there has been judicial determination of the requirement he must observe. This is not to imply that a threat of dismissal or statement of penalty must be included in the order but simply that it must be an order that is breached.³³⁰

In view of the fact that dismissals for failure to answer interrogatories are now presumptively with prejudice, the *Rashard* decision appears to require a caveat to the Bench and Bar to include an express provision in such orders that the dismissal be without prejudice if the delay and expense of unnecessary appeals are to be avoided.

The last sentence of subsection (e), relating to the time within which a voluntary dismissal pursuant to Rule 1.35(a) could be made, has been deleted because of the absolute right of dismissal, and the Rule has been made applicable to third party claims as well as to complaints, counterclaims and cross-claims.

Subsection (d) of Rule 1.35 now provides that costs *shall* be assessed in any dismissed action and judgment therefor entered in that action. In addition, until the party dismissing the first action has paid the costs so assessed to the adverse party the court before which a second suit on the same claim between the same parties is brought is required to stay the proceedings in the later suit. The subcommittee notes³³¹ indicate that the reason for requiring the judge in the original action to assess the costs is because he is in a better position to do so.

5. INVOLUNTARY DISMISSAL FOR FAILURE TO PROSECUTE

Subsection (e), relating to dismissals for failure to prosecute, has been added to Rule 1.35. This subsection substantially adopts the pro-

328. FLA. R. CIV. P. 1.31(d).

329. 171 So.2d 581 (Fla. 3d Dist. 1965).

330. *Id.* at 583.

331. 39 FLA. B.J. 1132, 1135 (1965).

visions of Florida Statute, section 45.19(1)³³² in accordance with the policy that all general procedure statutes should be incorporated into the rules. This subsection also supplies the time for dismissal for failure to prosecute, omitted in the equivalent Federal Rule 41(b).³³³ Subsection (e) provides:

All actions in which it does not affirmatively appear from some action taken by filing of pleadings, order of court or otherwise that the same is being prosecuted for a period of one year shall be deemed abated for want of prosecution and shall be dismissed by the court upon its own motion or upon motion of any interested person, whether a party to the action or not, after notice to the parties; provided that actions so dismissed may be reinstated on motion for good cause, such motion to be served by any party within one month after such order of dismissal.

Dismissal is mandatory if it is demonstrated to the court that no action towards prosecution has been taken within a year.³³⁴ What constitutes prosecution of a case is essentially a factual inquiry. For example asking the clerk to set the cause on the trial docket has been held sufficient.³³⁵ When the plaintiff's activities do not appear in the court records, a trial judge may justify his denial of a motion to dismiss on the basis of evidence *dehors* the record.³³⁶ It would appear that the provisions of amended Rule 1.35(b) now require that dismissals for failure to prosecute pursuant to Rule 1.35(e) be presumptively with prejudice. This is the federal view.³³⁷ Such a motion to dismiss for failure to prosecute may, however, only be granted after notice to the parties.³³⁸

6. REINSTATEMENT OF DISMISSED ACTIONS FOR GOOD CAUSE SHOWN

It should be noted that dismissed actions may be reinstated on motion for "good cause," and that the motion may be served by any party within a month after the order of dismissal. What constitutes "good cause" is a factual inquiry dependent upon the circumstances of each case.

In the *Adams Engineering Co.* case³³⁹ it was held that an order

332. FLA. STAT. § 45.19(1) (1965).

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

334. The Rule states that actions not prosecuted for a year *shall* be dismissed. For cases interpreting the identical provision in FLA. STAT. § 45.19(1) (1965) see *Little v. Sullivan*, 173 So.2d 135 (Fla. 1965); *Adams Eng'r Co. v. Construction Prod. Corp.*, 156 So.2d 497 (Fla. 1963).

335. *Adams Eng'r Co. v. Construction Prod. Corp.*, 156 So.2d 497 (Fla. 1963), *rev'd on rehearing*, 141 So.2d 300 (Fla. 3d Dist. 1962); *Ferrara v. Coyle Beverages, Inc.*, 156 So.2d 907 (Fla. 3d Dist. 1963).

336. *Reilly v. Fuss*, 170 So.2d 475 (Fla. 2d Dist. 1964).

337. 5 MOORE, FEDERAL PRACTICE, ¶ 41.11(2), at 1126 (2d ed. 1964).

338. FLA. R. CIV. P. 1.35(e), 1965 Revision; *Franklyn Acceptance Corp. v. Superior Elec. Indus., Inc.*, 167 So.2d 116 (Fla. 3d Dist. 1964).

339. *Supra* note 335. See also *Reilly v. Fuss*, *supra* note 336.

granting or denying a motion for reinstatement of an action dismissed for lack of prosecution—unlike an order granting a motion to dismiss the action for the same reason—is a discretionary order, which will be reversed on appeal only where the appellant meets the heavy burden of showing an abuse of judicial discretion. The Florida Supreme Court found such an abuse of discretion in the case of *Little v. Sullivan*.³⁴⁰ In that case the trial court had reinstated a damage action dismissed pursuant to Florida Statutes, section 45.18(1) for failure to prosecute. The plaintiff predicated his motion to reinstate the cause on the fact that the attorney originally representing the plaintiff had moved his practice to another area of the state, and that the attorney who thereafter assumed the responsibility of representing the plaintiff was a member of the Florida legislature which had been in session from April, 1963, to the date the motion to dismiss was granted on June 10, 1963. The plaintiff argued—and the trial and district courts agreed—that under section 54.08 of the Florida Statutes,³⁴¹ litigation is automatically continued for the duration of the session when a party to an action is represented by a legislator-attorney. On certified question the supreme court held that the district court had erroneously upheld the trial court in the exercise of its discretion. “Discretion is not available as a support for a conclusion in the face of a positive rule of law to the contrary.”³⁴² Florida Statutes, section 54.08 is not self-executing, but requires the legislator-attorney to file a motion to obtain the benefit of a continuance for pending litigation during the period provided by the statute.

By Section 54.08, supra, the cause of action in which a lawyer-legislator is engaged should be continued as a matter of law when the lawyer-legislator files a motion requesting such continuance. In the absence of such a motion, however, the litigation remains active. . . .³⁴³

The plaintiff in a wrongful death action appealed from an adverse final judgment denying her timely petition to reinstate her cause which had previously been dismissed for failure to prosecute. In response to the motion to dismiss, the plaintiff had submitted her own and her Iowa attorney's affidavit by which she sought to establish that she had been actively engaged in prosecuting the case, but that she had encountered difficulty in establishing the identity and location of the instructor of the deceased student pilot of the plane involved. The trial court granted the

340. 173 So.2d 135 (Fla. 1965), reversing 166 So.2d 697 (Fla. 3d Dist. 1964).

341. FLA. STAT. § 54.08 (1963) provided, (now FLA. STAT. § 11.111 (1965)):

All pending litigation before the courts of this state shall stand continued during any session of the legislature and for a period of time fifteen days prior to any session of the legislature, and fifteen days subsequent to the conclusion of any session of the legislature where either attorneys representing the litigants are members of the legislature, when motion to that effect is made by such member.

342. *Little v. Sullivan*, supra note 334, at 137.

343. *Ibid.*

motion to dismiss for lack of prosecution, and later denied the motion for reinstatement of the cause on the ground that the action of the plaintiff and her counsel, as reflected in the exhibits, was not an affirmative showing of such act as will stay the running of the one-year period provided by Florida Statutes, section 45.19(1). Apparently, the trial court believed that to warrant denial of the defendant's motion to dismiss, it was necessary that the plaintiff's activities in prosecution of the cause be reflected in the record. In the instant case, the plaintiff's activities had not been recorded.

Florida Statutes, section 45.19(1) provides for abatement of actions for lack of prosecution "in which there shall not affirmatively appear from some action taken by filing of pleadings, order of court, or otherwise, that the same is being prosecuted. . . ."³⁴⁴ Although the district court sustained the plaintiff's contention that the statutory language permitted the introduction of evidence outside of the record to establish the fact of timely action and to justify a decision denying a motion to dismiss for lack of prosecution, it nevertheless concluded that the trial court had not abused its discretion in finding that counsel's unrecorded activities did not constitute "good cause" for reinstatement of the action and affirmed the decision below.

In the light of the *Adams Constr. Co.*³⁴⁵ and *Little*³⁴⁶ cases, the district court decision seems clearly incorrect and unduly harsh. The record clearly reflected that the trial judge had reluctantly granted the motion to dismiss and denied the motion for reinstatement. He did this because he erroneously believed that Florida Statutes, section 45.19(1) required timely action in prosecution of a cause to be recorded in the court files before it could be considered either in opposition to granting a motion to dismiss for lack of prosecution, or as "good cause" for reinstatement of an action previously dismissed for nonprosecution.³⁴⁷ There-

344. FLA. STAT. § 45.19(1) (1965). These provisions are now contained in FLA. R. Crv. P. 1.35(e).

345. 156 So.2d 497 (Fla. 1963), *rev'd on rehearing*, 141 So.2d 300 (Fla. 3d Dist. 1962).

346. *Supra* note 340, and accompanying text.

347. The impreciseness of the trial court's understanding of the standards required by the statute is further demonstrated by its statement:

That the "good cause" to be shown by the plaintiff which would justify the Court in denying the motion to dismiss is the same as must be shown in order to have the case reinstated as provided by the last clause of the aforesaid Statute. *Gulf Appliance Distributors, Inc. v. Long*, (Fla. 1951), 53 So.2d 706, 707. *Reilly v. Fuss*, 170 So.2d 475, 477 (Fla. 2d Dist. 1964).

As stated above, notes 334 and 339 *supra*, and accompanying text, orders of dismissals are mandatory where it affirmatively appears that no action in prosecution of a cause has been taken for a year, but orders granting or denying reinstatement are discretionary. What the trial court apparently meant was that the same standards apply to determine whether any timely action in prosecution has been taken upon consideration to dismiss for nonprosecution as apply in determining whether a motion to dismiss was erroneously granted upon consideration of a motion to reinstate the action for good cause shown. It seems that the district court also failed to understand the difference between the two types of orders for it erroneously observed at p. 478 "that a ruling involving the dismissal of actions for lack of prosecution or

fore, the order denying reinstatement was predicated not on the exercise of a sound judicial discretion, but rather upon a misunderstanding of material provisions of the applicable statute.

K. *Depositions and Discovery*

1. AMENDMENTS TO THE RULES RELATING TO DISCOVERY

Subsection (a) of Rule 1.21, relating to oral depositions pending action, has been amended³⁴⁸ to require leave of court for taking a deposition "if notice of the taking is served by the plaintiff within 20 days after the service of process on the defendant" instead of "within 20 days after commencement of the action." The purpose of the amendment is to preclude a plaintiff from waiting 20 days after filing the complaint before service of process is attempted and then immediately serving a notice for deposition. The subcommittee Notes³⁴⁹ indicate that the rationale behind the amendment is in accord with the federal cases construing Federal Rule 26(a).³⁵⁰ It is interesting to note, however, that under the Federal Rule leave of court is required for taking a deposition "if notice of the taking is served by the plaintiff within 20 days *after commencement of the action,*" and that this language is identical with the wording of Rule 1.21(a) prior to its amendment in 1965.

Subsection 1.21(f), relating to objections to the admissibility of a deposition at the trial or final hearing, has been amended to include a reference to newly added Rule 1.23(b)³⁵¹ which provides for taking depositions in foreign countries.

Florida Rule 1.22(b) formerly provided for the taking of a deposition pending an appeal from a judgment of the circuit court. That limitation has now been removed³⁵² and Rule 1.22(b) is applicable to depositions taken pending, or prior to a timely appeal from the judgment of any court.

Subsection (b) has been newly added³⁵³ to Rule 1.23 to provide for taking depositions in foreign countries. The Rule is substantially similar to Federal Rule 28(b)³⁵⁴ from which it was taken. Former subsections (b) and (c) of Florida Rule 1.23 have been relettered as (c) and (d) respectively.

Florida Rule 1.24(d), relating to a motion to terminate or limit

their reinstatement are subject to attack only on the ground that it constitutes an abuse of discretion."

348. 1965 REVISION, at 22.

349. 39 FLA. B.J. 1132, 1134 (1965).

350. FED. R. CIV. P. 26(a).

351. FLA. R. CIV. P. 1.23(b), as amended, 1965 REVISION, at 23. See note 353 *infra* and accompanying text.

352. 1965 REVISION.

353. *Ibid.*

354. FED. R. CIV. P. 28(b).

examination under an oral deposition, has been reworded³⁵⁵ to eliminate an ambiguity concerning the court to which application for such termination or limitation should be made. Rule 1.24(d) formerly provided that the order disposing of such a motion should be made by "the court in which the action is pending or *the court in the circuit* where the deposition is pending." The Rule now specifies that such orders should be made by "the court in which the action is pending or *the circuit court* where the deposition is being taken." Under the amended rule, only the circuit court has jurisdiction to entertain motions to terminate or limit examination upon oral deposition when the deposition is taken out of the jurisdiction of the court in which the case is pending.

Rule 1.26³⁵⁶ concerns the effect of errors and irregularities in depositions. A clerical error contained in subsection (c)(3) has been corrected so that that subsection now relates to objections to the form of written interrogatories submitted under Rule 1.25³⁵⁷ rather than under Rule 1.27,³⁵⁸ "which relates to interrogatories to parties and has its own provisions for objections."³⁵⁹

As in the case of the amendment to Rule 1.21(a)³⁶⁰ the amendment to Rule 1.27,³⁶¹ which provides for interrogatories to parties, is designed to preclude a plaintiff from waiting 10 days after filing a complaint before attempting to serve the defendant with process and then immediately serving him with interrogatories. Whereas the prior Rule 1.27 required the plaintiff to obtain leave of court for the service of interrogatories on a party within 10 days after commencement of an action,³⁶² Rule 1.27 now requires the plaintiff to obtain the court's permission for serving interrogatories on a party within 10 days after service of process on the defendant. The time for answering interrogatories has also been enlarged from 15 to 20 days, and the limitation requiring a copy of the answers to be served only on the party submitting the interrogatories has been deleted.³⁶³

Rule 1.30(a),³⁶⁴ which provides for admissions of fact and of the genuineness of documents, has also been changed³⁶⁵ with the intention of

355. 1965 REVISION, at 23-24.

356. FLA. R. CIV. P. 1.26.

357. 1965 REVISION, at 24.

358. FLA. R. CIV. P. 1.27, as amended, 1965 REVISION, at 24.

359. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1134 (1965).

360. *Supra* notes 348-350 and accompanying text.

361. 1965 REVISION, *supra* note 76.

362. Under Florida practice, a civil suit, except ancillary proceedings, "shall be deemed as commenced when the complaint is filed." FLA. R. CIV. P. 1.2.

363. The deletion is consistent with FLA. R. CIV. P. 1.4(a), as amended, 1965 Revision, at 17, which now requires that "every other paper filed in the action . . . shall be served on *each party*."

364. FLA. R. CIV. P. 1.30(a), as amended, 1965 REVISION, at 24-25.

365. See the discussion of the analogous amendments to FLA. R. CIV. P. 1.21(a) and 1.27, *supra* notes 360-361, and notes 385-387 and accompanying text.

precluding a plaintiff from waiting 10 days after filing a complaint before attempting service of process upon a defendant and then immediately serving requests for admissions. The plaintiff must now obtain leave of court for serving such requests within 10 days after service of process upon the defendant. The time for responding to such requests has been enlarged from a minimum of 10 to a minimum of 20 days, and the former limitation requiring that denials or objections be timely served on the party requesting the admission has been deleted.³⁶⁶

Rule 1.31(a) has been reworded³⁶⁷ for clarity. The Rule previously provided that a person making discovery must give notice "to all persons affected thereby" of his intention to seek a court order to require a person who has previously refused to answer a question propounded either upon oral or written depositions or upon interrogatories, to respond to the question. The amended Rule requires notice to be given "to all parties and the deponent."

The title of Rule 1.32³⁶⁸ has been changed to read "Depositions of Expert Witnesses." For reasons of clarity the numbered subsections are now designated by letters to make Rule 1.32 uniform with all others.³⁶⁹

The last sentence of Rule 1.33³⁷⁰ has been added to give the clerk authority to place depositions or affidavits in the court file in courts where it is desired to have all of the papers in the file.³⁷¹

Subsection (c) of Rule 1.34 has been amended³⁷² to permit service of a subpoena either by a person authorized by law to serve process, or by any other person who is not a party and who is not less than 21 years of age. Where service of the subpoena is not made by an officer authorized by law to do so, "proof of such service shall be made by affidavit of the person making service." Except for the age limit and the added requirement of proof of service, the added provision is identical with a similar one contained in Federal Rule 45(c).³⁷³

2. DISCOVERY IN THE PROBATE COURT

The petitioner sought certiorari³⁷⁴ to review an order of the county judge's court which had held that the discovery procedures provided for in the Florida Rules of Civil Procedure were not available to a petitioner in a will contest filed and pending in a probate proceeding. In that pro-

366. See note 363 *supra*.

367. FLA. R. CIV. P. 1.31(a), as amended, 1965 REVISION.

368. FLA. R. CIV. P. 1.32, as amended, 1965 REVISION, at 25.

369. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1134-1135 (1965).

370. 1965 REVISION, at 25.

371. *Notes of the Subcommittee on Civil Procedure Rules*, *supra* note 369, at 1135.

372. 1965 REVISION.

373. FED. R. CIV. P. 45(c).

374. *In re Estes' Estate*, 158 So.2d 794 (Fla. 3d Dist. 1963).

ceeding the petitioner had served the executors with requests for admissions³⁷⁵ with interrogatories,³⁷⁶ and with a motion for the production of documents.³⁷⁷ They had also applied to the county judge for leave to take discovery depositions.³⁷⁸ The district court granted certiorari and quashed the order denying discovery. The rules, which are promulgated by the supreme court pursuant to constitutional authority,³⁷⁹ provide³⁸⁰ that they “. . . are applicable to all suits of a civil nature and all special statutory proceedings in the . . . County Judge’s Courts. . . .” In addition, the legislature has provided³⁸¹ that the rules of civil procedure shall be the rules of practice in the county judge’s courts in all civil matters. A will contest is a civil matter. As recognized by Florida Statutes, section 732.04(4)(1963), the will contest “action” proceeds separately and unrelated to the routine business of probate, and the rules of civil procedure control its course. This includes the provisions for discovery.

Such discovery under the rules in a probate court, however, is limited to a civil suit or statutory proceeding such as was involved in the *Estes* case. In *Yarmark v. Botsikas*,³⁸² the Third District Court of Appeal granted certiorari and quashed an order of the County Judge’s Court requiring the production of documents in the hands of the administratrix relating to the assets and the affairs of the decedent. The basis for the order had been that it was needed to properly and fully prepare a claim against the estate. The district court held that the jurisdiction of the county judge’s court in probate matters does not encompass suits for discovery such as may be brought in a court of equity. Since the person who had applied for the production of documents was not shown to be either a creditor who had filed a claim against the estate, or a person entitled to share in the estate, neither production under the Decedents’ Estate Law,³⁸³ nor production pursuant to Rule 1.28³⁸⁴ was proper.

3. SCOPE OF DISCOVERY

Under Federal Rule 1.21(b) “the right of discovery . . . is to be liberally construed to the end that any matter not privileged and which is

375. FLA. R. CIV. P. 1.30(a).

376. FLA. R. CIV. P. 1.27.

377. FLA. R. CIV. P. 1.28.

378. FLA. R. CIV. P. 1.21(a).

379. FLA. CONSTR. art. V, § 3.

380. FLA. R. CIV. P.

381. FLA. STAT. § 36.09 (1965).

382. 158 So.2d 770 (Fla. 3d Dist. 1963).

383. FLA. STAT. § 731.51 (1963) provides:

Upon the petition of any creditor, legatee, distributee, devisee or heir at law, or upon his own motion if he deems it necessary for the proper administration of said estate, the county judge may require any personal representative to produce satisfactory evidence that the assets of the estate are in his possession or under his control and, if necessary or proper, may order the production of such assets for the inspection of such creditor, legatee, distributee, devisee or heir at law, or of said judge.

384. FLA. R. CIV. P. 1.28.

relevant to the subject matter involved in the pending action must be disclosed.”³⁸⁵ However, where the use of the discovery devices³⁸⁶ transgresses the bounds of relevancy and needlessly harasses and imposes a burden on the person interrogated a court will sustain the latter’s objection to their use. This conclusion was upheld in *Marine Investment Co. v. Van Voorhis*.³⁸⁷

Privilege also constitutes a limitation on the permissible scope of discovery. Where a party to whom interrogatories have been submitted objects to answering them on the ground that the information called for is privileged, the burden is on the party seeking disclosure to produce evidence that the communication claimed to be privileged is in fact not privileged. Therefore, where a claim had been made that the information sought came within the purview of the attorney-client privilege, it was error for the trial court to reject the plaintiff’s proffered evidence by which they sought to establish that the attorney-client communication sought to be elicited by the interrogatory related to the future commission of a fraud or crime in connection with the sale of securities. “. . . [I]t is not within the duty of a legal advisor to assist in the planning of crime or fraud and . . . a consultation with a view to such purpose would not be privileged.”³⁸⁸ This is true whether the alleged criminal or fraudulent conduct is *malum in se* or *malum prohibitum*.

The question of whether or not the information sought to be elicited is privileged may depend upon whether the plaintiff or defendant is asserting the privilege. This is illustrated by a case where the plaintiff sued for divorce on grounds of cruelty.³⁸⁹ Her husband denied the allegations contained in the complaint and asserted as an affirmative defense his wife’s alleged adultery. Thereafter, the husband’s attorney sought from the plaintiff certain admissions relating to the husband’s affirmative defense. The plaintiff objected to the requests for admission on the grounds that her answers thereto might tend to incriminate her and were therefore privileged under section 12 of the Declaration of Rights. From an order denying the defendant’s motion to strike all of the plaintiff’s pleadings, to dismiss her complaint, and to deny her the relief prayed for, the defendant appealed. Held: reversed. “Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any

385. *Marine Inv. Co. v. Van Voorhis*, 162 So.2d 909, 910 (Fla. 1st Dist. 1964).

386. These include: (1) oral depositions, FLA. R. CIV. P. 1.24; (2) depositions upon written interrogatories, FLA. R. CIV. P. 1.25; (3) interrogatories to parties, FLA. R. CIV. P. 1.27; (4) motion for the production of documents and things for inspection, copying or photographing, FLA. R. CIV. P. 1.28, 1.34(b); (5) physical and mental examination of parties and examination of property, FLA. R. CIV. P. 1.29; (6) admissions of facts and of the genuineness of documents, FLA. R. CIV. P. 1.30.

387. 162 So.2d 909 (Fla. 1st Dist. 1964).

388. *Leithauser v. Harrison*, 168 So.2d 95, 98 (Fla. 2d Dist. 1964).

389. *Stockham v. Stockham*, 159 So.2d 481 (Fla. 2d Dist. 1963).

other purpose nor may be used against him in any other proceeding."³⁹⁰ The court went on to say that "it would indeed be an anomaly if a plaintiff could bring a divorce action and then refuse to answer requests for admissions, based upon an affirmative defense, on the grounds that her answers might tend to incriminate her."³⁹¹ On the plaintiff's appeal to the Supreme Court of Florida³⁹² the decision of the Second District Court of Appeal was affirmed. After reviewing the decisions of the other state courts interpreting the Fifth Amendment to the federal constitution and analogous provisions of other state constitutions, the supreme court noted that:

The distinction made in the cases is that the privilege against self-incrimination operates as a protection against one being required to incriminate himself in a criminal or other proceeding which might degrade him, however, in civil litigation where it is manifest the exercise of the privilege would operate to further the action or claim of the party resorting to the privilege against his adversary contrary to equity and good conscience, the party asserting the privilege will not be permitted to proceed with his claim or action.³⁹³

The right to employ the discovery devices provided by the rules is absolute, and a court may not properly deny a motion to dismiss a complaint for failure to state a cause of action and then refuse to permit discovery upon relevant unprivileged matters consonant with the allegations contained in a legally sufficient complaint.³⁹⁴ However, a court in the exercise of its inherent judicial power over pending litigation may regulate the timing of discovery relevant to a particular case. Thus, in an action to recover damages for an alleged breach of an agreement to pay a commission on certain policies of insurance written by the plaintiff and any renewals thereof, the Third District Court of Appeal held³⁹⁵ that the trial court had erroneously granted the plaintiff leave to depose the defendant concerning the amount allegedly due to the plaintiff prior to a determination of the issues upon which a right to an accounting would depend. Discovery as to accounting is premature and improperly ordered in advanced of a decision establishing the right to an accounting, and could result in irreparable harm to the defendant since it may be shown that no accounting is necessary.

4. THE WORK PRODUCT CONCEPT

The defendant in a personal injury action, who had employed a court reporter to make a record of proceedings in the traffic court arising

390. FLA. R. CIV. P. 1.30(b).

391. *Stockham v. Stockham*, *supra* note 389, at 482.

392. *Stockham v. Stockham*, 168 So.2d 320 (Fla. 1964).

393. *Id.* at 322; *Cf.*, WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 343 (1963).

394. *Boye v. Cash*, 160 So.2d 534 (Fla. 3d Dist. 1964).

395. *Drucker v. Martin*, 157 So.2d 435 (Fla. 3d Dist. 1963).

from the same accident, appealed from an order of the trial court granting the plaintiff's motion for production of a copy of the transcript. In quashing the order, the appellate court held that the transcript of the proceedings made by a court reporter employed by the plaintiff constituted "work product" which was immune from discovery absent a showing by the plaintiff of exceptional circumstances.³⁹⁶

Whether a particular inquiry invades the work product doctrine is a question of fact to be interpreted under the particular circumstances of each case. For example, it was held in *Coleman v. Imbruglia*,³⁹⁷ that a question in the course of deposing an insurance investigator employed by the defendant asking him whether he recalled meeting the plaintiff, did not improperly invade the qualified work product privilege where the purpose of the inquiry was to ascertain the circumstances surrounding the witness' taking of a statement from the plaintiff, and the plaintiff's physical condition at the time it was taken.

5. DEPOSITION OF AN EXPERT WITNESS

In *Cook v. Lichtblau*,^{397a} the plaintiffs sought to introduce a physician's deposition into evidence in their malpractice case. The deposition was taken by the defendant "for the purpose of discovery under the applicable statutes and Rules of Court." At the deposition, the defendant's attorney confined his questioning mainly to direct examination. The plaintiffs did not indicate in advance of trial that they would seek to introduce this deposition as evidence, although they did subpoena the physician to appear as a witness at the trial.

On the Friday afternoon immediately preceding the scheduled trial date, which was Monday, the plaintiffs' attorney learned unofficially that the physician would be unable to appear at the trial. Definite notification of the physician's inability to be at the trial was given to the plaintiffs' attorney on Saturday and took the form of an affidavit from the physician's heart specialist which recited that a court appearance might adversely affect his patient's health.

On Monday the plaintiffs' attorney proceeded with the trial under the impression that the physician's deposition would be admissible in evidence under Rule 1.21(d), which provides:

At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition

396. *Steinhardt v. Greenbaum*, 168 So.2d 200 (Fla. 3d Dist. 1964).

397. 166 So.2d 780 (Fla. 2d Dist. 1964).

397a. 176 So.2d 523 (Fla. 2d Dist. 1965). The *Cook v. Lichtblau* decision is rejected by the last sentence of 1967 Revised Rule 1.390(b) which provides "a deposition taken under this rule and any deposition taken of an expert witness under any other rule may be used in any manner permitted by Rule 1.280(d)." *In re Florida Rules of Civil Procedure 1967 Revision*, 187 So.2d 598, 622 (Fla. 1966).

or who had due notice thereof, in accordance with any one of the following provisions:

....
(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . 3, that the witness is unable to attend or testify because of age, *sickness*, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness. . . .”

In sustaining the defendants' objections to the admission of the deposition, the trial judge stated that if the plaintiffs had notified him of the affidavit from the heart specialist before the trial began he could have tried to arrange for the physician's appearance, or granted a continuance. In affirming the propriety of the trial court's refusal to admit the deposition, the district court held that the plaintiff had failed to avail himself of the procedure prescribed in Rule 1.32 for taking the deposition of an expert witness.

The district court affirmed the propriety of the trial court's refusal to admit the deposition and impliedly rejected an argument advanced by the defendant that "a deposition taken pursuant to Rule 1.21 for the express purpose of discovery is not subject to use as evidence under any circumstances."^{397b} The court went on to hold that the plaintiffs had failed to avail themselves of the procedure prescribed in Rule 1.32 for taking the deposition of an expert witness.

A party seeking to offer an expert's testimony by deposition under this procedure must give prior written notice of such intention to his opponent, who may then seek an order disallowing the taking on the ground that the personal appearance of the witness is necessary to insure a fair and impartial trial. Where, as here, a party knows in advance of trial that his expert will not be available, he should make timely application to invoke this special procedure instead of relying upon a deposition taken by his adversary solely for the purpose of discovery. To hold otherwise would result in depriving his opponent of the benefit of cross examination even though a procedure and opportunity still existed whereby that valuable right could be preserved.^{397c}

6. OBJECTIONS TO DISCOVERY PROCEEDINGS

Among the issues raised on the defendant's appeal³⁹⁸ from an adverse judgment in a negligence action arising out of the collision of an automobile with a motorcycle driven by the minor plaintiff, was the question

397b. *Cook v. Lichtblau*, 176 So.2d 523, 526 (Fla. 2d Dist. 1965).

397c. *Cook v. Lichtblau*, 176 So.2d 523, 527 (Fla. 2d Dist. 1965). See generally *The Use of Discovery Against the Expert Witness*, 40 F.R.D. 43 (1966).

398. *Evans v. Perry*, 161 So.2d 27 (Fla. 2d Dist. 1964).

of whether the trial court had erred in sustaining the plaintiffs' objection made only, and for the first time at the trial, to the introduction into evidence of a deposition of a medical expert for the defendants because it was not shown that the doctor was the treating physician, or that he had personal knowledge of the notes and hospital records from which he testified. In reversing the lower court, the court held that under Rule 1.26(c)(1)³⁹⁹ which is made applicable to objections to the admissibility of depositions at trial both by its own terms and through Rule 1.21(f),⁴⁰⁰ objections to the competency of a witness, and to the competency, relevancy and materiality of testimony taken on deposition, are waived if not made before or during the taking of the deposition if the ground of the objections is one which might have been corrected if made at that time. In the instant case, the grounds for objection might easily have been obviated had the plaintiffs timely interposed their objections in the course of the trial.

Rule 1.27⁴⁰¹ provides that within 10 days after the service of interrogatories, a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Rule 1.30(a)⁴⁰² makes substantially the same provision for serving objections to requests for admissions, except that the time limit is 20 days. The burden of proving the validity of objections is upon the party asserting them. In *Carson v. City of Fort Lauderdale*,⁴⁰³ the Second District Court of Appeal looked to the cases and commentary interpreting the substantially similar federal rules⁴⁰⁴ relating to interrogatories and to requests for admissions to ascertain the extent of this burden, which had not been developed in Florida case law, in order to determine whether the trial court had properly sustained the defendant's objections to 205 written interrogatories and 59 requests for admissions. In reversing the lower court's order the appellate court found that the word "thereto" in the provision relating to serving objections "refers to a particular interrogatory or class of interrogatories, not to the interrogatories in general."⁴⁰⁵

Objections to interrogatories must be sufficiently specific that the court may, in considering such objections with interrogatories propounded, ascertain therefrom their claimed objectionable character; general objections to interrogatories, as that they will require the party served to make research and compile data, or that they are unreasonably burdensome, oppressive and vexatious, or that they seek information which is easily avail-

399. FLA. R. Civ. P. 1.26(c)(1).

400. FLA. R. Civ. P. 1.21(f).

401. FLA. R. Civ. P. 1.27.

402. FLA. R. Civ. P. 1.30(a), as amended, 1965 REVISION, at 25.

403. 173 So.2d 743 (Fla. 2d Dist. 1965).

404. FED. R. Civ. P. 33 and 36.

405. *Carson v. City of Fort Lauderdale*, *supra* note 173, at 745, quoting *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159, 161 (E.D.N.Y. 1960).

able to the interrogating party as to the objecting party, or that they would cause annoyance, expense, and oppression to the objecting party without serving any relevant purpose to the issue, are insufficient.⁴⁰⁶

The blanket objections filed by the City did not sustain that burden in the absence of a finding that the interrogatories and requests for admissions were so inextricably intertwined that they had to stand or fall together, and the trial court therefore erred in rejecting them in their entirety without specifically designating the applicability of the objections to particular interrogatories or requests for admissions. Even though the method of procedure is improper, the court may, in the interest of expediting the litigation, select from among the propounded interrogatories or requests for admissions the particular questions to which the general objections apply.

7. USE OF DEPOSITIONS

Where reversal is sought of an order permitting or denying the introduction into evidence of the deposition of a party or a witness pursuant to the provisions of Rule 1.21(d),⁴⁰⁷ the party seeking reversal carries the heavy burden of clearly demonstrating an abuse of judicial discretion.⁴⁰⁸ Such an abuse of discretion will be found if a trial judge admits into evidence the deposition of a deceased party taken prior to the joinder of the party against whom it is sought to be used. In *Brown v. Tanner*,⁴⁰⁹ a case of first impression in Florida, the First District Court of Appeal, after extensively reviewing state and federal decisions interpreting analogous procedural rules and rules of evidence as well as the leading treatises on evidence, concluded that a plain reading of Rule 1.21(d)⁴¹⁰ required that a deposition so taken should be excluded. That Rule permits “. . . any part or all of a deposition, *so far as admissible under the rules of evidence . . . to be used against any party who was present or represented at the taking of the deposition or who had due notice thereof*” where the person deposed has since died. By the great weight of authority the deposition would be inadmissible under the rules of evidence because the adverse parties had been deprived of their very substantial right of cross examination, and because such a deposition violates the hearsay rule. It would also be inadmissible under the terms of the Rule itself since the persons against whom it was sought to be introduced were neither present, represented, or duly notified of the taking of the deposition as they were not parties at the time it was

406. 4 MOORE, FEDERAL PRACTICE, ¶ 33.27, at 2336 (2d ed. 1963).

407. FLA. R. CIV. P. 1.21(d).

408. See, e.g., *Burgin v. Florida Gas Util. Co.*, 172 So.2d 267 (Fla. 3d Dist. 1965); *Dino v. O'Dawe*, 158 So.2d 562 (Fla. 3d Dist. 1963).

409. 164 So.2d 848 (Fla. 1st Dist. 1964).

410. FLA. R. CIV. P. 1.21(d).

taken. Nevertheless, the court found that the erroneous admission of the deceased witness's deposition did not constitute a basis for appellate reversal of the lower court's judgment since the testimony contained in the deposition was to a great extent cumulative and could not be said to have deprived them of a fair trial.⁴¹¹

8. DENIALS IN RESPONSE TO REQUESTS FOR ADMISSIONS

Rule 1.30,⁴¹² which is patterned after Federal Rule 36(a),⁴¹³ provides that

A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

The plaintiff in a slip and fall case appealed⁴¹⁴ from an adverse summary final judgment. Among the requested admissions sought by the defendant was one to the effect that the plaintiff had seen a liquid puddle on the floor while she was walking towards the piano. This the plaintiff denied. The next request asked the plaintiff to admit "That after seeing the liquid substance described in request for admission 2, you passed Mr. Bill Hall, who asked you to dance."⁴¹⁵ The plaintiff's answer admitted her request. On the basis of the complaint, the answer thereto, and the plaintiff's responses to the requests for admissions, the defendant moved for summary judgment on the ground that there existed no genuine issue of material fact as to the plaintiff's contributory negligence and that the defendant was entitled to judgment as a matter of law. In opposition to this motion, the plaintiff submitted an affidavit by which she sought to vary the effect of her prior admission by asserting that she had not seen the puddle until after she began dancing and when it was too late to avert her fall. The court noted, in granting a summary judgment, that the

411. The case contained a partially concurring and partially dissenting opinion by Judge Wigginton. He concurred in the result reached by the majority, but vigorously opposed the adoption of an ironclad rule which reflected a procedural philosophy "in keeping with the horse and buggy vintage of the authorities on which they rely for support." (Brown v. Tanner, *supra* note 409, at 855). Judge Wigginton thought that Professor Wigmore expressed the better and more modern view in 5 WIGMORE, EVIDENCE, § 1390 (3d ed. 1940).

But, where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. *But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss.* Courts differ in their treatment of this difficult situation; except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished. (Emphasis added.)

412. FLA. R. CIV. P. 1.30(a).

413. FED. R. CIV. P. 36(a).

414. McKean v. Kloepfel Hotels, Inc., 171 So.2d 552 (Fla. 1st Dist. 1965).

415. *Id.* at 554.

affidavit refuted the material factual situation developed by the plaintiff's answers to the defendant's requests for admissions, but held that under such circumstances the affidavit may not be considered to the extent that it alters those admissions. In affirming the judgment of the lower court, the district court cited Barron and Holtzoff's interpretation of the analogous federal rule:

. . . [W]hen good faith requires that a party deny only partly or with a qualification, a matter as to which an admission is requested, he must specify and admit so much of it as is true and deny only the remainder. The admissions or denials must be forthright, specific and unqualified . . .⁴¹⁶

The court found that the plaintiff's denial of the second request was not sufficient to qualify the general admission of the third request. Although on a motion for a summary judgment, the pleadings and supporting proofs are construed strictly against the moving party, nevertheless, the party opposing the motion "will not be permitted to alter his position as occasion may indicate to be expedient in order to evade the consequences of his previous pleadings, admissions, affidavits, depositions or testimony."⁴¹⁷ The court further stated that "it is necessary . . . that the litigants by their pleadings be held to say what they mean and mean what they say according to common usage of the English language."⁴¹⁸

9. CONSEQUENCES OF FAILING TO RESPOND TO INTERROGATORIES

Failure to serve timely answers to propounded interrogatories subjects the defaulting party, on motion and notice, to the penalty of having any part filed by him stricken, or to the dismissal of his action or proceeding or any part thereof, or to entry of a judgment by default against him.⁴¹⁹

Although the court exercises a broad discretionary power in determining the consequences of failure to serve timely answers to propounded interrogatories, dismissal of the complaint was found to be an abuse of judicial discretion where both parties had been dilatory in prosecuting the action and prosecution of the suit had been once postponed at the request of one of the defendants.⁴²⁰ It was also held to be an abuse of judicial discretion to dismiss a complaint *with prejudice* for failure to timely answer interrogatories in violation merely of the requirements of the rules and not of a court order⁴²¹ since "the law abhors the denial of access to the courts for any reason other than a wilful abuse of the pro-

416. 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, Rules Edition, 543-44 (1951).

417. *McKean v. Kloeppe Hotels, Inc.*, *supra* note 414, at 556.

418. *Ibid.*

419. FLA. R. CIV. P. 1.31(d).

420. *State Road Dept. v. Hufford*, 161 So.2d 35 (Fla. 1st Dist. 1964).

421. *Rashard v. Cappiali*, 171 So.2d 581 (Fla. 3d Dist. 1965). This case is more fully discussed in the section on involuntary dismissals note 315 *supra* and accompanying text.

cesses of the court. Such a wilful disregard of the rules of court will not ordinarily be shown by a record which does not show the violation of a specific order of the court."⁴²²

In *Hyman v. Schwartz*,⁴²³ the district court granted certiorari to review a lower court order which struck the defendant's counterclaim in a negligence action arising out of an automobile collision and entered judgment by default against him on the question of liability. By his counterclaim, the defendant sought to recover damage to his automobile. The plaintiff submitted interrogatories to the defendant which were objected to on the ground that many of them went to the question of the defendant's health and medical condition, whereas the counterclaim sought relief for only property damage. After the trial court had overruled the defendant's objections to the interrogatories the defendant filed timely answers, but designated all interrogatories which did not go to the issue of property damage as "not applicable". Whereupon, on the plaintiff's motion, the court entered the order which formed the basis of the petition. In granting certiorari, the district court held that:

The action of a trial court in striking pleadings and entering a default judgment for failure to properly reply to interrogatories is a harsh remedy and should be cautiously applied.

It is our view that under the authority of Rule 1.31(d), Florida Rules of Civil Procedure, 30 F.S.A. and under *State Road Department v. Hufford*, supra, the defendant herein should have been given a fixed time in which to more fully reply to the interrogatories in question and that upon failure to do so, the court could then properly strike the pleadings.⁴²⁴

In determining the consequences to follow the failure to serve timely objections or answers to interrogatories a court is without power to assess costs or attorney's fees against either the defaulting party or his attorneys of record. The penalty provisions of Rule 1.31(c)⁴²⁵ apply only to a situation where a party has failed to comply with a request for the admission of the genuineness of a document or of the truth of a matter of fact. It has no bearing on the penalties available for failure to serve answers to interrogatories. These are governed by Rule 1.31(d) which contains no penalty relating to the assessment of costs and attorney's fees.⁴²⁶

10. ADMISSIONS OF FACT AND OF THE GENUINENESS OF DOCUMENTS

The Florida rules relating to admissions provide that:

. . . Each of the matters of which an admission is requested

422. *Id.* at 583.

423. 177 So.2d 750 (Fla. 1st Dist. 1965).

424. *Id.* at 751-52.

425. FLA. R. CIV. P. 1.31(c).

426. *State Road Dept. v. Hufford*, supra note 420.

shall be deemed admitted unless, within a period designated in the request, not less than 20 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves either (1) a *sworn* statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part together with a notice of hearing the objections at the earliest practicable time. . . .⁴²⁷

Where the answers to the requested admissions were not sworn to as expressly required, it was held in *Bente v. Nelson*,⁴²⁸ that the requests were to be deemed admitted at the expiration of the designated time for response.

In *Southern Railway Company v. Wood*,⁴²⁹ however, the plaintiff in an F.E.L.A. action addressed certain requests for admissions to the defendant railroad, including a request for an admission that the plaintiff's decedent was employed by the defendant railroad at the time of the accident which was alleged to have proximately resulted in his death. The defendant filed a timely, but *unverified*, denial of this request and objected to the other requests. The objections to the other requests were overruled and the defendant thereafter served *sworn* denials to the requests, including the request relating to the decedent's employment. No further action was taken in regard to these requests and responses until the second day of the trial sixteen months later. In the interim the court entered a pretrial order pursuant to which the parties stipulated that the question of the employment of the plaintiff's decedent by the defendant was one of the issues to be tried. Prior to this stipulation, the plaintiff had addressed an additional forty-one requests for admission to the defendant to which she had received sworn responses, and which she read to the jury at the commencement of the trial. On the second day of the trial, the plaintiff's attorney somehow became alerted to the fact that the defendant's original response to the requested admission concerning the decedent's employment had not been sworn to, and insisted that he was entitled to the benefit of the provision contained in Rule 1.30 under which a request is deemed admitted where there has been a failure to comply with the Rule. The trial court agreed and held that by virtue of the admission imposed upon the defendant the only issue necessary to be proved by the plaintiff was that of the defendant's negligence. In reversing, the district court held that in light of the pre-trial proceedings the defendant should either have been permitted to

427. FLA. R. CIV. P. 1.30(a) as amended, 1965 REVISION, at 24. (Emphasis added.)

428. 156 So.2d 17 (Fla. 2d Dist. 1963).

429. 171 So.2d 614 (Fla. 1st Dist. 1965).

verify its response to the subject admission *nunc pro tunc*, or that the plaintiff should be found to have waived her right to the benefit of the Rule and should further be required to establish by adequate proof the fact of her deceased husband's employment by the defendant at the time which was material to her case. As the period had not yet expired for applying to the trial court for relief from the erroneously entered judgment,⁴³⁰ the district court temporarily relinquished jurisdiction of the cause to the trial court for the purpose of receiving and disposing of such a motion within 30 days. On remand, the trial court concluded that it only had jurisdiction to entertain a motion by the plaintiff and to pass upon "the sole question of whether the defendant's failure within the period provided by Rule 1.30, Florida Rules of Civil Procedure, to verify its initial response to plaintiff-appellee's request No. 1 for admission. . . . should be deemed cured *nunc pro tunc*. . . ."⁴³¹ under the particular circumstances of the case, and it tossed the burden back to the district court to determine whether or not the evidence adduced on the question of employment was sufficient to sustain the verdict. The district court then found that the effect of the imposed admission restricted the jury's deliberations exclusively to the issue of negligence. It vacated the judgment, and granted a new trial on the question of liability only.⁴³²

11. MOTION FOR THE PRODUCTION OF DOCUMENTS V. SUBPOENA DUCES TECUM

In a case of first impression in Florida the district court reversed⁴³³ a lower court order that had quashed a subpoena duces tecum⁴³⁴ on the ground that "a subpoena duces tecum will not run to a party at time of trial." In holding that a subpoena duces tecum could be issued to a party, the district court adopted the construction given to Federal Rule 45(b)⁴³⁵ by the majority of federal courts⁴³⁶ and by the text writers⁴³⁷ interpreting that Rule.

Both the district court and the Florida Supreme Court, when it denied certiorari,^{437a} left unanswered the question of whether a showing of good cause is a prerequisite for the issuance of a subpoena duces tecum. In this connection, Professor Wright indicates a distinction in the cases

430. FLA. R. CIV. P. 1.38(b).

431. *Southern Ry. Co. v. Wood*, 175 So.2d 812, 813 (Fla. 1st Dist. 1965).

432. *Id. on rehearing*, p. 814.

433. *Franklyn's, Inc. v. Riesenbeck*, 166 So.2d 831 (Fla. 3d Dist. 1964).

434. FLA. R. CIV. P. 1.34(b).

435. FED. R. CIV. P. 45(b).

436. *Crary v. Porter*, 157 F.2d 410, 415 (8th Cir. 1946); *United States v. E. I. DuPont De Nemours & Co.*, 14 F.R.D. 341 (N.D. Ill. 1953); *Arcadia Knitting Mills, Inc. v. Princeton Knitting Mills, Inc.*, 35 F. Supp. 806 (S.D.N.Y. 1940).

437. 2 BARRON & HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE*, § 1002 (Rules ed. 1961); 4 MOORE, *FEDERAL PRACTICE*, ¶ 34.02 (2d Rules ed. 1963).

437a. *Grisillo v. Franklyn's, Inc.*, 173 So.2d 682 (Fla. 1965).

interpreting the Federal Rule between the issuance of a subpoena duces tecum addressed to a party before trial and its issuance at trial.

. . . If it is sought merely to *inspect* documents under the control of a party prior to trial, good cause must be shown and an order of the court obtained under rule 34. On the other hand, if a party desires the production of documents under the control of a party or witness for *use* at the trial or the taking of a deposition, he may obtain a subpoena duces tecum under Rule 45(b) without any showing of cause and without any order of the court. Nevertheless it is repeatedly said that Rule 45 must be read in *pari materia* with the discovery rules, notably Rule 26 and 34. Though there are some contrary decisions, the great weight of authority, and clearly the only tolerable rule, is that on a motion to quash a subpoena for production *before* trial, the party seeking production must show good cause just as he would have to do had he proceeded under Rule 34.^{437b} (Original footnotes, citing cases, omitted; emphasis added.)

The necessary implication of Professor Wright's statement is that where a subpoena duces tecum, addressed to a party is returnable at the time of trial, then no showing of good cause is required under Federal Rule 45(b). Generally, Florida courts follow federal precedent in construing substantially similar rules.^{437c} Therefore, it should be unnecessary under Florida Rule 1.34(b) to show good cause for the issuance of a subpoena duces tecum, addressed to a party and returnable at the time of trial.

"Failure to obey a subpoena is punishable by contempt, not by dismissal of the complaint.⁴³⁸ However, where a defendant moves for the production of documents,⁴³⁹ the complaint may be dismissed for failure to comply with an order of the court.⁴⁴⁰ Nevertheless, it may be found to be an abuse of discretion to dismiss a complaint where there is no finding and the record does not conclusively reveal that the plaintiff's failure to comply with the court's order on motion to produce was a refusal to obey. In *Metro Sporting Goods, Inc. v. Mutual Employees Trademart, Inc.*,⁴⁴¹ the district court reversed a final judgment of dismissal for failure to obey an order to produce where the record was

437b. WRIGHT, FEDERAL COURTS, § 87, at 338 (1963).

437c. See, e.g., *Carson v. City of Fort Lauderdale*, 173 So.2d 743 (Fla. 2d Dist. 1965); *Franklyn's, Inc. v. Riesenbeck*, 166 So.2d 831 (Fla. 3d Dist. 1964); *Brown v. Tanner*, 164 So.2d 848 (Fla. 1st Dist. 1964).

438. *Franklin Acceptance Corp. v. Superior Elec. Indus.*, 167 So.2d 116, 117 (Fla. 3d Dist. 1964). The penalty of contempt for failure to obey a subpoena is expressly provided by Rule 1.34(e).

439. FLA. R. CIV. P. 1.28.

440. FLA. R. CIV. P. 1.35(b) is made applicable to parties failing to comply with an order for production both by its express terms and Rule 1.31(b)(2)(iii).

441. 176 So.2d 578 (Fla. 3d Dist. 1964).

susceptible of the reasonable interpretation that failure to produce the documents was occasioned by events beyond the plaintiff's control. The plaintiff had produced some of the documents requested and had made an offer to produce any documents that could be located. The document which was not produced went only to the issue of damages and not to the existence of the cause of action. Absent a finding that failure was tantamount to refusal, the district court felt that the ends of justice would be better served by reversing the judgment and remanding the cause for further proceedings.

L. Evidence

1. JUDGMENT ON THE PLEADINGS

Subsections (c) and (d) have been added to Rule 1.37. They provide for the filing and disposal of documentary evidence in a cause.

(c) *Filing*. When documentary evidence is introduced in an action, the clerk or the judge shall endorse an identifying number or symbol on it and when proffered or admitted in evidence, it shall be filed by him and considered in the custody of the court and not withdrawn except with written leave of court.

(d) *Disposal*. The clerk shall retain exhibits introduced in evidence or marked for identification; provided (1) that the court may order any such exhibit returned to either party and (2) the clerk may destroy or dispose of such exhibits under order of court after notice to all parties or stipulation of the parties.

M. Judgment on the Pleadings and Summary Judgment

1. JUDGMENT ON THE PLEADINGS

"After the pleadings are closed, but within such time as not to delay the trial any party may move for judgment or decree on the pleadings."⁴⁴² The pleadings are closed when the answer has been filed if it does not contain a counterclaim, a cross-claim, or a third party complaint unless the court has ordered a reply to an answer. If a counterclaim, cross-claim, or third party complaint has been filed, an answer or, if the court has so ordered, a reply to an answer must also be filed.⁴⁴³

. . . In considering . . . a motion [for judgment or decree on the pleadings] all well-pleaded material allegations of the opposing party's pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false. Conclusions of law are not deemed admitted. Judgment

442. FLA. R. CIV. P. 1.11(c).

443. FLA. R. CIV. P. 1.7(a), as amended, 1965 REVISION, at 18-19.

on the pleadings may be granted only if, on the facts as so admitted, the moving party is clearly entitled to judgment. Hence a defendant may not obtain a judgment on the pleadings on the basis of the allegations in his answer where no reply is required, since under Rule 1.8(e), Florida Rules of Civil Procedure, these allegations are deemed denied; nor may the defendant move on the basis of an insufficient denial of the allegations of his answer in plaintiff's reply where the reply was not required or ordered by the court.⁴⁴⁴

However, where the parties stipulated at the hearing on the motion that there was no dispute between them as to any of the material facts alleged in the pleadings filed in the case, and that the pleadings contained all of the facts material in the case, it was held⁴⁴⁵ that the plaintiff had waived her right to insist on the strict enforcement of the above-stated principles and that "the chancellor was justified in proceedings to consider the merits of the complaint with a view of entering final decree on the pleadings in favor of the defendants if the admitted facts revealed that defendants were entitled to a final decree as a matter of law."⁴⁴⁶ With this limited exception, a trial judge at a hearing on a motion for judgment on the pleadings may not properly consider matters outside of the pleadings in determining whether or not to grant the motion. Rule 1.11(c), unlike its federal counterpart,⁴⁴⁷ is not interchangeable with a motion for summary judgment.⁴⁴⁸

2. SUMMARY JUDGMENT

a. Amendments

Subsections (c) and (e) of Rule 1.36 have been amended to include "answers to interrogatories" among the matters that may be considered on motion for summary judgment and among the materials that may be used to supplement or oppose affidavits.⁴⁴⁹ The subcommittee notes indicate⁴⁵⁰ that the change was intended to correct an inadvertent omission.

In addition, the notice period required for a hearing on a motion for summary judgment has been increased from a minimum of 10 to a minimum of 20 days because "many attorneys are unable to obtain opposing affidavits and documents within the shorter period."⁴⁵¹

444. *Miller v. Eatmon*, 177 So.2d 523, 524 (Fla. 1st Dist. 1965).

445. *Miller v. Eatmon*, *supra* note 444.

446. *Id.* at 524-25.

447. FED. R. CIV. P. 12(c).

448. *Adams Eng'r Co. v. Construction Prod. Corp.*, 158 So.2d 559 (Fla. 3d Dist. 1963).

449. 1965 Revision, at 26-27.

450. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1135 (1965).

451. *Ibid.*

b. In General

"A summary judgment is proper only when it is firmly established that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."⁴⁵²

At the hearing on a motion for summary judgment a trial judge must view the facts, and all reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party.⁴⁵³ This rule includes giving any reasonable meaning to a deposition which will not conflict with an affidavit subsequently filed by the same party, so that both may be considered in evidence at the hearing on the motion for summary judgment.⁴⁵⁴

However, where the plaintiff sought to modify the clear and unambiguous meaning of an earlier admission by an affidavit filed in opposition to the defendant's motion for a summary judgment, it was held⁴⁵⁵ on the plaintiff's appeal that the trial court had properly refused to consider the affidavit to the extent that it altered the prior admission. In affirming the lower court, the Second District Court of Appeal stated:

It is well-settled in this jurisdiction that the moving party for summary judgment is held to a strict standard. The pleadings and proofs supporting such motions are strictly construed against the movant, while those opposing the motion are leniently treated in determining whether the movant has satisfied the burden required of him; that in determining whether there exists a genuine issue of material fact, all reasonable inferences of fact from the proofs and pleadings must be resolved in favor of the party opposing the motion; and further, that the appellate court will indulge all proper inferences in favor of the party against whom a summary judgment or decree has been entered. These principles do not contemplate, however, that the trial court is compelled to give the same a strained construction simply to keep alive an action which, parenthetically, should expire of its own weight. The purpose of all good pleading is to develop material issues of law and/or fact upon which to resolve the controversy. It is necessary, therefore, that the litigants by their pleadings be held to say what they mean and mean what they say according to common usage of the English language, semantic refinements aside. This concept is vital to the judicial process and to further relax that requirement would only add confusion and render nugatory the guiding principles of orderly pleading. Paralleling those rules of law which impose upon the

452. *Matarese v. Leesburg Elks Club*, 171 So.2d 606, 607 (Fla. 2d Dist. 1965).

453. *Michalski v. Peaslee*, 174 So.2d 427 (Fla. 2d Dist. 1965); *Davis v. Major Oil Co.*, 164 So.2d 558 (Fla. 3d Dist. 1964); *Inter-County Tel. & Tel. Co. v. Purvis*, 163 So.2d 38 (Fla. 2d Dist. 1964).

454. *Koffen v. Great Atl. & Pac. Tea Co.*, 177 So.2d 529 (Fla. 3d Dist. 1965).

455. *McKean v. Kloeppel Hotels, Inc.*, 171 So.2d 552 (Fla. 1st Dist. 1965).

party moving for summary judgment the above mentioned heavy burdens is the rule that the party opposing the motion will not be permitted to alter his position as occasion may indicate to be expedient in order to evade the consequences of his previous pleadings, admissions, affidavits, depositions or testimony.⁴⁵⁶

Even where the evidence is uncontradicted, the movant will not be entitled to a summary judgment if the evidence is susceptible of two or more inferences of fact that lawfully could be drawn by a jury.⁴⁵⁷ For this reason, a summary judgment should be cautiously granted in a negligence action. Generally, questions of negligence, proximate cause, and contributory negligence are questions of fact to be determined by a jury, unless the evidence before the court is susceptible of but a single inference and one of the parties is entitled to judgment as a matter of law.⁴⁵⁸ “. . . [W]hen the question of negligence or contributory negligence is extremely close, doubt should always be resolved in favor of a jury trial.”⁴⁵⁹

“In considering a motion for summary judgment the trial judge is not privileged to weigh the evidence or pass upon the credibility of the witnesses.”⁴⁶⁰ The question before the court at a hearing on a motion for summary judgment is purely one of law, and it is not the function of the court on such a motion to resolve factual conflicts. The Third District Court of Appeal therefore reversed⁴⁶¹ a summary judgment for the defendants in an action to recover upon a promissory note where the lower court had erroneously ordered a hearing for the taking of testimony in regard to the decision on the motion for summary judgment. In *Bache v. Lefcoe*,⁴⁶² it was held that the chancellor erroneously entered a summary final decree in which he had made numerous findings of fact.

. . . It is not the function of a trial judge to make findings of fact on a motion for summary judgment [cites omitted]
When the issues created by the pleadings are in conflict (which conflict is supported by the record then before a trial judge), it is erroneous to enter a summary judgment or decree and the

456. *Id.* at 555-56.

457. See, e.g., *Koplen v. Great Atl. & Pac. Tea Co.*, 177 So.2d 529 (Fla. 3d Dist. 1965); *Benson v. Atwood*, 177 So.2d 380 (Fla. 1st Dist. 1965); *Wisner v. Goodyear Tire & Rubber Co.*, 167 So.2d 254 (Fla. 2d Dist. 1964); *Beikirch v. City of Jacksonville Beach*, 159 So.2d 898 (Fla. 1st Dist. 1964).

458. *Michalski v. Peaslee*, 174 So.2d 427 (Fla. 2d Dist. 1965); *Haynes v. Littleford*, 173 So.2d 477 (Fla. 2d Dist. 1965); *Jenkins v. Brackin*, 171 So.2d 589 (Fla. 2d Dist. 1965).

459. *Beikirch v. City of Jacksonville Beach*, 159 So.2d 898, 901 (Fla. 1st Dist. 1964). See also *Robinson v. City of Miami*, 177 So.2d 718 (Fla. 3d Dist. 1965).

460. *Benson v. Atwood*, 177 So.2d 380, 383 (Fla. 1st Dist. 1965). See also, *Harvey Bldg., Inc. v. Haley*, 175 So.2d 780 (Fla. 1965); *First Mortgage Corp. v. de Give*, 177 So.2d 741, (Fla. 2d Dist. 1965); *John K. Brennan Co. v. Central Bank & Trust Co.*, 164 So.2d 525 (Fla. 2d Dist. 1964).

461. *Franklin Acceptance Corp. v. Superior Elec. Indus., Inc.*, 167 So.2d 116 (Fla. 3d Dist. 1964).

462. 162 So.2d 525 (Fla. 3d Dist. 1964).

matter should proceed to a determination of the issues by the trier of fact; either a jury, trial judge, or chancellor. . . .⁴⁶³

In *Five Point Co. v. Neeley*,⁴⁶⁴ the corporate defendant in an action to recover upon certain loans allegedly made to it appealed from an adverse summary judgment. It appeared from the defendant's affidavit that the corporate records had been destroyed by fire so that the defendant would be unable to present proof of any genuine issue of fact, or to challenge the amount claimed by the plaintiff as properly due. In affirming the summary judgment for the plaintiff, the district court held that although the defendant's answer to the complaint raised an issue of fact as to the existence of the debt, nevertheless, the affidavits in support of the defense showed that the defendant was not in a position to refute the plaintiff's claim. In this posture of the case, the trial of an issue on which the defendant concededly could not produce evidence would result in a waste of judicial labor. Since the defendant's affidavits did not contradict or avoid the plaintiff's claim, nor support the defense tendered by it in its answer, it must be presumed that the corporation had gone as far as it could and summary judgment for the plaintiff was properly entered.

On the plaintiff's appeal from an adverse summary judgment in a contract action, it was held⁴⁶⁵ that the plaintiff was not precluded from asserting that the trial court had erred in entering summary judgment for the defendant on the ground that there existed genuine issues of material fact because it had also moved for summary judgment. "The fact that both parties moved for a summary decree does not require a finding that there was no genuine issue of material fact, nor does it follow that there is in fact no such issue merely because both parties so contend."⁴⁶⁶

c. Summary Judgment Before Answer

A party may move for a summary judgment or decree at any time after the expiration of twenty days from the commencement of the action, or after the adverse party has moved for a summary judgment or decree, whichever occurs first.⁴⁶⁷ Since the filing of a motion to dismiss for one of the reasons enumerated in Rule 1.11(b) tolls the time for filing an answer,⁴⁶⁸ a motion for summary judgment may be made before the defendant has answered.⁴⁶⁹ Where the plaintiff moves for a summary

463. *Id.* at 526. See also, *Tischler v. Tischler*, 173 So.2d 769 (Fla. 2d Dist. 1965); *Horner v. State*, 158 So.2d 789 (Fla. 3d Dist. 1963).

464. 157 So.2d 526 (Fla. 3d Dist. 1963).

465. *First Mortgage Corp. v. de Give*, *supra* note 460.

466. *Id.* at 748.

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

468. FLA. R. CIV. P. 1.11(a).

469. *Robinson v. City of Miami*, 177 So.2d 718 (Fla. 3d Dist. 1965); *Phillippi Creek Homes, Inc. v. Arnold*, 174 So.2d 552 (Fla. 2d Dist. 1965); *Hunt v. Gerber*, 166 So.2d 720

judgment before the defendant has answered, the motion should not be granted unless it is clear that an issue of material fact *cannot* be presented, and that under the applicable principles of substantive law he is entitled to judgment as a matter of law.⁴⁷⁰ This burden rests upon the movant regardless of whether he or his opponent would have the burden of proof on the issue concerned at trial, and it rests upon the movant whether he is required to show the existence or non-existence of facts.⁴⁷¹ In short the plaintiff must make it appear to a certainty that no answer which the defendant might properly serve could present a genuine issue of fact.

d. Notice and Hearing

Rule 1.36(c)⁴⁷² requires that a motion for a summary judgment shall be served at least twenty days before the time fixed for the hearing. Similarly, Rule 1.16⁴⁷³ requires the court to serve a copy of its order setting a pre-trial conference on the attorneys for the parties not less than 20 days prior to the conference. In *Green v. Manly Constr. Co.*,⁴⁷⁴ the plaintiffs appealed from an adverse summary judgment in a negligence action, and charged that the trial court had erroneously granted the defendant's motion for a summary judgment made at pre-trial conference because the plaintiffs had not received prior notice of the defendant's motion. In affirming the lower court's judgment, the district court noted that the litigants were charged with knowledge that the court may of its own motion enter a summary judgment as a result of a pre-trial conference, provided the requisite advance notice of the conference has been given. "The purpose of a pretrial is to simplify the issue. If the conference progresses to the point of eliminating all questions of fact, then the court may give judgment according to the law on the facts before him."⁴⁷⁵

In a suit for the specific performance of an agreement to reconvey real estate, or in the alternative for damages, the defendant-vendee filed motions before answering to both dismiss the complaint and for a

(Fla. 3d Dist. 1964); *John K. Brennan Co. v. Central Bank & Trust Company*, 164 So.2d 525 (Fla. 2d Dist. 1964); *Dean v. Gold Coast Theatres, Inc.*, 156 So.2d 546 (Fla. 2d Dist. 1963).

470. *Olin's, Inc. v. Board of County Comm'rs*, 165 So.2d 427 (Fla. 3d Dist. 1964); *Wallens v. Lichtenstein*, 159 So.2d 912 (Fla. 3d Dist. 1964); *Settecasei v. Board of Public Instruction*, 156 So.2d 652 (Fla. 2d Dist. 1963).

471. 6 MOORE, FEDERAL PRACTICE, §§ 56.07, 56.15(3) (2d ed. 1965).

472. FLA. R. CIV. P. 1.36(c), as amended, 1965 REVISION, at 26. Failure to observe the requisite notice requirement constitutes reversible error. *Seven-up Bottling Co. v. George Const. Corp.*, 166 So.2d 155 (Fla. 3d Dist. 1964) (reversing a summary decree for the defendant, heard 3 days after notice, in an independent action to set aside a decree of foreclosure, which was allegedly obtained by a fraud upon the court).

473. FLA. R. CIV. P. 1.16, as amended, 1965 REVISION, at 21.

474. 159 So.2d 881 (Fla. 2d Dist. 1964).

475. *Hillsborough County v. Sutton*, 150 Fla. 601, 603, 8 So.2d 401, 402 (1942), cited in *Green v. Manly Constr. Co.*, *supra* note 474, at 885.

summary judgment. The court denied the defendant's motions and *sua sponte* entered an interlocutory summary decree on the issue of liability in favor of the non-moving plaintiff-vendor, apparently because the court found, as a matter of law, that the time within which the option to re-purchase could be exercised had not expired at the time the plaintiff informed the defendant of its intention to demand a reconveyance. On the defendant's appeal, the Second District Court of Appeal held⁴⁷⁶ that the trial court had erroneously entered a summary judgment for the non-moving party before an answer had been filed in the absence of a ten-day notice by the plaintiff of hearing of a motion for summary decree in conformity with the provisions of Rule 1.36(c).

Like its federal counterpart,⁴⁷⁷ Florida Rule 1.36 makes no specific provision for a case in which the opposing party, and not the moving party is entitled to summary judgment.⁴⁷⁸ However, Florida Rule 1.36 is substantially analogous to Federal Rule 56, and cases and treatises interpreting the Federal Rule are persuasive in resolving similar problems under the Florida Rule. In *Begnaud v. White*,⁴⁷⁹ the Sixth Circuit noted:

The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion, is overruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of its own motion for summary judgment. We do not think that the concession continues over into the court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled.

The rationale that limits an admission that the facts are undisputed to the purposes of the party's own motion where both parties have moved for a summary judgment is equally applicable to a situation where the court, *sua sponte* is considering the propriety of entering such a judgment.

Although the court in disposing of a motion for summary judgment or decree may sometimes enter the judgment or decree for the nonmoving party,⁴⁸⁰ "[d]ue process requires that before a summary judgment is authorized to be entered against a non-moving party, it must be shown that

476. *John K. Brennan Co. v. Central Bank & Trust Co.*, 164 So.2d 525 (Fla. 2d Dist. 1964).

477. *FED. R. CIV. P.* 56.

478. See 3 *BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE*, § 1239 (Rules ed. 1958).

479. 170 F.2d 323, 327 (6th Cir. 1948), cited in the principal case.

480. *Carpineta v. Shields*, 70 So.2d 573 (Fla. 1954).

he has had a full and fair opportunity to meet the proposition that there is no genuine issue of a material fact and that the party for whom the summary judgment is rendered or ordered to be entered is entitled thereto as a matter of law. . . ."⁴⁸¹ In the absence of other controlling factors Florida Rule 1.36, like Federal Rule 56, requires that a summary judgment be entered against a party only after an opportunity to be heard on timely written notice of the application for the judgment.⁴⁸² A person who has filed notice of such a motion appears at the hearing on his motion in support of his own motion, and not to meet a like but non-noticed and unserved motion of his adversary or of the court. It was apparent in the instant case that the order as to the liability of the defendant was not after a full and fair opportunity to the defendant to meet the question of its liability under the terms of the agreement between the parties.⁴⁸³

As intimated in the discussion of the *Moreno* case,⁴⁸⁴ and as expressly provided by Rule 1.36(c), ". . . The adverse party prior to the day of hearing may serve opposing affidavits. . . ."⁴⁸⁵ Notwithstanding the use of permissive language, Florida courts continue⁴⁸⁶ to hold that if opposing affidavits are filed at all, they *must* be filed before the scheduled date of the hearing on the motion for summary judgment or they will not be considered by the court in determining whether or not to enter the summary judgment sought.

In all but extraordinary circumstances, affidavits in support of [a motion for summary judgment], if any there are, should be filed [in sufficient time to allow an opponent] to controvert

481. *John K. Brennan Co. v. Central Bank & Trust Co.*, *supra* note 476 at 530. See 6 MOORE, FEDERAL PRACTICE, § 56.12, at 2243 (2d ed. 1965).

482. In *City of Pinellas Park v. Cross-State Util. Co.*, 176 So.2d 384, (Fla. 3d Dist. 1965), the court in reversing a summary judgment for the non-moving party noted that:

While there are circumstances under which the court may grant a summary judgment to a non-moving party, it must always be borne in mind that this procedure is contrary to Fla. R. Civ. Pro. 1.36, 30 F.S.A. [Footnote citing the principal case omitted], and that it is better practice to require a motion by the successful party. [Footnote omitted.]

Id. at 386.

483. In *Fernandez v. Moreno*, 176 So.2d 587 (Fla. 3d Dist. 1965), the district court relied on the *Brennan Co.* case in holding on an appeal by the defendant that the trial court had erroneously entered a partial summary judgment for the plaintiff on the issue of liability. In the *Moreno* case, the hearing on the plaintiff's motion for summary judgment was never held pursuant to the original notice. Subsequently the plaintiff filed a further notice of hearing and various orders were entered but none on the motion for summary judgment.

On the day of trial and immediately prior thereto, the plaintiff's attorney requested the court to rule on the motion for summary judgment, although no hearing on this motion had been scheduled for the day of trial nor any notice of hearing forwarded to the defendant. The trial court thereupon granted the motion which the defendant assigned as error on appeal. In sustaining the defendant's contentions, the district court noted that although the summary judgment motions had been pending for many months, the notice provisions of Rule 1.36(c) had not been complied with and the defendant was deprived of his opportunity to serve opposing affidavits prior to the day of the hearing.

484. *Supra* note 482.

485. FLA. R. CIV. P. 1.36(c).

486. See *Massey & Westen, Civil Procedure*, 18 U. MIAMI L. REV. 745, 785 (1964).

them. . . A motion for summary judgment is calculated to save valuable time and thus to assist in securing speedy and inexpensive justice, but one object of the . . . rules of procedure is to prevent surprise, and this . . . objective should not be overlooked.⁴⁸⁷

e. Competent Evidence

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."⁴⁸⁸

Allegations of ultimate fact which are to be proved or disproved by evidentiary facts usually suffice for pleading purposes, but more is required of an affidavit to support a motion for a summary judgment or decree.⁴⁸⁹ Statements of ultimate fact in support of a motion for summary decree are of no weight.⁴⁹⁰ As in the case of ultimate facts, a trial court should disregard opinion testimony and legal conclusions contained in a motion in support of, or in opposition to, a motion for summary judgment, and give consideration only to the competent and admissible portions. Such opinion testimony and legal conclusions would, of course, not be admissible in evidence.⁴⁹¹

f. Unpleaded Defense

During the Survey period, the Florida Supreme Court granted certiorari⁴⁹² to review the decision of the Third District Court of Appeal in *Hart Properties, Inc. v. Slack*,⁴⁹³ which had affirmed an order of the trial court denying the plaintiff's motion for a summary judgment in a negligence action where the facts showed an issue not framed in the pleadings. In their complaint the plaintiffs had alleged, and by their answer the defendants had admitted, that the minor plaintiff was a licensee on the defendant's property. However, the proofs adduced at the hearing on the motion for summary judgment indicated that the minor plaintiff might have been an invitee. In denying the defendant's motion, the district court held that upon a motion for summary judgment "the issues are made by the pleadings, the depositions and admissions on file."⁴⁹⁴

The Supreme Court disagreed and affirmed the position it previously

487. *Nielsen v. Carney Groves, Inc.*, 159 So.2d 489 (Fla. 2d Dist. 1964). See also, *Settecasì v. Board of Public Instruction*, 156 So.2d 652 (Fla. 2d Dist. 1963).

488. FLA. R. CIV. P. 1.36(e), as amended, 1965 Revision, at 27.

489. *Dean v. Gold Coast Theatres, Inc.*, 156 So.2d 546 (Fla. 2d Dist. 1963).

490. See 6 MOORE, FEDERAL PRACTICE, § 56.22 at 2808, n. 25 (2d ed. 1965).

491. *First Mortgage Corp. v. de Give*, 177 So.2d 741 (Fla. 2d Dist. 1965).

492. *Hart Properties, Inc. v. Slack*, 159 So.2d 236 (Fla. 1963).

493. 145 So.2d 285 (Fla. 3d Dist. 1962).

494. *Id.* at 286.

adopted in the case of *Connolly v. Sebeco, Inc.*⁴⁹⁵ "The purpose of a motion for summary judgment is to determine if there be sufficient evidence to justify a trial *upon the issues made by the pleadings.*"⁴⁹⁶

"Parties litigant are bound by the allegations of their pleadings,"⁴⁹⁷ and admissions contained in the pleadings are accepted as facts as between the parties themselves without the necessity of supporting evidence. In the instant case, the plaintiff was bound by his allegation that he was a licensee, and the evidence adduced in support of, or in opposition to, a motion could not create an issue on a point that was already settled.

In circumstances such as this where a summary judgment should be entered, yet the matters presented indicate that the unsuccessful party may have a cause of action or defense not pleaded, or a better one than that pleaded, the proper procedure is to [grant the motion to] enter the summary judgment with leave to the party to amend⁴⁹⁸

g. Requisite Evidentiary Showing

Another problem dealt with during the Survey period is that of the evidentiary showing required by a movant for a summary judgment.

The second district court, in a recent slip and fall case, reversed a summary judgment for the defendant and held^{498a} that "a motion for summary judgment should not be granted if it could be inferred from the evidence that the plaintiff could prove at trial that the defendant was negligent. The defendant sought certiorari on the ground that the decision was in conflict with the opinion of the Third District Court of Appeal in *Hardcastle v. Mobley*, in which it was held that the party against whom summary judgment is sought must come forward with facts contradicting those submitted by the movant and demonstrate a real issue between the parties.

On a consideration of the merits, the Florida Supreme Court found that the district court had properly reversed the summary judgment for the defendants but for the wrong reasons. The court held that once the movant has tendered sufficient evidence to support his motion, the oppos-

495. 89 So.2d 482 (Fla. 1956).

496. *Id.* at 484. (Emphasis added.)

497. *Carvell v. Kinsey*, 87 So.2d 577, (Fla. 1956).

498. *Hart Properties, Inc. v. Slack*, *supra* note 228, at 240 (Fla. 1963). Accord: *City of Pinellas Park v. Cross State Util. Co.*, 176 So.2d 384 (Fla. 2d Dist. 1965); *Curley v. Finest Homes, Inc.*, 167 So.2d 739 (Fla. 2d Dist. 1964).

Rule 1.15(a), FLA. R. CIV. P., specifies that, when necessary, "leave [of court] shall be freely given when justice so requires."

The decision in the principal case comports with the view of the cases and treatises which construe the analogous FED. R. CIV. P. 56. See, e.g., *Rossiter v. Vogel*, 134 F.2d 908 (2d Cir. 1943). Cf. 6 MOORE, FEDERAL PRACTICE, ¶ 56.10 (2d ed. 1965).

498a. *Haley v. Harvey Building, Inc.*, 168 So.2d 330 (Fla. 2d Dist. 1965).

ing party must come forward with counterevidence sufficient to reveal a genuine issue of fact.^{498b}

h. Partial Summary Judgment

The provision in Rule 1.36(a)⁴⁹⁹ permitting a claimant to move with or without supporting affidavits for a summary judgment or decree in his favor upon all *or any part* of his complaint should be read *in pari materia* with the requirements of Rule 1.36(d) relating to the proper procedure at a hearing on a summary judgment motion at which the court grants a partial summary judgment only. That Rule specifies that:

[T]he court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. *Upon the trial or final hearing of the action, the facts so specified shall be deemed established*, and the trial or final hearing shall be conducted accordingly.⁵⁰⁰

In an action upon an entertainment contract, the plaintiffs recovered a partial summary judgment as to part of the damages sought, which were found to be due without dispute and the court ordered execution. The defendant appealed and superseded the judgment. In reversing the lower court the Third District Court of Appeal held⁵⁰¹ that under Florida Rule 1.36, the trial court was without power to enter the challenged partial summary final judgment. The terms of subsection (d) of Rule 1.36 contemplate that the final judgment, when entered, would incorporate the partial relief previously found due without dispute. The object and function of Rule 1.36(d) is to expedite the litigation of a cause by eliminating uncontested matters. The purpose of the Rule was not to provide for the piecemeal litigation of a cause, but was simply to preserve "as established and ready for inclusion in the final judgment, to be entered after trial, the amounts of damages found to be undisputed and owing"⁵⁰² At that stage of the proceeding the court was without authority to enter a judgment.

498b. *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 782-83 (Fla. 1965).

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

500. FLA. R. CIV. P. 1.36(d). (Emphasis added.)

501. *Fontainebleau Hotel Corp. v. Young*, 162 So.2d 303 (Fla. 3d Dist. 1964).

502. *Id.* at 305. The court noted that its interpretation of FLA. R. CIV. P. 1.36(a) and (d) conformed to the interpretation given by the federal appellate courts to the identical subsections (a) and (d) of FED. R. CIV. P. 56. *Biggins v. Oltmer Iron Works*, 154 F.2d 214 (7th Cir. 1946). See 6 MOORE, FEDERAL PRACTICE, ¶ 56.20(3) part 3 (2d ed. 1965).

Interpreting the identical provisions contained in Federal Rule 56(d), Professor Moore states:

Rule 56(d) imposes a duty upon the court to sift the issues and to specify which material facts are really in issue and which are not, thereby facilitating and expediting the trial. This pre-trial sifting of the issues upon a motion for summary judgment, as provided in Rule 56(d), is quite similar to the pre-trial procedure provided in Rule 16, except that under Rule 56(d) it is compulsory, while under Rule 16 it is discretionary with the court.⁵⁰³

"A case which seeks recovery of several elements of damage or relief presents only a single 'claim,' if they grow out of one contract or cause of action,"⁵⁰⁴ and a final judgment as to undisputed damages may not properly be entered until all of the damages arising from the same claim have been litigated.⁵⁰⁵ This construction of Federal Rule 56 had already been established at the time that Florida incorporated the federal practice under Rule 56 into its own procedural system.⁵⁰⁶

Florida Rule 1.36(c) also provides for an interlocutory summary

503. 3 MOORE, FEDERAL PRACTICE 3175 (1st ed. 1938).

504. *Fontainebleau Hotel Corp. v. Young*, *supra* note 501, at 307.

505. This point is significant in federal practice because the rules regulating procedure in the federal courts contain, in addition to FED. R. CIV. P. 56 (which is analogous to FLA. R. CIV. P. 1.36), FED. R. CIV. P. 54(b), for which there is no counterpart in the Florida rules. FED. R. CIV. P. 54(b) expressly authorizes the entry of *judgment* on "one or more but less than all of the claims." Obviously, if final judgments for partial relief could be granted under FED. R. CIV. P. 56, there would be no necessity for Rule 54(b).

506. The First District Court of Appeal in *Berry v. Pyrofax Gas Corp.*, 121 So.2d 447 (Fla. 1st Dist. 1960), had previously voiced an opinion, by way of obiter dictum, to the effect that the summary judgment rule authorizes partial final judgments. The principal cases contained a dissent based upon the *Berry* dictum.

A few months later, the question of partial summary judgments was again before the Third District Court of Appeals in the case of *Wabash Life Ins. Co. v. Rosenberg*, which was an action by the beneficiaries to recover the face amount of a life insurance policy. In December, 1964, the plaintiffs were granted a partial summary judgment for the face amount of the policy, and at the end of the following March, after hearing, judgment for interest and attorney's fee was entered in the plaintiffs' favor. On defendant's timely appeal from the latter order, the plaintiffs' motion to dismiss the appeal was denied in a brief per curiam opinion.

The decision contains a concurring opinion which would have held the appeal untimely as it related to the partial summary judgment for the principal amount of the policy. In view of the *Fontainebleau* case, and of the express provision in the order awarding the plaintiffs the amount of the policy specifying that "(f)inal judgment shall be entered herein after the termination of the matters of interest, attorney fees and costs" (emphasis added), this conclusion seems patently erroneous. Neither the fact that the December order was in the form of a judgment, nor the fact that the court erroneously stayed the execution on that order sought by the plaintiffs should be dispositive of the defendant's right to challenge the propriety of an order in an action at law, which, under the rules regulating procedure in Florida courts, was necessarily interlocutory. Substance, not form, should dictate the rights of litigants.

judgment or decree where no genuine material issue exists as to the issue of liability, although the amount of damages is in dispute.⁵⁰⁷

i. Attorney's Fees

On an appeal by the defendants in an action to recover under the terms of an indemnity agreement, the district court reversed⁵⁰⁸ a summary judgment awarding the plaintiff attorney's fees pursuant to a conclusive evidence clause contained in the agreement itself. The conclusive evidence clause was void as being against public policy, and the record on appeal contained no testimony as to the reasonableness of the attorney's fees incurred, although it did contain affidavits as to the reasonableness of the attorney's fees awarded. Generally, the reasonableness of attorney's fees is a question of fact to be determined by a jury upon a consideration of the evidence adduced at a final hearing.

j. Extension

Where more time is needed to prepare for an opponent's motion for summary judgment, a motion for a continuance will not suffice.⁵⁰⁹ Rule 1.36(f)⁵¹⁰ requires that the opposing party's motion state the reasons why he cannot present by affidavit the facts essential to justify his opposition. When such a motion has been presented, "the court may refuse the application for judgment or decree or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

k. Appellate Review

It appears that the districts are not in accord as to the test to be applied by an appellate court in determining whether a trial court has erroneously denied a party's motion for a summary judgment or decree where denial of such a motion is assigned as error on appeal.

In *Well-Bilt Prod., Inc. v. Liechty*,⁵¹¹ the appealing plaintiff assigned as error the denial of his motion for a summary judgment. The Second District Court of Appeal affirmed and stated that in denying a motion for summary judgment, as opposed to granting a motion for summary judgment,⁵¹² discretion may play a part.

507. FLA. R. CIV. P. 1.36(c). See, e.g., *Florida State Turnpike Auth. v. Michael Baker, Jr., Inc.*, 156 So.2d 198 (Fla. 2d Dist. 1963).

508. *Sork v. United Benefit Fire Ins. Co.*, 161 So.2d 54 (Fla. 3d Dist. 1964). See also, *Seven-up Bottling Co. of Miami v. George Constr. Corp.*, 166 So.2d 155 (Fla. 3d Dist. 1964).

509. *Raydel, Ltd. v. Medcalfe*, 162 So.2d 910 (Fla. 3d Dist. 1964).

510. FLA. R. CIV. P. 1.36(f).

511. 167 So.2d 84 (Fla. 2d Dist. 1964).

512. In granting a motion for a summary judgment, like (sic) in granting a motion for a directed verdict at trial, the trial court determines that there are no genuine issues of a material fact that ought to be tried and as a matter of law the

Discretion plays no real role in the grant of summary judgment: the grant of summary judgment must be proper under the above principles or the grant is subject to reversal. The trial court may, however, exercise a sound discretion in denying summary judgment where, although the movant may have technically shouldered his burden, the court is not reasonably certain that there is no triable issue of fact; where a portion of an action may be ripe for summary judgment but it is intertwined with another claim(s) that must be tried; and in certain other situations.⁵¹³

However, the Third District Court of Appeal on an interlocutory appeal by a defendant from a combined order denying its motion to dismiss the complaint and its motion for summary judgment, stated⁵¹⁴ in affirming the trial court's decision, that:

. . . to determine if the chancellor erred in the denial of the motion for summary judgment [or decree], it is incumbent upon the appellant to demonstrate that there were no issues of material fact and that it was entitled to a summary judgment [or decree] as a matter of law.⁵¹⁵

The test applied by the court appears to be a mechanical one not requiring the appellant to demonstrate that there has been an abuse of judicial discretion, but merely to show the absence of a genuine issue of material fact, and his right to a judgment in his favor under the applicable substantive law.

N. *Relief From Final Orders, Judgments, or Decrees*

The interpretation of Rule 1.38(b), which was added to the Florida Rules of Civil Procedure in 1962,⁵¹⁶ has formed the basis of a number of opinions emanating from the district courts during the survey period. The Florida Rule is substantially analogous to Federal Rule 60(b)⁵¹⁷ except for the omission of the omnibus clause contained in the latter,⁵¹⁸ and, as might be expected, in interpreting its various provisions, Florida courts have freely adverted to cases and texts construing similar provisions of the Federal Rule.

The Rule provides five grounds upon which a party or his legal

matter is well founded; no discretion is involved. *Id.* at 85. See also, *Dean v. Goldcoast Theatres, Inc.*, 156 So.2d 546 (Fla. 2d Dist. 1963).

513. 6 MOORE, *FEDERAL PRACTICE*, ¶ 56.15(8), at 2440-2441 (2d ed. 1965).

514. *Dade County v. Ray*, 166 So.2d 475 (Fla. 3d Dist. 1964).

515. *Ibid.*

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

517. *FED. R. CIV. P.* 60(b).

518. Federal Rule 60(a)(6) provides for relief by motion practice from a final judgment for "any other reason justifying relief from the operation of the judgment." See *Barns & Mattis, 1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 290, n.47 (1963).

representative may, upon such terms as are just, move for relief from a final order, judgment or decree:

- (1) where the judgment has been entered as a result of mistake, inadvertence, surprise, or excusable neglect,
- (2) where there is newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing,
- (3) where there has been fraud, misrepresentation or other misconduct by an adverse party,
- (4) where the judgment is void,
- (5) where the judgment or decree has been satisfied, released or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the motion or decree should have prospective application.

A motion under 1.38(b) should be made within a reasonable time, and if on the basis of one of the first three grounds, not more than a year after the judgment, decree, order or proceeding was entered or taken. Thus, the Rule does not grant a year in which to seek relief under one of the first three enumerated grounds, but requires that the motion be made "within a reasonable period," and in specified instances defines a year as the outside limit of what constitutes a reasonable period. In *Odum v. Morningstar*,⁵¹⁹ the defendant moved to set aside a decree pro confesso on grounds of mistake or inadvertence within nine months of the entry of a final decree, but stated no grounds for his delay. The district court held that since the plaintiff made no showing of laches, and since the proceedings against the defendant were *ex parte*, it was assumed that the defendant acted with reasonable promptness.

Although Florida Rules 2.9⁵²⁰ and 3.9⁵²¹ provide for the entry of default judgments and decrees pro confesso respectively, the Florida rules contain no counterpart to Federal Rule 55(c)⁵²² relating to the setting aside of a default, nor has there been any statute for that purpose since 1955 when section 50.-10 of the Florida Statutes was repealed.⁵²³ Now the common law of the state as it had previously existed⁵²⁴ in relation to the vacation of defaults has been revived. The revival does not apply to those portions of the *Waterson v. Seat*,⁵²⁵ doctrine dealing with terms

519. 158 So.2d 776 (Fla. 2d Dist. 1963).

520. FLA. R. CIV. P. 2.9.

521. FLA. R. CIV. P. 3.9.

522. FED. R. CIV. P. 55(c).

523. Fla. Laws 1955, ch. 29737.

524. *Waterson v. Seat*, 10 Fla. 326 (1863).

525. *Ibid.*

of court as bearing on the time within which a motion to vacate a default must be made, since this subject was dealt with expressly by Rule 1.6 of the Florida Rules of Civil Procedure.⁵²⁶ The repeal of the statute relating to the vacation of default judgments and the reversion to the common law abrogated prior decisions holding that under the statute a showing of "gross abuse" of the trial court's discretion was a prerequisite to reversal of a ruling upon a motion to vacate.

The rules of procedure were liberalized by the adoption of 1.38(b). Cases construing its federal counterpart have leaned toward liberality based upon the objective of the rules to make legal procedure ". . . *the vehicle for determination of the issues upon their merits instead of upon refinements of procedure*, though limited to the extent that litigants and counsel are not allowed with impunity to disregard the processes of the court."⁵²⁷

The purpose of the rule is to assure a party claiming in good faith to have a good and substantial defense to an action⁵²⁸ an opportunity to be heard, and the trial courts should exercise the power vested in them liberally in order to achieve this result.⁵²⁹

"Although it is well settled that default judgments may not be set aside for a party guilty of gross negligence, the precise circumstances constituting excusable neglect, mistake or inadvertence is not well defined, but depends upon all the factors in a case."⁵³⁰ The federal cases give strong consideration to whether the original cause has been litigated, and often grant relief for inadvertence of counsel in failing to file an answer under factual situations not warranting relief, and for inadvertence occurring after the trial of a cause. Factors commonly considered

526. FLA. R. CIV. P. 1.6(c).

The period of time provided for the doing of any act or the taking of any proceeding shall not be affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is and has been pending before it.

See *North Shore Hosp., Inc. v. Barber*, 143 So.2d 849 (Fla. 1962); *Evans v. Hydeman*, 168 So.2d 183 (Fla. 2d Dist. 1964).

527. *Florida Inv. Enterprises, Inc. v. Kentucky Co.*, 160 So.2d 733, 736 (Fla. 1st Dist. 1964). (Emphasis original.)

528. A party who moves to vacate a judgment or decree entered against him by default must show in addition to mistake, inadvertence or excusable neglect, that he has a meritorious defense to the claim asserted against him.

[T]he power and discretion of the court to grant such relief [pursuant to 1.38(b)] is not unbridled and cannot be invoked as a matter of right, but is to be exercised within the limits of judicial discretion. The power thus granted may properly be used to prevent manifest injustices, but a prerequisite is a showing of the existence of grounds justifying its exercise.

Butler v. Butler, 172 So.2d 899, 902 (Fla. 3d Dist. 1965); *Florida Inv. Enterprises, Inc. v. Kentucky Co.*, 160 So.2d 733 (Fla. 1st Dist. 1964). See 7 MOORE, FEDERAL PRACTICE ¶ 60.19, p. 223 (2d ed. 1955).

529. See e.g., *Evans v. Hydeman*, 168 So.2d 183 (Fla. 2d Dist. 1964), and the state and federal cases cited therein.

530. *Florida Inv. Enterprises, Inc. v. Kentucky Co.*, *supra* note 527, at 737.

are the size of the judgment, the length of time after being in default before judgment is applied for and entered, and the diligence of the defaulting party in moving to set aside judgment.⁵³¹

As indicated, what constitutes such a mistake, inadvertence or excusable neglect as to warrant the vacation of a default judgment or decree is essentially a factual inquiry dependent upon the peculiar circumstances of each particular case. On appeal, an order granting a motion to vacate a decree pro confesso was affirmed⁵³² where the record revealed that the defendant had filed a timely motion to dismiss the plaintiff's complaint later in the same day on which the clerk had erroneously entered a decree pro confesso. It is clear that to enter a final decree against a defendant on the mistaken idea that he is in default for failure to defend is a mistake, and squarely within the purview of the relief afforded by Rule 1.38(b)(1).

Similarly an order vacating a judgment of dismissal was affirmed⁵³³ on the defendant's appeal from an adverse judgment entered on a jury verdict. The affidavit supporting the motion recited that the plaintiff's attorney had been out of town on several occasions after the suit was filed because of a death in his family, that he had been occupied with these affairs and had neglected to ask for an extension of time within which to file an amended complaint. The affidavit further asserted that the cause would be forthwith prosecuted. The district court held that the defendant had failed to demonstrate the gross abuse⁵³⁴ of judicial discretion required for an appellate court to reverse the trial court's granting of a motion to open a default judgment.

An order denying a motion for relief under 1.38(b) was affirmed on appeal where it was apparent "that the matters attempted to be brought to the attention of the trial judge in the common law action could have been available to the movant during the trial proceedings."⁵³⁵

531. *Ibid.*

532. *Odum v. Morningstar*, 158 So.2d 776 (Fla. 2d Dist. 1963).

533. *Houston Corp. v. Hofmann*, 161 So.2d 243 (Fla. 3d Dist. 1964).

534. *But see Florida Inv. Enterprises, Inc. v. Kentucky Co.*, *supra* note 527, which held that the abrogation of FLA. STAT. § 50.10 (1953) in 1955 likewise repealed prior decisions holding that under the statute a showing of gross abuse of the trial court's discretion was a prerequisite to reversal of a ruling upon a motion to vacate. Since "the discretion of the court in setting aside should be liberally exercised toward the result that parties claiming a substantial defense to the action may have an opportunity to have the cause determined upon its merits rather than upon procedural technicalities," (*Id.* at 738) it appears that a party appealing from an order granting such a motion will have substantially more difficulty in demonstrating that the trial court abused its discretion than one appealing from an order denying a motion under 1.38(b). In the *Florida Investment Enterprises* case, the district court had erroneously denied a motion to vacate a default and final judgment where the record affirmatively showed that the defendant had been in default only 7 days when the adverse final judgment was entered, that the judgment was for a substantial sum, that the defendant's attorneys had been active in the case (although the trial judge was not so advised), and that the plaintiff's attorney did not notify defense counsel of his application for default and final judgments although all of the attorneys involved practiced in the same city.

535. *Shongut v. Malnik*, 173 So.2d 708 (Fla. 3d Dist. 1965).

The plaintiff brought a wrongful death action against the administrator of the estate of a deceased co-pilot of an aircraft piloted by the plaintiff's deceased. When the administrator failed to answer or plead to the complaint a default judgment was entered against him. In June the cause was set for trial on September 21. In August, the plaintiff served the administrator with a copy of the notice of the taking of a deposition of a witness. Four days before the scheduled date of the trial, the co-pilot's widow moved for the court to remove the cause from the trial calendar. She alleged that she had not been notified of the pending suit, had just recently learned of the administrator's failure to answer the complaint, and had petitioned the county judge's court for the removal of the administrator and for her appointment as personal representative. The widow's motion was denied and the cause was reset for trial in December. In October, certain attorneys who allegedly represented the widow in her capacity as administratrix cum testamento annexo de bonis non of her deceased husband's estate filed a "notice of appearance" in the cause. Subsequently, the administratrix' motion to set aside the default judgment was granted by the trial court. On appeal,⁵³⁶ the district court sustained the plaintiff's contention that in vacating the default the trial court had grossly abused its discretion. If a party is guilty of gross neglect, a default will not be opened. While it was true that the neglect was by the defendant's predecessor, and that the defendant moved promptly upon succeeding to the position of personal representative of the estate, the plaintiffs were not responsible for the default and gross negligence. The widow's remedy, if any, was against the prior administrator and the sureties on his bond, if any.⁵³⁷

Under the fifth provision of Rule 1.38(b), relief may be had from decrees where ". . . it is no longer equitable that the judgment or decree should have prospective application." Federal courts construing the identical provision of Federal Rule 60(b) have generally applied this portion of the Rule, or permitted its use, in injunctive proceedings where changed circumstances would render it inequitable to permit the injunctive decree to have prospective application.⁵³⁸ When relief is sought pursuant to this provision there is an implied admission of the validity of the original decree from which relief is sought, and the basis of the motion is that changed circumstances have arisen since the decree that would make it inequitable to force it, or to give it, prospective application.⁵³⁹

The purpose of the rule was to allow "motion procedure" in lieu of a bill of review as known to the classical equity practice, and the rule may be more liberal than the classical bill; such motion does not affect the finality of the final decree or suspend

536. *Sugar v. Blek*, 172 So.2d 272 (Fla. 3d Dist. 1965).

537. See 7 MOORE, FEDERAL PRACTICE, § 60.26(4) (2d ed. 1955).

538. *Tepley v. Key*, 158 So.2d 549 (Fla. 3d Dist. 1963).

539. Writs of coram nobis, coram vobis, and bills in the nature of a bill of review,

its operation as does a timely motion for a rehearing under Rule 3.16 A denial of the motion is appealable as a final decree, but such appeal will not bring up for review the final decree sought to be vacated; if the motion is granted, the order is an interlocutory order, which when in equity, is appealable as such . . . unless the court's action on granting of motion meets the test of finality, in which event it is appealable as a final judgment or decree. 7 Moore's Fed. Practice, 2d ed., § 60.30.

. . . ⁵⁴⁰

Nevertheless, this Rule does permit an independent action to set aside a judgment or decree for fraud upon the court.⁵⁴¹

A trial court has control over its judgments and decrees until they become final But the power and discretion of the court to grant such relief is not unbridled and cannot be invoked as a matter of right, but is to be exercised within the limits of judicial discretion.⁵⁴²

When a judgment has been appealed and reversed or affirmed, the subsequent judgment is that of the appellate court, and the permission of that court must be obtained before the filing of an independent action to review the same because of alleged fraud or a similar ground.⁵⁴³ Prior to the amendment of Rule 1.38 in 1962 to include subsection (b), it was also necessary to secure the permission of the appellate court whose judgment was sought to be reviewed before filing a bill in the nature of a bill of review.⁵⁴⁴ A recent case decided under the analogous Federal Rule 60(b) held that trial courts do not have jurisdiction to entertain either an independent action, or a motion to review a judgment which has been affirmed on appeal without leave having first been obtained from the appellate court.⁵⁴⁵

are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

FLA. R. Civ. P. 1.38(b); *Shongut v. Malnik*, 173 So.2d 708 (Fla. 3d Dist. 1965); *Irving v. Irving*, 157 So.2d 544 (Fla. 3d Dist. 1963); *State v. Anderson*, 157 So.2d 140 (Fla. 3d Dist. 1963).

540. *Odum v. Morningstar*, 158 So.2d 776, 778 (Fla. 2d Dist. 1963). See also FLA. R. CIV. P. 1.38(b); *Shongut v. Malnik*, *supra* note 539.

541. *Southern Ry. Co. v. Wood*, 171 So.2d 614 (Fla. 1st Dist. 1965), was an FELA action in which it appeared that the trial court had mistakenly withdrawn from the jury's consideration the question of the decedent's employment, and that consequently judgment for the plaintiff on a jury verdict might have been erroneously entered. Since the time for filing a motion for relief from the judgment pursuant to FLA. R. Civ. P. 1.38(b) had not yet expired, the district court on its own motion temporarily relinquished jurisdiction of the cause to the trial court for the purpose of receiving and disposing of such a motion, if any. "The ends of justice under the law dictate that an opportunity be afforded in the trial court to cure the error, if any resulting under the circumstances. . . ." *Id.* at 617.

542. *Butler v. Butler*, 172 So.2d 899, 901-02 (Fla. 3d Dist. 1965).

543. *State v. Anderson*, 157 So.2d 140 (Fla. 3d Dist. 1963).

544. *Alford v. Nunez*, 111 So.2d 425 (Fla. 1959).

545. *Geuder, Paeschke & Frey Co. v. Clark*, 280 F.2d 1 (7th Cir. 1961).

O. Transfers of Actions

1. AMENDMENTS

Subsection (b) of Rule 1.39 has been amended⁵⁴⁶ to refer to Rule 1.13(j) instead of Rule 1.39(a) to established a uniform practice on transfers between courts within a county,⁵⁴⁷ as compared with transfers between the law and equity sides of the same court which is the subject matter of Florida Rule 1.39(a). Subsection (b) now reads:

If it should appear at any time that an action is pending in the wrong court of any county it may be transferred to the proper court within said county by the same method as provided in Rule 1.13(j).

In accordance with the policy that all general procedure statutes should be incorporated in the rules,⁵⁴⁸ subsection (c), which has been added to Rule 1.39, transfers to that rule much of section 53.17⁵⁴⁹ of the Florida Statutes. Subsection (c) provides:

When any action is filed laying venue in the wrong county or district, the court may transfer the action to the proper court in any county or district where it might have been brought in accordance with the venue statutes in the same manner as provided in Rule 1.13(j). When the venue might have been laid under the venue statutes in two or more counties or districts, the person bringing such action may select the county or district to which the action is transferred; but if no such selection is made, the matter shall be determined by the court.

2. LAW V. EQUITY

When a chancellor determines that a plaintiff has an adequate remedy at law, the express provisions of Rule 1.39(a)⁵⁵⁰ require that the cause "shall be forthwith transferred to the proper side [of the court] and proceeded with without interruption." In such cases dismissal of the complaint, with or without prejudice, is procedurally improper.⁵⁵¹

The plaintiff filed suit in chancery alleging the existence of a partnership between the parties, and praying for dissolution and an accounting. On final hearing the chancellor determined that no partnership had existed between the parties, and upon further consideration, entered an order to the effect that the plaintiff had not proved a cause of action in

546. 1965 REVISION, at 27.

547. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1135 (1965).

548. See the nn. to Rule 1.35, *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1135 (1965).

549. FLA. STAT. § 53.17 (1965).

550. FLA. R. CIV. P. 1.39(a); *Giovannielli v. Lacedonia*, 117 So.2d 506 (Fla. 3d Dist. 1965).

551. *Olkap Realty Corp. v. Dade Meat Packing Corp.*, 158 So.2d 768 (Fla. 3d Dist. 1963).

equity. The court thereupon transferred the cause to the law side of the court with leave to the plaintiff to there file an amended complaint.

The amended complaint at law alleged substantially the same ultimate facts alleged in the prior complaint in equity, and then alleged facts upon which the plaintiff sought damages for the reasonable value of his services to the defendant. From a final judgment holding that his claim was barred by the statute of limitations, the plaintiff appealed. It appeared that the original complaint in equity had been filed within the applicable one-year statute of limitations,⁵⁵² but that the amended complaint had been filed in the law action after the one-year period had run. The district court held that under the provisions of Rule 1.15(c),⁵⁵³ the amended complaint in the action at law related back to the date upon which the plaintiff filed his original complaint in chancery.

[T]he proper test of relation back of amendments is not whether the cause of action stated in the amended pleading is identical to that stated in the original (for in the strict sense almost any amendment may be said to be a change of the original cause of action), but whether the pleading as amended is based upon the same specific conduct, transaction, or occurrence between the parties upon which the plaintiff tried to enforce his original claim. If the amendment shows the same general factual situation as that alleged in the original pleading, then the amendment relates back—even though there is a change in the precise legal description of the rights sought to be enforced, or a change in the legal theory upon which the action is brought.⁵⁵⁴

An interesting question, not in terms answered by Rule 1.39(a), is presented when the claim for equitable relief in a suit properly commenced in chancery either is later abandoned by the plaintiff, or it is found impracticable to award the equitable relief sought, but the plaintiff is found entitled to recover damages in lieu thereof. Should the chancellor transfer the cause to the law side of the court, or, following the traditional maxim in that "equity does not do justice by halves," should he take testimony and award damages? Rule 1.39(a) *requires* transfer *only* "if at any time it appears that an action has been *commenced* either in equity or at law when it should have been brought on the opposite side of the court."

In *McSwiggan v. Edson*,⁵⁵⁵ the defendants moved to dismiss the complaint and to transfer the cause to the law side of the court "upon the ground that the same does not state a ground for relief in equity." The motion to dismiss was granted with leave to amend. The defendants

552. FLA. STAT. § 95.11(7) (1965).

553. *Kell v. Brown*, 162 So.2d 321 (Fla. 2d Dist. 1964).

554. *Id.* at 323.

555. 172 So.2d 490 (Fla. 3d Dist. 1965).

again moved to dismiss and to transfer to the law side of the court an amended complaint which the plaintiff had filed in response to the original order. The latter motions were denied and the plaintiff thereafter moved for leave to file a second amended complaint and to have the cause transferred to the law side of the court. On an interlocutory appeal from an order granting the plaintiff's motions the defendants argued inter alia that the trial court had erroneously transferred the cause to the law side on the theory that "where suit is properly commenced in equity it may not be transferred to the law side under rule 1.39(a) F.R.C.P. even though thereafter it is stripped of its equities leaving only matters cognizable at law."⁵⁵⁶ Without regarding the merits, the district court held that the defendants were estopped from objecting to the transfer for the reason that they had twice sought, and had induced, the trial court's complained-of action by arguing at the outset that the cause was not properly in equity.

In *Sangster v. Boca Raton Sun & Surf, Inc.*,⁵⁵⁷ suit was brought alternatively for specific performance or rescission of certain contracts, or for damages for their breach. At the beginning of the trial, the plaintiffs abandoned their prayer for equitable relief and elected to proceed on the basis of a breach of contract and claim for damages. Nevertheless, a lengthy hearing was held in the equity court which resulted in dismissal of the complaint because the plaintiffs created an untenable situation by retaining their deeds pending a decision on the merits. On appeal, the district court reversed and held that the trial court, which had not ruled on the question of liability, should transfer the cause to the law side of the court and proceed to determine if there was a breach of the contracts constituting injury to the plaintiffs for which the defendants would be liable, and if so, to determine the damages.

West Plumbing & Heating Co. v. Hurley,⁵⁵⁸ involved a suit by a subcontractor to foreclose an alleged lien on the defendant's real property. By order of the court, the general contractor was joined as a party defendant.⁵⁵⁹ Thereafter, the plaintiff filed a second amended complaint in which it alleged, in part, that in another cause pending before the court the general contractor had posted a bond "in substitution of the lien herein sought to be foreclosed." The real property owner moved for a summary decree and the general contractor moved to dismiss the complaint on the grounds, among others, that it affirmatively appeared that the plaintiff had failed to bring proceedings to foreclose the alleged lien within a period of one year from the date of the filing of said lien as re-

556. *Id.* at 491.

557. 167 So.2d 56 (Fla. 2d Dist. 1964).

558. 168 So.2d 328 (Fla. 1st Dist. 1964).

559. Pursuant to the provisions of FLA. R. CIV. P. 1.18.

quired by the applicable statute.⁵⁶⁰ The chancellor granted the summary final decree and dismissed the suit as to the general contractor "without prejudice however to any right which the plaintiff may have against the said defendant or the bond filed for transfer of plaintiff's lien to bond in substitution of the real property." On the plaintiff's appeal, the district court held on rehearing that the record indicated that the plaintiff's suit to foreclose the lien had in fact been timely instituted, and that when the surety bond was posted the equitable lien against the real estate became substituted with the obligation of the principal and surety on the bond so that any default which would support a suit to foreclose the lien would, by operation of law, be converted to a cause of action against the obligors on the bond. Therefore, proceedings against the general contractor could properly lie on the law side of the court, and the trial court should have given consideration to such transfer as is provided in Rule 1.39(a).

3. TRANSFERS BETWEEN COURTS

Rule 1.39(b)⁵⁶¹ provides for the transfer of a cause to the court in the same county in which it should have been brought if at any time it appears that a suit is pending in the wrong court of that county. Where transfer is based on the jurisdictional amount, a court is bound by the good faith claim of a litigant.⁵⁶² In *Rocco v. Coffey*,⁵⁶³ a physician mistakenly diagnosed a foetus as a tumor, for the removal of which he performed an operation upon the plaintiff-wife. In a subsequent malpractice suit against the doctor the trial judge at pre-trial conference announced that he had examined the depositions of the plaintiffs and the answers to interrogatories in the court file, and was of the opinion that the plaintiffs' good faith claim could not reasonably amount to \$10,000.00 or more so as to bring the case within the circuit court's jurisdiction. He therefore dismissed the complaint and transferred the cause to the court of record. The plaintiffs sought certiorari to review this order on the ground that it constituted a departure from the essential requirements of law. In granting the writ, the district court held that "the jurisdiction of. . . [the] Circuit Court depends not upon the amount of damages which is actually recoverable as a matter of law, but rather by the sum in good faith demanded or actually put in controversy."⁵⁶⁴ The court concluded that based on the facts in the record the amount actually recoverable was a jury question, and that a jury might well find that plaintiffs' damages exceeded the minimum required to invoke the jurisdiction of the circuit court.

560. FLA. STAT. § 84.221(1) (1965).

561. FLA. R. CIV. P. 1.39(b), as amended, 1965 Revision, at 27.

562. *Miami Athletic Club v. Morency*, 158 So.2d 146 (Fla. 3d Dist. 1963).

563. 163 So.2d 21 (Fla. 2d Dist. 1964).

564. *Id.* at 23.

II. ACTIONS AT LAW ONLY

A. Jury Trials

1. WAIVER

The absolute right to a jury trial exists only in those cases for which it has been declared by the Florida Constitution or by statute.⁵⁶⁵ In other cases jury trials are permissive, not mandatory.⁵⁶⁶ Even when an absolute right to a jury trial exists, it may be waived by failure to make a timely demand.⁵⁶⁷ After such a waiver, the right to a jury trial is discretionary with the court.⁵⁶⁸ Where an appeal is taken from an order either granting or denying a tardy demand for a jury trial, the appellant carries the heavy burden of having to demonstrate an abuse of judicial discretion. In affirming⁵⁶⁹ the denial of such a motion made by the defendants more than two months after they had answered the complaint, the district court noted, *inter alia*, that the case had already been docketed for trial, and that granting the motion would have resulted in a postponement of the trial date with possible inconvenience to both the plaintiff and the court.

The right to a trial by jury is a deeply cherished and jealously guarded fundamental precept. It will not be taken away when injustice would be the result. However, our rules do require of a litigant to have this right that he make a simple, unsophisticated, short written demand for it either in his pleading, or separately, within ten days after service of the last pleading. If he doesn't ask for it then, the court and his opponent may deem it waived and arrange their affairs accordingly. *When this almost effortless prerequisite is not met, the tardy litigant must demonstrate that the award of a jury trial will not only be an accommodation of his desires but also will impose no injustice on his adversary and further will not unreasonably inconvenience the court in the performance of its duties.*⁵⁷⁰

The defendant in an action for damages arising out of a rear-end collision appealed from an adverse judgment and assigned as error the denial of his motion for a new trial. In their complaint, the plaintiffs had

565. FLA. R. CIV. P. 2.1(a).

566. *Brownstone, Inc. v. Miami Nat'l Bank*, 165 So.2d 262 (Fla. 3d Dist. 1964). Among the errors assigned on the defendant's appeal from an adverse judgment in proceedings supplementary to execution was the trial court's denial of the defendant's request for a jury trial. The district court based its affirmance of the propriety of the order denying the jury trial on two grounds: (1) the right to institute the proceedings was based upon the enactment of a special statute which did not require a jury trial, and (2) the defendant's request came so late in the proceedings (about six months after the commissioner had finished taking testimony) that its refusal by the trial judge did not constitute an abuse of discretion.

567. FLA. R. CIV. P. 2.1(b), (d); *Wertman v. Tipping*, 166 So.2d 666 (Fla. 1st Dist. 1964); *Brownstone, Inc. v. Miami Nat'l Bank*, *supra* note 566.

568. *Fontainebleau Hotel Corp. v. Goddard*, 177 So.2d 555 (Fla. 3d Dist. 1965); *Wertman v. Tipping*, *supra* note 567.

569. *Wertman v. Tipping*, *supra* note 567.

570. *Id.* at 667-68 (Footnote omitted).

demanded a jury trial. After personal service of the complaint and summons upon the defendant, a default "for failure to answer or otherwise plead" was entered against the defendant. Thereafter, a hearing on the issue of damages was had before the court sitting without a jury and resulted in the judgment appealed. The district court reversed.⁵⁷¹ As this was a case of first impression, the court noted that other states' courts construing rules or statutes analogous to Rule 2.1(d), which provides that "a demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties," have been divided on the question of whether the defendant's default amounts to either a waiver of his right to a jury trial or an implied consent to a non-jury trial. Federal courts interpreting the analogous federal rule⁵⁷² have likewise been split, but the majority of the federal courts have adopted the view that it is the better, if not actually compulsory practice, to submit the issue as to damages following the entry of a default judgment to a jury when a jury trial has previously been demanded by a party. It was therefore concluded that:

Since the right to a trial by jury is constitutionally protected and guaranteed, we think it more reasonable to conclude that if . . . [the defendant] is to be precluded a jury trial on the question of damages, it should be upon an affirmative showing that he has either consented to . . . [the plaintiffs'] withdrawal of their demand for jury trial, or that his conduct in law constitutes a waiver. By this statement, we do not infer that a person who might otherwise be protected in his constitutional rights to a trial by jury cannot effectively waive such rights as he could other constitutional rights which he possesses. We do say, however, that waiver by implication in these circumstances must be more than a mere failure to appear and contest the issues of the case.⁵⁷³

In *Olin's, Inc. v. Rader*,⁵⁷⁴ one of two defendants appealed from an adverse judgment. It appeared that none of the parties had initially requested a jury trial, but that counsel had subsequently orally moved the court for a severance of the cause and for a jury trial. The motion for severance was denied, but the jury trial was granted. However, before the cause was tried, another judge entered an order directing that the cause proceed as a non-jury case.

The district court held that the second judge had abused his discretion in setting aside a prior order by another judge of the same court which had granted a jury trial. The record did not indicate the basis for the later order. Although a successor or interim judge can overrule

571. *Loiselle v. Gladfelter*, 160 So.2d 740 (Fla. 3d Dist. 1964).

572. FED. R. CIV. P. 38(d).

573. *Loiselle v. Gladfelter*, *supra* note 571, at 742.

574. 161 So.2d 711 (Fla. 3d Dist. 1964).

or modify prior orders of another judge of equal jurisdiction, this is permitted only upon the basis that different or special conditions or circumstances exist which warrant a modification or reversal. The record in the case at bar did not indicate such special circumstances and it was, therefore, an abuse of discretion.

The plaintiff filed suit for rescission of a stock purchase agreement with the defendant, or in the alternative, for damages for the defendant's alleged breach of the agreement. The defendant answered and counter-claimed, *inter alia*, for the imposition of an equitable lien in his favor upon the stock. Upon the defendant's appeal from an order denying her alternative motion either to dismiss the complaint, or to transfer the cause from the equity to the law side of the court for failure to state a claim for relief cognizable in equity, the Third District Court of Appeal affirmed⁵⁷⁵ the lower court's action for the nebulous—and, it is submitted, erroneous—reason that

the jurisdiction of equity may not be divested by the party seeking its assistance.

The defendant, in her counterclaim, sought to invoke the equitable jurisdiction of the court. . . . By so doing, she waived her right to object to the jurisdiction of the equity court to assess the plaintiff's damages.⁵⁷⁶

Florida procedure⁵⁷⁷ requires a defendant to assert any claim, legal or equitable, that he may have against the plaintiff arising out of the same transaction or occurrence, or to thereafter forfeit his right to prosecute such claim. It is therefore submitted that a defendant ought not to be found to have waived his right to assert that the plaintiff's only right to relief, if any, is by an action at law, in which the defendant could demand a jury trial merely because his answer contains a compulsory counterclaim that is equitable in nature. To so hold defeats the object of the rules which is to release justice from the chains of form, and leaves the defendant in the untenable position of having to elect between his right to assert a compulsory counterclaim and his constitutionally protected right to a jury trial. Not only is such an illiberal decision inconsistent with the doctrine enunciated by the Florida Supreme Court in *Hightower v. Bigoney*,⁵⁷⁸ but such a construction of Rule 1.13(1) probably renders it an unconstitutional abridgement of a protected right.

2. PEREMPTORY CHALLENGES OF JURORS

On the trial of any civil cause in any court each party [is] entitled to three peremptory challenges of jurors; provided, that

575. *Fink v. Bluestein*, 169 So.2d 335 (Fla. 3d Dist. 1964).

576. *Id.* at 336. (Footnotes omitted.)

577. FLA. R. CIV. P. 1.13(a)

578. 156 So.2d 501 (Fla. 1963). See the discussion in 18 U. MIAMI L. REV. 745, 788-89 (1964).

where the number of parties on opposite sides . . . are unequal, [each side shall have] the same aggregate number of peremptory challenges [to be divided as provided by the statute].⁵⁷⁹

On the defendants' appeal from an adverse judgment in a negligence action arising out of an automobile accident, the district court held⁵⁸⁰ that the trial court had properly ruled that each side was entitled to six peremptory challenges instead of three.

The quantity of peremptory challenges is determined by the number and status of the parties on a side, and on consideration of the issues as to them at the time of trial. . . . Different or additional issues applicable to two or more parties on one side entitle them to the benefit of three challenges each as provided for in the statute. Antagonistic or hostile positions of two or more parties on one side will do likewise, but their right to such challenges does not depend upon the presence of hostility or antagonism. It is sufficient if their positions are different, or depend on different issues. The intent of the clearly worded statute to accord three peremptory challenges to each party on a side should be given effect unless it is made to appear, at the time of trial, that their interests are common and their positions in the cause the same.⁵⁸¹

The trial court's erroneous statement that each of the parties was entitled to three peremptory challenges of prospective jurors, when in fact they were entitled to six, was not preserved for appellate review where no objection was made to the statement.⁵⁸² Rule 2.6(a) provides:

(a) *Adverse Ruling.* For appellate purposes, no exception shall be necessary to any adverse ruling, order, instruction or thing whatsoever said or done at the trial or prior thereto or after verdict, *which thing was said or done after objection made and considered by the trial court, and which affected the substantial rights of the party complaining and which is assigned as error.*⁵⁸³

The purpose of the rule is to give the trial judge a fair opportunity to consider and rule upon the correctness of his statement.

B. *Setting Cases for Trial*

Former Rules 2.2, 2.3 and 3.12 have been repealed,⁵⁸⁴ and replaced by the following rule:

579. FLA. STAT. § 54.11 (1965).

580. Owen v. Bennett, 164 So.2d 544 (Fla. 3d Dist. 1964).

581. *Id.* at 545.

582. Rubin v. Gonzalez, 166 So.2d 167 (Fla. 3d Dist. 1964).

583. FLA. R. CIV. P. 2.6(a). (Emphasis added.)

584. 1965 REVISION, at 17.

Rule 2.2 *Setting Cases for Trial*

(a) *When at Issue.* An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading.

(b) *Notice that Cause is at Issue.* Thereafter any party may file and serve a motion that the action be tried and thereupon the clerk shall notify the court and the action shall be set for trial as provided in subdivision (c) of this rule.

(c) *When Set.* When the motion that the action be tried is filed, the court shall set the action for trial and notify all parties in writing of the trial date; provided no trial date shall be less than thirty days from the service of notice of the trial date unless all parties agree to a shorter time. An action shall not be set for trial if the parties so stipulate, with the approval of the court. By giving the same notice, the court may set a case for trial of its own motion.⁵⁸⁵

The new rule substitutes motion practice for the cumbersome docket sounding procedure. Since it applies to cases both at law and in equity,⁵⁸⁶ it would seem that it might have been more properly included among the 1.- rules. The new rule is designed to permit flexibility. "A judge who wishes a hearing to set the action for trial may hold one, while the judge who prefers to do it *ex parte* may do so. It protects the parties by the 30-day notice and clarifies the time when a case is ready for trial."⁵⁸⁷

C. *Documentary Evidence*

The provisions of Rule 2.5, relating to filing and marking documentary evidence, have logically been transferred⁵⁸⁸ to Rule 1.37(e), the general rule relating to matters of evidence.

D. *Adverse Rulings*

The defendant in a negligence action arising out of an automobile collision appealed from an adverse final judgment and among other things, assigned as error the denial of his motion for a mistrial based upon remarks concerning insurance made by counsel for the plaintiffs during the *voir dire* examination of the jury. The district court held⁵⁸⁹ that objec-

585. *Id.* at 28.

586. Although the Committee Note to Rule 2.2, 39 FLA. B.J. 1132, 1136 (1965), has been deleted (1965 REVISION, *supra* note 584, at 17), it would appear from the language of the rule—as well as from the former FLA. R. CIV. P. 3.12, relating to evidence and trial of suits in equity—that it was intended to apply to the trial of claims generally.

587. Excerpt from the deleted Committee Note to Rule 2.2, 39 FLA. B.J. 1132, 1136 (1965).

588. 1965 REVISION, at 27, 28.

589. *Alvarez v. Mauney*, 175 So.2d 57 (Fla. 2d Dist. 1965).

tions to the questions concerning insurance had been waived either by the defendant's failure to object during the *voir dire* examination,⁵⁹⁰ or by the failure to move for a mistrial until after the jury was accepted.

E. Jury Instructions

On appeal from an adverse judgment in the second trial of a negligence action the plaintiff challenged the propriety of certain instructions to the jury relating to a certain Florida traffic law. The plaintiff contended that the statute was inapplicable, and the defendants argued that the questions sought to be raised in the instant appeal had been decided adversely to the plaintiff on a prior appeal⁵⁹¹ from the decision in the first trial of the same cause, and that the prior decision became the "law of the case," which thereby precluded the plaintiff from relitigating the same issues.⁵⁹²

In sustaining the plaintiff's contention that an insufficient evidentiary basis was established at the trial to warrant the objected-to instruction, the district court rejected⁵⁹³ the defendants' argument as to the binding effect of the law of the case. Although reversal of the lower court's judgment was grounded on the fact that the circumstances presented on the second appeal were materially different from those which had been presented on the first appeal, the court concluded that "Even if we now should find that we were in error on that point of the case, we have power to correct it,"⁵⁹⁴ and that they were not foreclosed from such reconsideration by the supreme court's decision⁵⁹⁵ since the questions presented in the instant appeal were not then presented or determined.⁵⁹⁶

The defendants sought certiorari⁵⁹⁷ to review the district court decision on the basis of apparent conflicting supreme court decisions which

590. As previously noted, note 583 *supra* and accompanying text, FLA. R. CIV. P. 2.6(a), dispenses with the necessity of excepting to an alleged erroneous statement or procedure in the trial court only where the "thing was said or done after objection made and considered by the trial court. . . ." In *Miami Athletic Club v. Morency*, 158 So.2d 146 (Fla. 3d Dist. 1963), the defendant was precluded from obtaining appellate review of an alleged erroneous interruption of the jury's deliberations by the trial court to admonish the jury that they must shortly return a verdict or be discharged. The defendant had failed either to enter an objection at the time of the occurrence or to move for a new trial pursuant to FLA. R. CIV. P. 2.8.

591. *Hendrick v. Strazzula*, 125 So.2d 589 (Fla. 2d Dist. 1960), *quashed on cert.* to the Florida Supreme Court, 135 So.2d 1 (Fla. 1961).

592. The giving of the antipass instructions under the statute had been assigned as error on the first appeal. However, on that appeal the appellate court without discussion declined to sustain the assignment, stating merely that "The remaining assignment has been examined and we find no error."

Hendrick v. Strazzula, *supra* 125 So.2d, at 591. *Strazzula v. Hendrick*, 177 So.2d 1, 2 (Fla. 1965).

593. *Hendrick v. Strazzula*, 168 So.2d 156 (Fla. 2d Dist. 1964).

594. *Id.* at 161.

595. *Supra* note 593.

596. The giving of the anti-pass instructions was not reviewed in the certiorari proceedings following the decision of the district court in the first appeal.

597. *Strazzula v. Hendrick*, 177 So.2d 1 (Fla. 1965).

generated confusion and uncertainty. Although the supreme court concluded that there were two distinct lines of cases relating to the doctrine of the law of the case which conflicted sufficiently to invoke its direct conflict jurisdiction, it discharged the defendants' petition for certiorari since it reaffirmed, as the better view, its prior decision in *Beverly Beach Properties v. Nelson*,⁵⁹⁸ relied on by the second district in the instant case, and receded from its view in *Family Loan Co. v. Smetal*⁵⁹⁹ and the line of cases following it insofar as they might be construed as holding that an appellate court is wholly *without authority* to reconsider and reverse a previous ruling that was "the law of the case." As the court had put it in the *Beverly Beach Properties* case,

We may change "the law of the case" at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude.⁶⁰⁰

In espousing the doctrine of the *Beverly Beach Properties* case, the Florida Supreme Court noted that it followed what appeared to be the trend in other jurisdictions by recognizing that administration of justice requires some flexibility in the rules, but emphasized that

an appellate court should reconsider a point of law previously decided on a former appeal only as a matter of grace, and not as a matter of right; and an exception to the general rule binding the parties to "the law of the case" at retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons—and always, of course, only where "manifest injustice" will result from a strict and rigid adherence to the rule. . . .

But the exception to the rule should never be allowed when it would amount to nothing more than a second appeal on the question determined on the first appeal.⁶⁰¹

In the instant case the only question sought to be reviewed by certiorari was the district court's *power* to reconsider the propriety of a challenged

598. 68 So.2d 604 (Fla. 1953).

599. 123 Fla. 900, 169 So. 48 (1936).

600. 68 So.2d 604 (Fla. 1953).

601. *Strazzula v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965). Given as examples of "unusual circumstances" justifying such reconsideration are: (a) Considerations of public policy, in order to give effect to the law of a sister state as required under the full faith and credit clause of the federal Constitution; (b) An intervening decision by a higher court contrary to the decision reached on the former appeal, the correction of the error making unnecessary an appeal to the higher court; and (c) A clear conviction of error (as opposed to mere doubt) on a point of law that is certain to recur.

jury instruction. The question of whether that power, if it existed, was properly exercised under the facts of the case was not raised, so the supreme court discharged the petition for the writ.

In spite of the unequivocal mandate of Rule 2.6(b)⁶⁰² that

. . . No party may assign as error the giving of any charge unless he objects thereto at [the conference to settle the charges to be given]. . . .

counsel for the litigants continue to waive their clients' right to challenge on appeal the propriety of charges given to the jury by their failure to make timely objections to the allegedly offensive charges.⁶⁰³

The failure of the trial court to properly instruct the jury may not be initially raised in a motion for a new trial. Nor will a general objection to the charges as given suffice to preserve for review, either on motion for a new trial or for appeal, instructions which are alleged to be erroneous for particular reasons.⁶⁰⁴ Similarly, if a party objects to an alleged erroneous instruction on one specific ground, he may not in his appeal assert that the challenged instruction was incorrect for a reason other than that previously asserted. In *Henningsen v. Smith*,⁶⁰⁵ the defendant objected to certain jury instructions on the ground that insufficient evidence had been adduced at the trial to support the charge. On appeal from an adverse judgment entered on a jury verdict for the plaintiff, the defendant alleged that the same instructions incorrectly stated the law. The district court found that the evidence at the trial raised issues justifying the charges given, and also held that the defendant was precluded from challenging the instructions for reasons not previously asserted in the trial court.

Rule 2.6(b) F.R.C.P., 31 F.S.A., requires proper objection to a charge given by the court where opportunity for such objection is afforded as a prerequisite to assigning the giving of such charge as error on appeal. *An objection which fails to state distinctly the portion or omission or failure to instruct to which objection is made and the specific ground of such objection is not sufficient compliance with the rule.*⁶⁰⁶

Where sufficient objections to particular instructions to the jury have not been made during the trial, "the findings of the jury which have

602. FLA. R. CIV. P. 2.6(b).

603. See, e.g., *City of Miami Beach v. Belle Isle Apartment Corp.*, 177 So.2d 884 (Fla. 3d Dist. 1965); *Henningsen v. Smith*, 174 So.2d 85 (Fla. 2d Dist. 1965); *Eicholz v. Frey*, 173 So.2d 771 (Fla. 1965); *Wofford Beach Hotel v. Glass*, 170 So.2d 62 (Fla. 3d Dist. 1964); *Park v. Belford Trucking Co.*, 165 So.2d 819 (Fla. 3d Dist. 1964).

604. *Park v. Belford Trucking Co.*, 165 So.2d 819 (Fla. 3d Dist. 1964).

605. 174 So.2d 85 (Fla. 2d Dist. 1965).

606. *Id.* at 86.

been reviewed by the trial judge on motion for a new trial will not be disturbed on appeal when there is substantial evidence to support the verdict unless error of the trial judge in the instructions to the jury appears to have resulted in a miscarriage of justice."⁶⁰⁷

A limited exception to the necessity of objecting to an alleged erroneous jury instruction as a prerequisite to appellate review has developed where the challenged instruction is one given independently or inadvertently by the court to the jury without prior notice to the objection of party. In *Wofford Beach Hotel, Inc. v. Glass*,⁶⁰⁸ the court mistakenly admitted into evidence an ordinance which, on its face, was inapplicable to the facts of the case. It then inadvertently charged the jury—after indicating that the instruction would not be granted—that violation of the ordinance would be evidence of negligence. Objection to this instruction was not preserved in the record. On appeal from an adverse judgment entered on a jury verdict for the defendant, the district court nevertheless held: “. . . that an erroneously given instruction based upon the introduction of an inapplicable ordinance was such fundamental error that a fair trial could not have resulted and a new trial must be granted.”⁶⁰⁹

The rules require that before the failure to give a particular instruction can be assigned as error on appeal, the objecting party must have filed a written request therefor in the trial court.⁶¹⁰ However, even where there may have been a request for an alleged erroneously omitted charge, appellate review will still normally be precluded if the objecting party fails to include in the record on appeal the requested charges that were tendered to the trial judge.⁶¹¹

F. *Exceptions Unnecessary to Orders on New Trial, Directed Verdict, etc.*

Rule 2.6(c) has been amended to omit the reference to nonsuits because of the change in Rule 1.35 and now reads:

2.6(c) *Orders on New Trial, Directed Verdicts, etc.* It shall not be necessary to object or except to any order granting or denying motions for new trials, directed verdicts or judgments non obstante verdicto, or in arrest of judgment to entitle the party against whom such ruling is made to have the same reviewed by an appellate court.

607. *Rivers Body Orlando, Inc. v. Hartford Acc. & Indem. Co.*, 167 So.2d 760 (Fla. 2d Dist. 1964).

608. 170 So.2d 62 (Fla. 3d Dist. 1964).

609. *Id.* at 64.

610. FLA. R. CIV. P. 2.6(b); *Rodriguez v. Haller*, 177 So.2d 519 (Fla. 3d Dist. 1965); *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So.2d 543 (Fla. 2d Dist. 1963).

611. *Harper v. Adams*, 166 So.2d 824 (Fla. 3d Dist. 1964).

G. Directed Verdict

1. AMENDMENTS

The last sentence has been added to Rule 2.7(a) “. . . to permit the judge to direct a verdict without the useless formality of submitting it to the jury.”⁶¹² That section now reads:

2.7(a) *Effect.* A party who moves for a directed verdict at the close of the evidence offered by the adverse party may offer evidence in the event the motion is denied without having reserved the right to do so and to the same extent as if the motion had not been made. The denial of a motion for a directed verdict shall not operate to discharge the jury. A motion for a directed verdict shall state the specific grounds therefor. The order directing a verdict is effective without any assent of the jury.

2. IN GENERAL

A verdict should be directed only where all the facts are undisputed and only one reasonable deduction may be made, or where the evidence is legally insufficient to support the movant's case. Where there is a conflict in the evidence as to the facts, or when the undisputed facts are of such a nature that reasonable men might draw different conclusions then a jury question is presented.⁶¹³ “A case should not be withdrawn from the jury's consideration unless as a matter of law no proper view of the evidence could possibly sustain the position of the party against whom the verdict is directed.”⁶¹⁴ In determining a motion for a directed verdict, all inferences are resolved in favor of the party moved against.⁶¹⁵ “The party moving for a directed verdict admits not only the facts established by the evidence, but also every conclusion favorable to the adverse party that a jury might reasonably infer from the evidence . . .”⁶¹⁶

A verdict may properly be directed for a plaintiff where the proof fully establishes his claim and where there is no evidence on which a verdict for the defendant may lawfully be found.⁶¹⁷ In order to support

612. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1136 (1965).

613. *Isenberg v. Ortona Park Recreational Center, Inc.*, 160 So.2d 132 (Fla. 1st Dist. 1964).

614. *E.M.G. Leather Arts, Inc. v. Central Truck Lines, Inc.*, 165 So.2d 203, 204 (Fla. 3d Dist. 1964). *Accord*, *Stanek v. Houston*, 165 So.2d 825 (Fla. 2d Dist. 1964); *Graham v. Camp*, 162 So.2d 672 (Fla. 1st Dist. 1964).

615. See, e.g., *Alterman Transp. Lines, Inc. v. McCahon*, 168 So.2d 707 (Fla. 3 Dist. 1964); *Hott v. Funk*, 165 So.2d 792 (Fla. 2d Dist. 1964).

Houston, *supra* note 62. This is the same test applied by an appellate court where the granting or denial of a motion for a directed verdict has been assigned as error on appeal. *Security Underwriting Consultants, Inc. v. Collins, Tuttle Inv. Corp.*, 173 So.2d 752 (Fla. 3d Dist. 1965); *Purdue v. Vogelsang*, 166 So.2d 902 (Fla. 2d Dist. 1964).

616. *Pahucki v. Armster*, 161 So.2d 719 (Fla. 2d Dist. 1964) quoting *Cash v. Gates*, 151 So.2d 838, at 840 (Fla. 2d Dist. 1963). *Cf.* *Black v. Heininger*, 163 So.2d 3 (Fla. 2d Dist. 1964); *Hott v. Funk*, 165 So.2d 792 (Fla. 2d Dist. 1964).

617. *Dade County Dairies, Inc. v. Projected Planning Co.*, 158 So.2d 565 (Fla. 3d Dist. 1963).

a directed verdict for the defendant, entered at the close of the plaintiff's evidence, it should be clear that there is no evidence whatsoever that could in law support a verdict for the plaintiff.⁶¹⁸ Even if the facts as outlined by the defendant are capable of belief, they are the defendant's version and the plaintiff's version is the one that must be considered as true for the purpose of deciding a defendant's motion for a directed verdict.⁶¹⁹

3. PRESUMPTIONS, INFERENCES AND EXPLANATIONS

The defendants sought certiorari⁶²⁰ to review a decision of the Third District Court of Appeal, which had reversed⁶²¹ the trial judge for submitting to the jury, for its determination as a matter of fact, the question of whether the defendant's explanation as to how a rear-end collision occurred was sufficient to rebut the statutory presumption of negligence. The defendant had testified that she had decelerated her car, that when she was about two car lengths away from the car in front she jammed on her brakes but that there must have been something in the road, or else the brakes locked, so that she was unable to stop the car in time. The defendant had also testified that she was prevented from turning her car either into the left or right lanes by oncoming traffic on the one side, and by a sidewalk on the other. The district court held that the defendant's explanation of the accident was legally insufficient to overcome the statutory presumption of negligence. In *Pensacola Transit Co. v. Denton*,⁶²² the first district had reversed the trial judge because he directed a verdict and refused to submit the same question to the jury for its determination. In granting certiorari and adopting the position of the first district, the supreme court said:

It is not for appellate court judges—who are furnished only with a cold typewritten or printed transcript of the testimony and who are not privileged as is the trial judge and as are the jurors to sit in the milieu of the nisi prius court—to determine as a matter of law whether the explanation as to how an accident occurred is sufficient to rebut the presumption of negligence when, as here, the defendant testifies positively that, in “taking precaution” to avoid the collision, she decelerated and, in due time, . . .⁶²³

The court further quoted from Judge D. Carroll's opinion in the *Pensacola Transit Co.* case:

618. *Security Underwriting Consultants, Inc. v. Collins, Tuttle Inv. Corp.*, 173 So.2d 752 (Fla. 3d Dist. 1965).

619. *Theriault v. Rogers*, 166 So.2d 820 (Fla. 3d Dist. 1964).

620. *Stark v. Vasquez*, 168 So.2d 140 (Fla. 1964).

621. *Vasquez v. Stark*, 155 So.2d 905 (Fla. 3d Dist. 1963).

622. 119 So.2d 296 (Fla. 1st Dist. 1960).

623. *Supra* note 620, at 142.

We do not think a judge, with his limited powers in the field of the determination of facts, can determine this question without 'climbing into the jury box,' so to speak, and encroaching upon the exclusive domain of the jury.⁶²⁴

In this connection one should note the effect of an explanation of the accident by a defendant upon the presumption of negligence created⁶²⁵ in a rear-end collision case.

Once the defendant explains what transpired or produces evidence which "fairly and reasonably tends to show that the real fact is not as presumed," the presumption dissipates and the "jury must decide the case on the conflicting theories or facts," . . . unless, of course, the evidence is such that the jury could not lawfully find for the defendant. If the defendant's explanation is insufficient to rebut the presumption of negligence, *as a matter of law*, the case should not be presented to the jury and upon the plaintiff's motion a verdict should be directed for the plaintiff. If, however, the evidence is such that reasonable men could arrive at different conclusions the question of negligence and contributory negligence should be submitted to the jury. . . . "When the matter goes to the jury in this posture it must be *without the aid of the presumption.*" *Gulle v. Boggs*, Fla. 1965, 174 So.2d 26.⁶²⁶

Since the presumption is dissipated by the explanation, and the case is submitted to the jury upon conflicting theories or facts, it is improper to instruct the jury on the presumption of negligence.⁶²⁷

It is also interesting to compare presumptions with inferences. Take for example the doctrine of *res ipsa loquitur*.

Essentially, that doctrine is a rule of evidence. . . . *Res ipsa* is sometimes said to raise a refutable presumption of negligence, but under the law of this state and of some other jurisdictions, it merely establishes a permissible inference which may be rejected by the jury. Mr. Justice Thornal in *Thomason v. Miami Transit Company*, Fla., 100 So.2d 620 said: "The creation of a presumption would have the effect of making a *prima facie* case without more. The creation of an inference merely enables the jury to draw the inference and weigh it in the balance with all of the other evidence." An inference is a deduction from facts which reason dictates, but a presumption is an arbitrary conclusion which the law directs to be made from certain facts. . . . The application of the *res ipsa* doc-

624. *Id.* at 143 quoting *Pensacola Transit Co. v. Denton*, *supra* note 623, at 297. *Accord*, *Gulle v. Boggs*, 174 So.2d 26 (Fla. 1965), *reversing Boggs v. Gulle*, 162 So.2d 286 (Fla. 3d Dist. 1964).

625. *McNulty v. Cusack*, 104 So.2d 785 (Fla. 2d Dist. 1958).

626. *Baker v. Deeks*, 176 So.2d 108, 110 (Fla. 2d Dist. 1965).

627. *Ibid.*

trine is not necessarily removed where an explanation is obtained by calling defendants as adverse parties under the rule.⁶²⁸

4. APPELLATE REVIEW

A party may not challenge the sufficiency of the evidence to support the verdict on appeal unless he has first moved for a directed verdict in the trial court.⁶²⁹ As a general rule, a party who has moved for a directed verdict at the conclusion of the plaintiff's case will be precluded from assigning the denial of the motion as error unless the motion has been renewed at the conclusion of all of the evidence. There exists, however, a recognized limitation to the general rule. Where the insufficiency of the evidence constitutes plain error apparent on the face of the record which if not noticed would result in a manifest miscarriage of justice, an appellate court may reverse a judgment entered on a jury verdict notwithstanding the fact that no motion for a directed verdict was made at the conclusion of all of the evidence.⁶³⁰

A defendant may not assign as error on appeal a verdict directed for a co-defendant. Although the principle may first have been recognized in regard to joint tortfeasors, it is not now limited to such situations.⁶³¹

5. ALTERNATIVE MOTIONS FOR A RESERVED DIRECTED VERDICT (JUDGMENT N.O.V.) AND FOR A NEW TRIAL

Where a motion for a directed verdict made at the close of all of the evidence is denied, the court is deemed to have submitted the action to the jury subject to a later determination of the legal question raised by the motion. Within ten days after the verdict has been received, or within ten days after the jury has been discharged if no verdict was returned, a party who has so moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with his motion for a directed verdict.⁶³² Such a motion may be joined with a motion for a new trial, or a new trial may be prayed for in the alternative.⁶³³

Motions for judgment n.o.v., like motions for directed verdict,

628. *Stark v. Houston*, 165 So.2d 825, 827 (Fla. 2d Dist. 1964).

629. *FLA. R. Civ. P. 2.7(a), (b)*; *Winn-Dixie Stores, Inc. v. Sellers*, 161 So.2d 251 (Fla. 3d Dist. 1964).

630. *Pickard v. Maritime Holdings Corp.*, 161 So.2d 239 (Fla. 3d Dist. 1964). See 2 *BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE* 1081 (1961).

631. *Durbin Paper Stock Co. v. Watson-David Ins. Co.*, 167 So.2d 34 (Fla. 3d Dist. 1964); *Nutt v. James City, Inc.*, 162 So.2d 700 (Fla. 3d Dist. 1964); *Milks v. Wright*, 161 So.2d 890 (Fla. 3d Dist. 1964).

632. *FLA. R. Civ. P. 2.7(b)*; *City of Miami Beach v. O'Hara*, 166 So.2d 598 (Fla. 3d Dist. 1964).

633. *FLA. R. Civ. P. 2.7(c)*; *Flex v. Blair*, 173 So.2d 518 (Fla. 2d Dist. 1965); *Gelfo v. General Acc. Fire & Life Assur. Co.*, 167 So.2d 31 (Fla. 3d Dist. 1964).

should be resolved with extreme caution, since the granting thereof holds that one side of the case is essentially devoid of probative evidence. . . . [Citations omitted.] The movant admits all material facts as attested by his adversary and also admits all inferences of fact favorable to the adversary that reasonably might be drawn from the evidence as a whole. If there is room for difference among reasonable men as to the existence of a material fact sought to be established, or as to a material inference which might reasonably be drawn from established facts, the case should be submitted to the jury. . . .⁶³⁴

“Unless the evidence as a whole points to only one possible conclusion, the trial judge is not warranted in setting aside a jury determination based on conflicting evidence.”⁶³⁵ However, “[i]t is a well established rule that the trial court may direct a verdict upon a mixed question of law and fact whenever the facts, as presented to the jury, upon their most favorable interpretation to the party moved against are susceptible to only one reasonable conclusion.”⁶³⁶

H. *New Trial*

1. AMENDMENTS

There have been no substantive changes in the rules relating to new trials. However, subsections (a), (b), and (f) have been more succinctly and accurately restated. In subsections (a) and (b) the express reference to summary judgments has been omitted and, presumably, these are now included in the comprehensive phrase “matters heard without a jury.” The last sentence has been added to permit timely amendment of a motion for a new trial. Subsection (f), relating to orders granting new trials, now omits the reference to “actions tried by a jury” since new trials are properly granted only in jury cases. In non-jury cases the equivalent procedure is a rehearing. The reworded subsections read as follows:

(a) *Jury and Non-Jury Cases.* A new trial may be granted to all or any of the parties and on all or a part of the issues. On a motion for a rehearing of matters heard without a jury, the court may open the judgment if one has been entered, take additional testimony and enter a new judgment.

(b) *Time for Motion.* A motion for a new trial, or a motion for rehearing in matters heard without a jury or rehearing of any motion for judgment provided for by these rules, shall be

634. *Deese v. White Belt Dairy Farms, Inc.*, 160 So.2d 543, 545 (Fla. 2d Dist. 1964).

635. *Beason v. Evans*, 173 So.2d 516, 517 (Fla. 3d Dist. 1965). See also *Gelfo v. General Acc. Fire & Life Assur. Co.*, *supra* note 633.

636. *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 173 So.2d 492, 495 (Fla. 3d Dist. 1965).

served not later than 10 days after the rendition of verdict or the entry of such judgment. A timely motion may at the discretion of the court be amended to state new grounds at any time before it is disposed of.

(f) *Order Granting to Specify Grounds.* All orders granting a new trial shall specify the particular and specific grounds therefor.

2. IN GENERAL

New trials should be cautiously granted. A "lower court should generally grant a new trial only when the verdict was against the manifest weight of the evidence and when ' . . . the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record. . . .'"⁶³⁷ A verdict should not be set aside, thereby necessitating the retrial of a case, unless error sufficiently grave as to appear prejudicial is disclosed.⁶³⁸ However, as has frequently been recognized by Florida cases,⁶³⁹ trial courts are allowed a broad and liberal discretion in granting a new trial, and an order granting one reaches the appellate courts with a presumption of its correctness. Although an appealing party must demonstrate an abuse of judicial discretion to reverse an order either granting or denying⁶⁴⁰ a motion for a new trial, a stronger showing is required to demonstrate an abuse of judicial discretion sufficient to justify overturning an order granting a new trial than is required to upset an order denying a motion.⁶⁴¹ Nevertheless, it is well established⁶⁴² that a trial court's judicial discretion is subject to appellate review, and that an order entered in the exercise of such discretion will be subject to reversal if an abuse thereof is shown. In *Bell v. Tarwin*,⁶⁴³ it was held that the trial court had abused its discretion in granting a new trial in a negligence action that arose out of an automobile collision where the verdict found ample support in the record, no illegal evidence was shown to have gone to the jury, and all that could be accomplished was to have another jury try the case.

Since, however, an order granting a new trial reaches the appellate

637. *Love Realty Corp. v. O'Brien*, 162 So.2d 532, 533, (Fla. 2d Dist. 1964) *quoting in part*, from the leading Florida case, relating to new trial motions, of *Cloud v. Fallis*, 110 So.2d 669, 673 (Fla. 1959). See also *Beason v. Evans*, 173 So.2d 516 (Fla. 1st Dist. 1965).

638. FLA. STAT. § 54.23 (1965); *Seaboard Airlines R.R. Co. v. McCutcheon*, 158 So.2d 577 (Fla. 3d Dist. 1963).

639. See, e.g., *Ford v. Nathan*, 166 So.2d 185 (Fla. 1st Dist. 1964); *Olsen v. Allied Fla. Corp.*, 163 So.2d 316 (Fla. 2d Dist. 1964); *Dupree v. Pitts*, 159 So.2d 904 (Fla. 3d Dist. 1964).

640. *Red Top Cab & Baggage Co. v. MacLaughlin*, 171 So.2d 22 (Fla. 3d Dist. 1965).

641. *Billo v. Augella*, 171 So.2d 547 (Fla. 3d Dist. 1965); *Bell v. Tarwin*, 163 So.2d 300 (Fla. 1st Dist. 1964); *City of Clearwater v. McClury*, 157 So.2d 545 (Fla. 2d Dist. 1963).

642. See, e.g., *Bell v. Tarwin*, 163 So.2d 300 (Fla. 1st Dist. 1964); *Olsen v. Allied Fla. Corp.*, *supra* note 3; *Gager v. General Hosp. of Greater Miami, Inc.*, 160 So.2d 749 (Fla. 3d Dist. 1964); *State Road Dept. v. Falcon, Inc.*, 157 So.2d 563 (Fla. 2d Dist. 1963).

643. *Supra* note 642.

court with a presumption of correctness, and represents an exercise of judicial discretion, the burden is upon the appealing party to make the reversible error clearly appear.⁶⁴⁴ Where the trial court bases its order on only one of several grounds presented by the movant as a basis for a new trial, the court's ruling does not inferentially overrule the others. Rather, the court's action merely indicates that they are not considered as controlling.⁶⁴⁵ By express statutory provision,⁶⁴⁶ however, an appellate court in considering the propriety of an order granting a new trial may consider only those reasons stated by the trial court as a basis for its order granting the new trial. If the trial court's ruling is sustainable on any of the grounds so stated, it will not be overturned on appeal.

Ford v. Nathan,⁶⁴⁷ is an interesting case in which the plaintiff in an automobile negligence action appealed from an order vacating a jury verdict in his favor and granting the defendant's motion for a new trial. Among the six grounds stated for the order was one to the effect that the trial court had erred by failing to further instruct the jury, as requested by the jury foreman, as to the verdict it should return in the event that it found that the plaintiff had been guilty of contributory negligence. It appeared that the jury had returned from its deliberations to ask for additional information. At this time the jury foreman commented that they had found both parties to blame, but they did not want to see the plaintiff go without any compensation, and he therefore wanted to know what form they should fill out. The court concluded that its prior instructions had been adequate and refused to further advise the jury. In affirming the order appealed, the district court found that the jury foreman's extraordinary statement had afforded the trial court an almost unique opportunity

to determine positively upon the trial record itself that a jury, whose deliberations have traditionally been veiled in utmost secrecy, is laboring under such a misunderstanding of the law given it by the trial court, that one of the parties will likely be deprived of their right to justice under the law.⁶⁴⁸

644. *Erwin v. Chaney*, 160 So.2d 139 (Fla. 1st Dist. 1964); *City of Clearwater v. McClury*, *supra* note 641.

645. *Ibid.*

646. FLA. STAT. § 59.07(4) (1965), provides in part:

[U]pon appeal from any such order [granting a new trial] if taken under the statutes providing for appeal from orders granting new trials, no other grounds than those specified by the trial judge, as a basis for the order granting the new trial, shall be considered as arguable upon said appeal.

See also, *Miami Int'l Hatcheries, Inc. v. General Mills, Inc.*, 168 So.2d 83 (Fla. 3d Dist. 1964); *Gelfo v. General Acc. Fire & Life Assur. Corp.*, 167 So.2d 31 (Fla. 3d Dist. 1964).

647. 166 So.2d 185 (Fla. 1st Dist. 1964).

648. *Id.* at 189. For a case dealing with timely objections to hearsay evidence see *Miami Int'l Hatcheries, Inc. v. General Mills, Inc.*, *supra* note 646. See also *Dean v. State Road Dept.*, 165 So.2d 257 (Fla. 3d Dist. 1964) in which the district court reversed a lower court order granting the plaintiff a new trial. The plaintiff-road department had failed to object to the evidence proffered by the defendant in an eminent domain proceeding as to the amount

In innumerable cases a trial court's granting of a new trial has been upheld on appeal upon the basis of the said court's inference from the proceedings at the trial that the jury had been subjected to and affected by some prejudicial influence.

A new trial may be granted to all or any of the parties, and on all or a part of the issues.⁶⁴⁹ In *Deese v. White Belt Dairy Farms, Inc.*,⁶⁵⁰ it was held that although erroneously admitted testimony concerning the plaintiff's earnings related directly only to the issue of damages, nevertheless the trial court had properly granted a complete new trial on the issue of liability as well as on the issue of damages since the inadmissible testimony had broadly tended to prejudice the defendants.

Where the alleged fundamental and prejudicial error relates only to the issue of liability, a new trial may be granted on the question of liability alone if the issue of liability is distinct and separable from the issue of damages. Rule 2.8(a)

makes no distinction between the re-submission of the damage question to a new jury following the granting of a new trial and resubmission of the liability question. Indeed, even in the absence of such authorizing rule or statute, the majority rule is that a new trial may be limited to the question of liability when it is clear that the course can be pursued without confusion inconvenience or prejudice to the rights of any party. . . .⁶⁵¹

The Florida Supreme Court followed the rule of the *Larrabee* case in *Purvis v. Inter-County Tel. & Tel. Co.*⁶⁵² The district court reversed a judgment for the plaintiff on the ground that the trial court had improperly granted the plaintiff a partial summary judgment on the issue of liability and remanded the case for a new trial upon the issues of liability and damages.⁶⁵³ On plaintiff's petition for certiorari, the Florida Supreme Court quashed the district court decision insofar as the new trial order included the damage issue. It concluded that on the re-trial the judge could protect the defendant from being prejudiced by the separation of the liability and damage issues by proper instructions to the jury, supervision of the trial process, and for that matter, by precluding any reference to the award of damages in the new trial.⁶⁵⁴

of severance damages or to the court's instruction to the jury that such damages were allowable, and the amount ultimately awarded by the jury was within the range and limits of the testimony adduced.

649. FLA. R. CIV. P. 2.8(a). See *Tolin Mfg. Corp. v. Roy Feiner Handbags, Inc.*, 173 So.2d 714 (Fla. 3d Dist. 1965).

650. 160 So.2d 543 (Fla. 2d Dist. 1964).

651. *Larrabee v. Capeletti Bros.*, 158 So.2d 540 (Fla. 3d Dist. 1963).

652. 173 So.2d 679 (Fla. 1965).

653. *Inter-County Tel. & Tel. Co. v. Purvis*, 163 So.2d 38 (Fla. 2d Dist. 1964).

654. There was also an opinion concurring in the result for the reason that the question

3. NEW TRIAL ORDER MUST STATE GROUNDS

By the express provisions of section 59.07(4) of the Florida Statutes and Rule 2.8(f), an order granting a new trial "*shall* specify the particular and specific grounds therefor." The language both of the rule and of the statute is mandatory, and Florida cases construing it so hold.⁶⁵⁵ Failure to state the grounds in an order granting a new trial constitutes reversible error on an appeal from such an order.

In an action to recover compensatory and punitive damages for the plaintiff's alleged wrongful eviction from his place of business and for alleged conversion of his merchandise, the district court held⁶⁵⁶ that the trial court had properly entered an amended order pursuant to Rule 1.38(a), stating the grounds on which it had granted the new trial eleven days after the original order granting the defendants' motion for a new trial. The original order was defective because it failed to specify the ground or grounds upon which the order was based. The district court found that Rule 1.38(a) provided for the correction of "clerical mistakes in judgments, decrees or other parts of the record, and [that] *errors therein arising from oversight or omission* may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."⁶⁵⁷ The supreme court disagreed as to the applicability of Rule 1.38(a). It held⁶⁵⁸ that the omission of the ground for new trial was a judicial error—not a mere clerical expression—which could not be supplied after expiration of the time for the trial court to act. Therefore the court felt such an omission could only be corrected by one of the methods authorized under Rule 2.8.

4. THE NEED FOR SPECIAL VERDICTS

The Florida Supreme Court in *Lehman v. Spencer Ladd's, Inc.*,⁶⁵⁹ declared

that in all cases tried after the effective date of this opinion, and in which the element of punitive damages against joint tortfeasors is an issue for determination, a special or separate verdict shall be used for the assessment of punitive damages against each tortfeasor. Verdicts for compensatory damages shall continue as at present to be joint and several . . .⁶⁶⁰

of damages had not properly been introduced by assignment of error or argued in the briefs, but the concurring judge thought that ordinarily the ends of justice would be best served by having the same jury determine both liability and damages.

655. See, e.g., *Annis v. Gang*, 160 So.2d 171 (Fla. 3d Dist. 1964).

656. *Spencer Ladd's, Inc. v. Lehman*, 167 So.2d 731 (Fla. 1st Dist. 1964).

657. *Id.* at 734.

658. *Lehman v. Spencer Ladd's, Inc.*, 182 So.2d 402 (Fla. 1965).

659. 182 So.2d 402 (Fla. 1965).

660. *Id.* at 403-404.

5. INABILITY TO PERFECT RECORD FOR APPEAL AS GROUND FOR NEW TRIAL

The plaintiffs appealed from a favorable judgment assigning numerous errors relating to the inadequacy of the damages. However, they were unable to complete their record on appeal because the deputy official court reporter who attended the trial certified that he had inadvertently destroyed a substantial portion of his notes which were material to the errors assigned by the plaintiffs on their appeal. At the hearing on the plaintiffs' motion for an order by the trial court it was established that the loss of the reporter's notes was not caused by any lack of due diligence on the part of any of the parties, and it further appeared that the parties were unable to agree on a stipulated statement.⁶⁶¹ The plaintiff's attorneys submitted a summarized statement representing the plaintiffs' recollection of the trial proceedings.⁶⁶² However, certain complex technical testimony could not be reconstructed nor summarized in a narrative statement to complete the record on appeal. The plaintiffs then moved for an order either remanding the cause to the trial court with directions to enter an order granting a new trial, or relinquishing jurisdiction to the trial court to permit that court to hear the plaintiffs' extraordinary motion for a new trial because of the court's inability to perfect the record-on-appeal.

Since the particular problem presented appeared to be one of first impression in Florida, the district court reviewed the decisions of other jurisdictions, but concluded that the cases were irreconcilable. It held⁶⁶³ that since it had acquired jurisdiction of the action on appeal it had inherent authority to award a new trial as an incident to its power to require that it be furnished a complete and accurate record on appeal, where essential records had been destroyed by an official of the lower court through no fault of the appellant. The court further held that such power should be exercised where the loss was not discovered until after appellate jurisdiction had attached and the record unequivocally established the appellant's right to relief. Under the particular facts of the case, it was therefore unnecessary to decide whether there might also exist alternative procedures for obtaining relief in the same or similar circumstances.

6. QUOTIENT VERDICTS

Florida does not recognize quotient verdicts. Technically, a quotient verdict is a binding agreement among the jurors to be subsequently bound

661. FLA. APP. R. 3.6(h) (1962 Revision).

662. This was the procedure prescribed by the Second District Court of Appeal in *Thomas v. State*, 160 So.2d 119 (Fla. 2d Dist. 1964), where the notes of the deputy court reporter assigned to the trial were illegible and the deputy reporter was no longer available. The appellant in that case moved to remand the cause to the trial court with instructions to grant a new trial.

663. *Van Scoyoc v. York*, 173 So.2d 483 (Fla. 2d Dist. 1965).

by the sum of the damages suggested by each juror divided by the number of jurors. The prohibition in Florida appears to be broader. In *Malone v. Marks Bros. Paving Co.*,⁶⁶⁴ it was held that the trial court had properly found that the verdict had been arrived at in an illegal manner and had properly granted the defendant's motion for a new trial. Attached to the defendant's motion for a new trial were the affidavits of two jurors and an insurance adjuster which stated that the jurors had agreed to be bound *before* an average was reached. Upon subsequent polling, however, the jurors stated that there was no such agreement before the figures were submitted, but they all agreed that the verdict was the result of all of the figures divided by the number six.

In sustaining the lower court's order, the district court held that any such irregular method of arriving at a verdict as aggregating or averaging was improper "for the reason that such verdicts do not represent the independent opinion of each juror and this undermines and circumvents the deliberative process underlying the jury system."⁶⁶⁵

7. EXCESSIVE OR INADEQUATE DAMAGES AS A GROUND FOR A NEW TRIAL

One of the most frequently enunciated grounds in support of a motion for a new trial is that the damages awarded by the verdict are either excessive or inadequate—depending of course upon who is the appellant.

Under the old common law, a motion for a new trial for inadequacy of damages should not be granted,

. . . but the general rule now seems to be that a verdict for grossly inadequate damages stands on the same ground as a verdict for excessive or extravagant damages and that a new trial may as readily be granted in the one case as in the other. Such verdicts will not be set aside for the mere reason that they are less than the Court thinks they should be. It must be shown that the verdict was induced by prejudice or passion, some misconception of the law or the evidence or it must be shown that the jury did not consider all of the elements of damage involved, missed a consideration of the issues submitted or failed to discharge their duty as given them by the Court's charge.⁶⁶⁶

Absent a showing of vitiating circumstances it is assumed that the jury considered all elements of damage.⁶⁶⁷

664. 168 So.2d 753 (Fla. 3d Dist. 1964).

665. *Id.* at 756.

666. *Radiant Oil v. Herring*, 146 Fla. 154, 200 So. 376 (1941), cited by the court in *Shaw v. Puleo*, 159 So.2d 641, 644 (Fla. 1964). *Accord*, *Roberts v. Bushore*, 182 So.2d 401 (Fla. 1966), *reversing* 172 So.2d 853 (Fla. 1st Dist. 1965).

667. *City of Miami v. Smith*, 165 So.2d 748 (Fla. 1964), *reversing* *Smith v. City of*

Even though it is apparent that the verdict might have exceeded that awarded by the jury, this conclusion alone does not warrant the granting of a new trial. Generally, in order to be entitled to a new trial, it is incumbent upon an appellant [particularly when he received a favorable verdict in the trial court] to demonstrate error on the part of the trial judge, but for which he would have received an increased verdict from the jury.

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However, neither the trial court nor the district court is precluded from disturbing a verdict which has awarded such grossly inadequate damages that it shocks the conscience of the court.⁶⁶⁹

An appellate court may, of course, find that the damages awarded either by a jury, or by a court sitting without a jury, were excessive, where under the applicable rule of damages the record is lacking in evidence to prompt or support the damages allowed. In *Standard Oil Co. v. Dunagan*,⁶⁷⁰ the defendant in a negligence action to recover property damages resulting from a defective gas tank installed on the plaintiff's property appealed from an adverse judgment awarding the plaintiff sixty-five thousand dollars. The case had been tried by the court sitting without a jury. The district court held that the damages awarded were not adequately supported by the record and reversed and remanded the cause for a new trial on the issue of damages. In an action to recover for permanent property damage, the measure of the damages recoverable is the difference between the value of the property before the injury occurred and the value afterwards. Evidence had been submitted to support an award of twenty thousand dollars for permanent damage to the land, but there was nothing in the record from which to determine the pecuniary loss to the plaintiff resulting from permanent damage to the building.⁶⁷¹

8. REMITTITUR

It is well established in Florida that a trial judge may condition an order granting a new trial on the ground of the excessiveness of the damages awarded by the jury upon the non-acceptance by the plaintiff of a remittitur in the amount awarded.⁶⁷²

Miami, 153 So.2d 62 (Fla. 3d Dist. 1963). *Accord*, *Hayes v. Hatchell*, 166 So.2d 146 (Fla. 1964), *reversing* *Hatchell v. Hayes*, 157 So.2d 855 (Fla. 1st Dist. 1963).

668. *Stager v. Florida E. Coast Ry. Co.*, 163 So.2d 15, 19 (Fla. 3d Dist. 1964).

669. *Roberts v. Bushore*, 182 So.2d 401 (Fla. 1966), *reversing* 172 So.2d 853 (Fla. 1st Dist. 1965). See Note, 20 U. MIAMI L. REV. 465 (1965).

670. 171 So.2d 622 (Fla. 3d Dist. 1965).

671. There was a dissenting opinion which would have affirmed the award on the ground that the trial on damages was fairly conducted, and the damages assessed ought not to shock the conscience of the appellate court.

672. See, e.g., *Gresham v. Courson*, 177 So.2d 33 (Fla. 1st Dist. 1965); *Kight v. Wilson*, 167 So.2d 906 (Fla. 3d Dist. 1964); *Love Realty Corp. v. O'Brien*, 162 So.2d 532 (Fla. 2d Dist. 1964).

In an action against a landlord for malicious prosecution, the defendant appealed from an adverse judgment entered on a jury verdict awarding the plaintiff four hundred fifty dollars compensatory and two thousand dollars punitive damages. In the lower court, the defendant's motion for a new trial had been denied on condition that the plaintiff agree to a five hundred dollar remittitur of the punitive damages award. The plaintiff agreed and the court entered an order that such compliance "shall not be deemed to be a waiver or estoppel on her part insofar as her right to cross-assign as error (in any subsequent appeal) that portion of the order . . . which directed the plaintiff to enter the said remittitur." The district court disagreed.⁶⁷³ By electing to remit as an alternative to the granting of a new trial, the plaintiff cannot subsequently complain of the trial court's action in requiring the remittitur. She was bound by her action and could not conditionally accept the remittitur. The trial judge could not confer upon her the right to appeal from the remittitur order which she had voluntarily accepted.

The plaintiff sued to recover its pro rata share of a misappropriated brokerage commission from the defendant, a former employee of the plaintiff. During the trial, the testimony for the plaintiff clearly showed that it was entitled to but eight hundred of the two thousand dollar commission earned for the sale of a certain piece of real property, but the jury, nevertheless, returned a verdict for the plaintiff for the full two thousand. Thereupon, the lower court granted the defendant's motion for a new trial on the ground, *inter alia*, that the verdict was excessive. On plaintiff's appeal, the court reversed. Although the trial court was absolutely correct in finding the verdict to be excessive, it erred in granting a new trial instead of "ordering" a remittitur.⁶⁷⁴ The granting of a remittitur as an alternative for new trial, on the ground that the verdict was so excessive as to shock the judicial conscience of the trial judge "involves his consideration of the entire record . . . and on appeal from an order granting a new trial for excessiveness, it is necessary to look to the record to determine whether excessiveness, is disclosed."⁶⁷⁵ Therefore, unless the record presented is complete, appellate review of an order of remittitur will be precluded.

The plaintiff brought two negligence actions against the defendants to recover for the death of his infant son, while he was in the care of a day nursery operated by the defendants. The plaintiff brought one action as administrator of his deceased son's estate, and in another action the plaintiff proceeded individually to recover for his son's wrongful death. In the first action the plaintiff recovered a jury verdict for twenty-five thousand dollars, but the plaintiff consented to a twenty thousand dollar

673. *Darges v. Maguire*, 156 So.2d 897 (Fla. 3d Dist. 1963).

674. *Love Realty Corp. v. O'Brien*, 162 So.2d 532 (Fla. 2d Dist. 1964).

675. *Kight v. Wilson*, 167 So.2d 906, 907 (Fla. 3d Dist. 1964).

remittitur in lieu of a new trial. In the second suit, the jury returned a verdict of one hundred thousand dollars for the plaintiff, and the trial court denied the defendants' motions to vacate the judgment, for a remittitur and for a new trial. On appeal, the defendants asserted, among other things, that the second verdict was excessive. The district court agreed.⁶⁷⁶ It concluded that absent a contrary showing in the record the value to the father of any services that the child might be expected to render during his minority would be more than offset by expenses incurred by his father in raising him. Although the couple had been unsuccessful in their efforts to have other natural children, and although they had been married six years before their son was born, the district court noted that a few months after their little boy's death, they adopted a child, and that with the adoption of the new baby, the record indicated that the wife returned to her normal self.

In cases where damages for mental pain and suffering are allowed, it must bear some reasonable relation to the facts, the status of the parties, the amount allowed as compensatory damages, and the philosophy and general trend of decisions affecting such cases.⁶⁷⁷

The court concluded that viewing the evidence in the light most favorable to the plaintiff, it was nevertheless legally insufficient to support the verdict for the plaintiff. It noted that the damages awarded in the instant case were twice as much as had ever been awarded previously in a parent's action to recover for the wrongful death of his child,⁶⁷⁸ and cynically surmised that the fact that the plaintiff consented to a substantial remittitur in his action brought as administrator was to some extent persuasive of the fact that the verdict of one hundred thousand dollars in the father's individual suit was induced by passion, prejudice, bias, or some other improper motive.

We are fortified in this conclusion by the fact, as appears by the record, that in each case here reviewed the jury verdict was in the exact amount suggested by counsel for plaintiff in the course of oral argument to the jury and does not appear elsewhere in the trial proceedings. A verdict is not per se excessive because the jury awards the full amount of damages suggested by counsel for the prevailing party, but we would be exceedingly naive should we fail to recognize that as a matter of

676. *Gresham v. Courson*, 177 So.2d 33 (Fla. 1st Dist. 1965).

677. *Florida Dairies Co. v. Rogers*, 119 Fla. 451, 161 So. 85 (1935), cited by the court in *Gresham v. Courson*, *supra* note 676, at 37-38.

678. In *Holland Paving Co. v. Dann*, 169 So.2d 849 (Fla. 3d Dist. 1964), *cert. denied without opinion*, 173 So.2d 145 (Fla. 1965), the Third District Court of Appeal reversed an order granting a new trial in the father's suit as administrator of his deceased son's estate in which the trial court had held a verdict of ten thousand dollars excessive, and affirmed a judgment of fifty thousand dollars in the companion wrongful death suit, brought by the child's father, individually.

practice the advocate usually suggests to the jury a figure for damages substantially in excess of the amount that is clearly supportable by the evidence and likewise in excess of the amount which he deems to be supportable in point of law should the jury happen to return a verdict approaching the amount suggested.⁶⁷⁹

The court affirmed the five thousand dollar judgment in the administrator's action and decided that in view of the evidence produced at the trial and prior decisions of Florida courts in analogous actions, fifty thousand dollars was the maximum amount to which the plaintiff was entitled. It therefore affirmed the judgment for the plaintiff in his individual suit conditionally upon his consent to a remittitur for the balance. Otherwise the cause was remanded for a new trial on the issue of damages.⁶⁸⁰

9. CORRECTION OF A VERDICT

In an action for false imprisonment, unlawful detention, unauthorized search, and assault and battery, the defendants appealed from an adverse judgment entered on a jury verdict for the plaintiffs, but to no avail. Where the verdicts for the sum of no dollars compensatory damages and five thousand dollars punitive damages for the minor plaintiff, and

679. *Gresham v. Courson*, *supra* note 676, at 39. The quoted remarks should be compared with those of the Third District Court of Appeal in *Direct Transp. Co. v. Rakaskas*, 167 So.2d 623, 627 (Fla. 3d Dist. 1964). That court, in affirming a judgment entered on a jury verdict that awarded the plaintiff \$102.61 more in damages than the amount for which his counsel had asked, interpreted *Braddock v. Seaboard Airline R.R. Co.*, 80 So.2d 662 (Fla. 1955),

to be authority for the proposition that when a jury awards a verdict in the exact amount requested by the plaintiff's counsel there is an assumption that the aggregate verdict constitutes an award of each particular item of damage as contended by plaintiff's counsel, affording a proper basis for an analysis of the verdict.

Since the question involved in the *Rakaskas* case was whether or not the verdict was grossly excessive because the jury had failed to reduce to present value the damages awarded for loss of future earnings, the inconsistency is in the spirit of the remarks made by the two courts rather than in the exposition of a point of law.

680. The case contained a vigorous dissenting opinion by Judge Wigginton, who was unable to agree that the one hundred thousand dollar verdict awarded was so grossly excessive as to subject the judgment to reversal unless the plaintiff consented to a remittitur. He stated that the majority opinion had erroneously held that the jury was not justified in awarding damages for the loss of the child's future services when the plaintiff failed to introduce evidence supporting the premise that they would have derived a pecuniary benefit from the services of their deceased child. As in the case of damages awarded for pain and suffering, damages awarded for lost services are necessarily speculative and peculiarly within the province and function of the jury in this type of claim.

Appellate courts are not at liberty to play a numbers game with verdicts rendered by juries in personal injury actions, especially when the verdict has been approved by the judge who tried the case. . . . [T]he majority, has reached the arbitrary conclusion that because the verdict in this case exceeds verdicts in lesser amounts awarded in other cases, that the verdict here is illegal and must be stricken. Before such position may be taken in an appellate court, the record must disclose with reasonable certainty the event or events which infected the jury's consideration of the case and rendered its verdict illegal. Such has not been done in this case.

Gresham v. Courson, *supra* note 676, at 41 (Dissent).

fifteen hundred dollars compensatory damages for her father on his derivative claim were not in accordance with the jury instructions given, and indicated an obvious misunderstanding by the jury of those instructions, the court properly reinstructed the jury to retire and further consider the compensatory award to the minor plaintiff without further considering the punitive damages awarded to her, or the compensatory award to her father.⁶⁸¹

10. REHEARING

The plaintiffs appealed⁶⁸² from a summary judgment in favor of the four defendants in a malpractice suit. In opposition to the defendants' motion for a summary judgment, the plaintiffs had submitted the affidavit of a New York surgeon. This affidavit was stricken as legally insufficient, in that it failed to connect the alleged negligent acts to the resulting injury. The court further granted the defendants' motions for a summary judgment. Thereafter, the plaintiffs moved for a rehearing,⁶⁸³ so as to open the judgment for the submission of additional affidavits. The petition did not point out in what manner defects in the original affidavit would be corrected, but in effect requested the court to exercise its discretion and grant a rehearing without indicating in any way on what basis the court should so act. At the hearing on the motion, the plaintiffs tendered a second affidavit of the same New York physician which the plaintiffs proposed to submit in opposition to the motion for summary judgment in the event that a new hearing was granted. The trial court declined to permit the affidavit to be filed, and the district court affirmed. Rule 2.8(a) requires that an affidavit in support of a motion for a rehearing be filed with the motion. A motion for a rehearing is directed to the sound judicial discretion of the court, and the record on appeal had failed to establish an abuse of that discretion.

The plaintiff in a personal injury action against his employer petitioned for a rehearing of an order dismissing his complaint with prejudice and requested that he either (1) be granted leave to amend, or that (2) the prejudicial dismissal be set aside. The court granted the second relief asked but subsequently re-dismissed the complaint, this time for lack of jurisdiction over the subject matter, without prejudice to the plaintiff to seek such other remedies as might be available to him. On an appeal by the plaintiff in which he contended first, that a state court of general jurisdiction did have jurisdiction of the subject matter of a maritime tort, and second, that the trial court had erroneously denied him the right of an opportunity to amend, the defendant argued that the second

681. *Stevens Mkts, Inc. v. Markantonatos*, 177 So.2d 51 (Fla. 3d Dist. 1965). Ordinarily in Florida, a verdict of no dollars is a good verdict, but in the instant case, the record indicated that such a verdict involved a misinterpretation of the court's instructions and that the verdict was therefore defective.

682. *Holl v. Talcott*, 171 So.2d 411 (Fla. 3d Dist. 1965).

683. *FLA. R. Civ. P. 2.8(a)*.

judgment dismissing the complaint without prejudice was not appealable because it was entered pursuant to the plaintiff's own motion. The district court disagreed and held that the appeal was properly before the court.⁶⁸⁴ The plaintiff did not appeal from that portion of the order which was changed on his motion. "It would be straining the office of a petition for rehearing to say that because some relief was gained under it, the moving party thereby is precluded from appealing that portion to which he did not agree in the first instance but which was not changed on the petition."⁶⁸⁵

I. Garnishment

The defendant in a garnishment proceeding appealed from an adverse summary judgment and assigned as error the court's failure to enter judgment for it, contending that the garnishor had traversed its answer more than ten days after the answer had been filed.⁶⁸⁶ The district court disagreed.⁶⁸⁷

The courts of this state have within recent years leaned toward the view that in dealing with the progress of a cause in the trial court, the trial judge has a reasonable discretion to allow the remedying of defaults in order to reach an issue upon the merits of litigation. . . . This is especially true where the default in pleading has not in any way precluded a fair trial upon the merits.

We know of no reason why the rule should be different in garnishment. . . .⁶⁸⁸

The trial judge's refusal to enter judgment for the garnishee because of the late traverse by the garnishor was in furtherance of justice. The purpose of the proceeding was not departed from or materially affected.

However, the summary judgment for the garnishor was reversed because the judgment out of which the garnishment proceedings had arisen, and upon which the summary judgment for the plaintiff in the garnishment proceedings was based, had been appealed and superseded at the time of the summary final judgment.

684. *Preston v. Grant Advertising, Inc.*, 166 So.2d 219 (Fla. 3d Dist. 1964).

685. *Id.* at 221.

686. FLA. R. CIV. P. 2.12(a) provides:

(a) *Time for Traverse.* When any garnishee answers at the time required by law and the plaintiff is not satisfied with the answer of any such garnishee, he shall within 10 days thereafter file a statement traversing the allegations of the garnishee in such particulars as he desires, whereupon the cause shall proceed as provided by law. Upon failure of the plaintiff to file such traverse such answer shall be taken as true and upon proper disposition of the assets, if any disclosed thereby, the garnishee shall be entitled as of course to an order discharging him from further liability under the writ. (Emphasis added.)

687. *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Barrett*, 174 So.2d 417 (Fla. 3d Dist. 1965).

688. *Id.* at 419.

A supersedeas has the effect to suspend all further proceedings in relation to a judgment superseded, but it does not, like a reversal, annul it. The supersedeas, being preventive in nature, does not set aside what the trial court has adjudicated, but stays further proceeding in relation to the judgment until the appellate court acts thereon.⁶⁸⁹

The lower court should have stayed the garnishment proceedings until the disposition of the appealed judgment had become final. Since that judgment was reversed,⁶⁹⁰ the plaintiff in the garnishment proceedings was no longer entitled to judgment as a matter of law, and the case was remanded for a trial on the issues made by the answer and the traverse.

Where a defendant in a garnishment proceeding fails to appear or answer as required, the rules provide⁶⁹¹ that a judgment by default shall be entered against him for the amount of the plaintiff's claim plus interest. After entry of a default "a scire facias shall issue against such garnishee returnable within ten days . . ." If the garnishee fails to sufficiently answer the scire facias, "a final judgment shall be entered against the said garnishee provided, however, that no final judgment against a garnishee shall be entered before the entry of the final judgment against the original defendant together with interest and costs." Defenses available in answer to the original writ of garnishment may not be asserted in answer to the writ of scire facias. The purpose of this latter writ is to give the party against whom execution is about to issue notice so that he may urge defenses which have arisen after creation of the original record in the garnishment proceedings.⁶⁹²

J. Executions

2.13 Executions and Final Process.

(a) *Issuance.* Executions on judgments shall issue on the request of the party entitled thereto or his attorney. No execution or other final process shall issue until the judgment on which it is based has been recorded nor within the time for serving a motion for new trial and if a motion for new trial is timely served, until the motion is determined; provided it may be issued on special order of the court.

(b) *Stay.* The court before which an execution or other process based on a final judgment is returnable may stay such execution or other process and suspend proceedings thereon for good cause on motion and notice to all adverse parties.

689. *Id.* at 418.

690. *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Traister*, 173 So.2d 153 (Fla. 2d Dist. 1965).

691. FLA. R. CIV. P. 2.12(b).

692. *Seven-Up Bottling Co. of Miami, Inc. v. J. N. Rawleigh Co.*, 156 So.2d 180 (Fla. 2d Dist. 1963) (garnishee may not raise the defense of "no debt" in response to a writ of Scire Facias).

Subsection (a) is [former] RCP 2.13 after deleting "his agent" as unnecessary and substituting "execution" for "writ of fieri facias" and including other final process within the rule so it is applicable to law and equity.⁶⁹³ The requirement for recording is taken from 62.16 Florida Statutes which should be repealed.

Subsection (b) is 55.38 Florida Statutes which should be repealed.⁶⁹⁴

K. *Prohibition*

The term "petition" has been substituted for "suggestion" in subsections (a) and (b) of Rule 2.18 to conform to the amendment to Rule 1.7(a) to include petitions, as the initial pleadings in special statutory proceedings, among the pleadings required or allowed by the Florida Rules of Civil Procedure.

The defendants in a negligence action arising out of an automobile collision petitioned the district court for a writ of prohibition to restrain the trial court from proceeding further on the ground that it lacked jurisdiction of the action. The plaintiffs had previously brought an action based on the same claim against the petitioners, but had taken a nonsuit. Subsequently, the plaintiffs filed a second action. The defendants answered alleging the prior action, and its termination by judgment of nonsuit as a defense of *res judicata*, and thereafter moved for summary judgment based on this defense. Their motion was denied, and proceedings for a writ of prohibition were filed. In discharging the rule nisi and dismissing the petition,⁶⁹⁵ the district court held:

... The writ of prohibition is that process by which a superior court prevents an inferior court from exceeding its jurisdiction or usurping a jurisdiction with which it has not been vested by law. It issues only when the party seeking it is without other adequate means of redress. The writ should not become a vehicle for the determination of questions involving the correct or incorrect decision of another court in matters in which that court has jurisdiction to act. Prohibition does not lie to correct errors of a court which is acting within its jurisdiction although it is proceeding improperly in the exercise of that jurisdiction.⁶⁹⁶

Where two actions have been instituted involving the same parties and the same subject matter, a judgment in the first action does not, of itself, deprive the court of jurisdiction to proceed in the second action. The

693. [Authors' footnote.] If the rule is now applicable to law and equity, shouldn't it be relocated and included among the 1.—rules?

694. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1136 (1965).

695. *State v. White*, 162 So.2d 697 (Fla. 2d Dist. 1964).

696. *Id.* at 699.

proper remedy is either by appeal, or perhaps in a case such as this one, where the court may have departed from the essential requirements of law, and an interlocutory appeal from the order denying the defendants' motion for summary judgment is unavailable, by petition for a writ of certiorari.

L. *Quo Warranto*

Subsection (a) of Rule 2.20 has been amended by deleting from that subsection the requirement that proceedings in quo warranto be instituted in the circuit court, and by deleting the term "information" as descriptive of the initial pleading in such proceedings. The latter change is consistent with the amendment to Rule 1.7(a), which includes petitions among the pleadings required or allowed as the initial pleadings in statutory proceedings. The term "information" has similarly been stricken from subsection (c) of Rule 2.20 for the same reasons. These subsections now read:

(a) *By Whom Instituted.* Proceedings in quo warranto including informations in the nature of quo warranto may be instituted by petition in the name of the State by the Attorney General, or by any person claiming title to the office or franchise on the refusal of the Attorney General.

(c) *Judgment of Ouster.* When any petition is well founded, a judgment of ouster may issue without further amendments to the extent that the petition is well founded. Committee Note: Common Law Rule 58.

M. *Review*

Newly added Rule 2.23 transfers the provisions of section 54.16 to the Florida Rules of Civil Procedure in accordance with the policy that all general procedure statutes should be incorporated in the rules.⁶⁹⁷

III. SUITS IN EQUITY ONLY

A. *Trustees May Represent Beneficiaries*

The defendant-trustee in an action for the specific performance of an agreement to sell certain real property took an interlocutory appeal from an order denying his motion to dismiss the plaintiff-vendee's complaint on the ground, *inter alia*, that the plaintiff had failed to join the beneficiaries of the collateral trust agreement as indispensable parties. The district court affirmed the decision of the lower court.⁶⁹⁸

Although as a general rule, beneficiaries should be made parties to a suit brought for specific performance of a contract made by a trustee

697. See *Notes of the Subcommittee on Civil Procedure Rules, supra* note 694, at 1135 (Comments on Rule 1.35, final paragraph).

698. *Grammer v. Roman*, 174 So.2d 443 (Fla. 2d Dist. 1965).

in behalf of a trust, the deed to the defendant-trustee in the instant case was in the form of an Illinois Land Trust Deed. The purpose of such a deed is to permit a trustee thereunder to convey freely without joinder of spouses or beneficiaries. By the express terms of the deed the interest of each beneficiary under the trust is declared to be only in the earnings and avails of the property. The interest of the beneficiaries is stated to be personal property carrying no legal or equitable title to the trust realty. The court concluded that the deed involved came within the terms of section 689.071, which was enacted in 1963 and which provides "that a deed, in trust, regardless of any reference to an unrecorded trust agreement which does not name the beneficiaries of such trust, shall be effective to vest in such trustee full rights of ownership with full power and authority as provided for in the deed."⁶⁹⁹ Although the deed and contract in question were executed prior to the passage of this act, the statute provides that it is remedial in nature, that its application is to be liberally construed, and that it applies to every deed "heretofore or hereafter made." Since the trustee had authority to convey the realty, under the Florida Rules of Civil Procedure, he could represent the interests of the beneficiaries without their joinder. Rule 3.3 provides:

Rule 3.3. Trustees May Represent Beneficiaries.

In all suits concerning property which is vested in trustees, where such trustees are competent to sell and give discharges for the proceeds of the sale, or the rents, income or profits of the estate, all, or any of such trustees, shall represent the persons beneficially interested in the estate or the proceeds, or the rents, income or profits, and in such cases it shall not be necessary to make the persons beneficially interested in such property, or rents, income or profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons beneficially interested to be made parties.

B. Intervention v. Interpleader

When her ex-husband became delinquent for the second time in his alimony payments, the plaintiff instituted the instant proceedings by which she sought a judgment for the alimony arrearages and the imposition of a lien upon her ex-husband's sole asset in Florida, a promissory note secured by a purchase money mortgage on real and personal property in the sum of one hundred thousand dollars. The divorce had been obtained in Florida, and the mortgaged property on which the plaintiff sought to impose a lien was located there, but at the time of the instant proceedings the defendant and his second wife were residents of Mississippi. The mortgagor filed a petition for interpleader alleging that it was in the possession of checks in the amount of fifty thousand dollars, the proceeds of certain fire insurance policies payable to it and to the

699. *Id.* at 446.

defendant; that pursuant to the terms of the mortgage the defendant had exercised his option to receive the money and apply it on the indebtedness; and that during the period when the mortgagor and the defendant were negotiating for a complete settlement on the note and mortgage, the mortgagor received notice of *lis pendens*. The mortgagor sought to tender the checks together with outstanding interest into the registry of the court and to receive credit therefor on the principal and interest due on the mortgage. From a post-decretal order favorable to the wife, and directing the clerk of the court to deposit the sums received from the mortgagor in secured savings accounts to insure future alimony payments to the plaintiff, the defendant took an interlocutory appeal. Among other things, the defendant on appeal questioned the chancellor's jurisdiction to proceed upon the "Petition for Interpleader" on the ground that such a suit contemplated the institution of a new action which necessitated the service of process before the court acquired jurisdiction of the parties and the subject matter. In affirming the lower court's order, the district court held⁷⁰⁰ that, labels notwithstanding, the mortgagor's petition should be treated as one for intervention pursuant to Rule 3.4.⁷⁰¹ It further stated that this conclusion was buttressed by the essential facts existing at the time of the filing of the petition by the mortgagor. The wife had upon reasonable notice sought to impose a lien against the indebtedness owing to her ex-husband by the mortgagor. This indebtedness constituted the *res*. As the obligor, the mortgagor, whose interest was subordinate to the main proceedings, could properly intervene. Its petition for relief brought the proceedings into such a position that the rights of all parties interested in the subject matter could be resolved in the pending equitable proceeding.⁷⁰²

C. *Class Suits*

In an action against the county tax collector, the plaintiffs appealed from an adverse decree. In their complaint they had alleged that (1) "In the preparation and certification of the 1961 tax assessment roll, like property similarly situated [even adjoining property] did not receive like treatment as to valuation," and (2) "Agreeable to Rule 3.6, plaintiffs bring this suit on their own behalf and on behalf of other persons similarly situated." Among other things, the plaintiffs assigned as error on appeal that part of the decree which held that the action could not be maintained as a class suit. In sustaining this portion of the challenged

700. *Carter v. Carter*, 164 So.2d 219 (Fla. 1st Dist. 1964).

701. FLA. R. Crv. P. 3.4 provides:

Anyone claiming an interest in pending litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

702. Professor James defines intervention as "[A] device which enables one who was not originally a party to an action to become such a party on his own initiative." JAMES, CIVIL PROCEDURE, § 10.19 at 501 (1965).

decree, the supreme court held⁷⁰³ that although the complaint tracked the wording of the statute, it was too broad.

An allegation that the plaintiff brought suit on his own behalf and in behalf of all others similarly situated does not, of itself, determine the character of the proceeding as a class suit, and does not establish such community of interest as would enable the plaintiff to represent the other persons interested in the subject matter . . . and; in class suits it is important to plead and describe the class with certainty whether the class by plaintiffs or defendants and if they are considered so numerous as to make it impractical to bring them before the court it too should be plead and proved with a fair degree of certainty. More is required than the mere pleading the language of the statute.⁷⁰⁴

D. *Default: Decree Pro Confesso*

Rule 3.9. *Default: Decree Pro Confesso.*

If the defendant shall fail to serve his answer or other defense to the complaint, within the time prescribed, or within such other time as shall have been fixed by the court, then the plaintiff may at his election take an order to be entered by the clerk or the judge, as of course, that the complaint be taken pro confesso; and thereupon the cause shall proceed ex parte, and the matter or the complaint may be decreed by the court accordingly if the same can be done without an answer and is proper to be decreed. A party may plead at any time until such decree pro confesso be entered.

If the cross-defendant shall fail to serve his reply or other defense to an answer asserting a counterclaim and specially praying relief at the time prescribed, or within such other time as shall have been fixed by the court, a decree pro confesso may be taken and like proceedings had thereon as in case of failure of the defendant to serve defensive pleadings to the complaint.

The final sentence has been added to the first paragraph of Rule 3.9 to expressly provide that "a party may plead at any time until such decree pro confesso be entered." Otherwise, the Rule remains unchanged.

After the entry of a decree pro confesso, the chancellor is authorized to proceed *ex parte*.⁷⁰⁵ At that point a defendant is not entitled to notice of further proceedings in the cause, so long as those proceedings are commensurate with the relief prayed for in the complaint served upon him. However, if after entry of a decree pro confesso, a plaintiff so amends his complaint as to seek different or additional relief from that

703. *Peters v. Meeks*, 163 So.2d 753 (Fla. 1964).

704. *City of Lakeland v. Chase Nat'l Co.*, 159 Fla. 783, 32 So.2d 833 (Fla. 1947), cited by the court in *Peters v. Meeks*, *supra* note 703, at 757-58.

705. FLA. R. Civ. P. 3.9.

originally prayed for, "even the most minimal standards of due process would require that notice be given to a party who had suffered a default or decree pro confesso where the complaint had been amended in a matter of substance after the entry of such default. . . ."706

Where an action is brought against a defendant who does not answer, a judgment by default is conclusive upon him only in the character in which he is sued. In *Baum v. Pines Realty Co.*,⁷⁰⁷ a real estate broker brought suit against other brokers and the owners of certain realty for an accounting, for a declaratory decree, and for payment of his share of the brokers' commission which the defendant-brokers had recovered in a prior action against the plaintiff and the owners of the realty. Because the plaintiff was unwilling to join in the earlier action, the other brokers joined him as a party defendant to their suit. He subsequently permitted a decree pro confesso to be entered against him in that suit, and the court entered an opinion and order in which it found the existence of a valid contract, performance by the brokers and that the defendant property owners owed the full commission. Based upon that opinion and order, a summary final decree and judgment were entered for the plaintiffs and against the property owners, and the decree pro confesso against the present plaintiff was confirmed and ratified. On the basis of the judgment in the first suit summary decrees were entered in favor of the defendants in the instant suit, and the plaintiff appealed.

The district court reversed. The plaintiff's right to participate in the brokerage commission was not adversely determined in the broker's suit, since the complaint in that suit admitted his interest. In determining what was decided by a money judgment by default, where the adjudicating part of the judgment is not entirely clear on its face, one must advert to the pleadings to determine those matters without the allegations of which it would not have been possible for plaintiff to obtain judgment by default. Only those matters and no others should be regarded as *res judicata*. The plaintiff's portion of the commission was neither in issue nor litigated in the first suit; and he was therefore not precluded from maintaining the instant action to determine that share. Where, as in the

706. *Kitchens v. Kitchens*, 162 So.2d 539, 541 (Fla. 3d Dist. 1964). In the *Kitchens* case, the district court reversed that portion of the final decree which had granted the plaintiff a divorce, and which ordered the husband's interest in the parties' jointly owned property transferred to the plaintiff as satisfaction for necessities found to be due the plaintiff from her husband. In her original complaint, the wife had sought separate maintenance and other relief unconnected with divorce, pursuant to FLA. STAT. § 65.09 (1965), on grounds, which, if proven, were also legally sufficient to entitle her to a divorce under FLA. STAT. § 65.04 (1965). The husband did not answer, and a decree pro confesso was entered against him. At the subsequent hearing, the plaintiff presented testimony in support of the allegations in her complaint. On the following day, the plaintiff filed a motion for entry of a final decree of divorce. On the husband's appeal, the district court held that the chancellor had erroneously granted this motion where the record indicated that the husband was neither served nor notified of the plaintiff's motion for different and additional relief.

707. 167 So.2d 517 (Fla. 2d Dist. 1964).

instant case, the causes of action are different⁷⁰⁸ in two suits, the prior judgment is not *res judicata* as to those matters which were not litigated, but which could have been, but the first judgment is *res judicata* only as to those matters or issues common to both actions which were either expressly or by necessary implication adjudged in the first action.

E. Evidence

Rule 3.12 has been repealed, and the sole rule governing evidentiary matters in suits of equity, as well as in actions at law, is now Rule 1.37, as amended.

F. Attorneys' Fees in Interpleader Suits

To avoid double or multiple liability, the Florida rules provide for interpleader—both strict interpleader and a bill in the nature of interpleader.⁷⁰⁹

Even though an interpleader action may be maintained under this rule, it does not necessarily follow that in every such action the court must award costs and attorney's fees to the interpleading plaintiff [or defendant]. In order to be entitled to such an award the plaintiff must prove his total disinterest in the stake he holds other than that of bringing it into court so that conflicting claims thereto can be judicially determined. The plaintiff must also show that he did nothing to cause the conflicting claims or give rise to the peril of double vexation. . . .⁷¹⁰

A few days prior to his death, the insured of a group life insurance policy sent a notice of change of beneficiary, requesting that the beneficiary of the policy be changed from his first wife to his second wife, to the insurer's agent.⁷¹¹ Three days later, the insured met an accidental death, and two days after that the agent filled in and dated a rider to the group insurance certificate noting such change of beneficiary. Nine days thereafter, the agent forwarded the notice of change of beneficiary to the insurer's Chicago group claims office. The insurer's principal office was in New York City. Both the former wife and the widow of the insured claimed the right to the proceeds of the group policy. The insurer notified the divorced wife that the change of beneficiary had been accomplished, and also advised her that until she relinquished her claim under the group policy, it would withhold payment to her of the proceeds on a certain other policy issued by the insurer on the decedent's life, to which she was the acknowledged beneficiary.

Subsequently, the divorced wife brought the instant suit against the

708. The brokers' suit was to recover a commission, and the instant suit was to determine the plaintiff's share of the commission so recovered.

709. FLA. R. Crv. P. 3.13.

710. *Ellison v. Riddle*, 166 So.2d 840, 841 (Fla. 2d Dist. 1964).

711. *Kurz v. New York Life Ins. Co.*, 168 So.2d 564 (Fla. 1st Dist. 1964).

widow and the insurer for a decree declaring her to be the beneficiary of the group policy, and an order entitling her to the proceeds thereof and the payment of reasonable attorney's fees by the insurer. The widow denied the plaintiff's right to the proceeds of the policy and counter-claimed for a decree that she was the beneficiary of the policy. She also cross-claimed against the defendant-insurer demanding judgment for the proceeds, together with interest, costs, and a reasonable attorney's fee. In answer to the cross-claim the insurer alleged that the question of entitlement to the proceeds of the group policy was a matter properly to be settled between the plaintiff and the widow, and not between either of them and the company. The court noted that this allegation was clearly a conclusion of law. The insurer also filed a cross-claim and counterclaim for interpleader and declaratory relief alleging that by reason of the conflicting claims of the plaintiff and the widow, it was in great doubt as to which of the claimants was entitled to payment of the proceeds. It paid the amount of the policy into the court's registry, asked that the claimants be required to interplead between themselves, that the insurer be discharged from further liability and dismissed with its taxable costs and reasonable attorney's fees. The plaintiff denied that the insurer was in doubt as to which of the claimants was entitled to the proceeds and further contended that the insurer had at all times steadfastly maintained that the widow was the proper beneficiary. (The court commented that this allegation of the plaintiff was unequivocally supported by the record.)

The trial court found that the change of beneficiary had been accomplished, and accordingly dismissed the plaintiff's complaint, granted the widow's motion for summary judgment on her counterclaim and cross-claim except as to attorney's fees, and denied the insurer's motion, except as it related to the issue of the award of attorney's fees to the widow, as to which it was granted. From the final decree all parties appealed and cross-appealed.

The district court concurred with the trial court that the change of beneficiary had been accomplished, and found that the trial court had properly dismissed the plaintiff's complaint and also had properly denied the plaintiff's claim for attorney's fees. However, the district court held that the lower court had erroneously denied the widow's claim for attorney's fees.

The insurer had steadfastly maintained that the widow was exclusively entitled to the proceeds of the policy, and the district court found that the record revealed no lawful basis for the insurer's failure to promptly pay the proceeds to the party it recognized as being entitled thereto. Instead, it had withheld payment for approximately six months after it had received the requisite proof of death and unwarrantedly imposed a requirement as a condition precedent to payment that the

spurious claimant should first execute a waiver and release of any claim she might have to the proceeds. This unwarranted requirement was at least partly responsible for the instant suit, which subjected the widow to litigation and to the necessity of employing attorneys to protect her interest, and to assert her claim against the insurer.

The fact that there are conflicting claims to the proceeds of an insurance policy, the terms and conditions of which are clear, will not operate to relieve the insurer from prompt performance of its obligation to pay the proceeds to the recognized rightful beneficiary, nor will it be permitted to relieve that obligation and be awarded a fee for the services of its attorney by resorting to interpleader on the theory that it may be put to vexatious suits by contesting claimants when, as in this case, it has wrongfully delayed payment. It is a normal consequence of engaging in business that the parties to an unambiguous contractual relationship accept the risk of performing according to the clear terms and conditions of their undertaking.⁷¹²

G. *Masters*

The word "or" has been substituted for "of" as the third word from the end of Rule 3.14(i) to correct a clerical error.⁷¹³

H. *Rehearings*

The plaintiff sought a writ of prohibition to compel the district court to dismiss a pending appeal on the ground that the finality of the decree contemplated by appellate Rule 1.3 was destroyed by a timely petition for a rehearing and application for leave to amend. The court entered a rule absolute.⁷¹⁴ The Florida Supreme Court noted that ap-

712. *Id.* at 568. The case contained a strong dissent to that portion of the majority opinion which held that the trial court had erroneously denied the widow's claim for reasonable attorney's fees. The dissenting judge noted that "this case was one of first impression in the United States, as no other appellate court has by a reported decision placed a construction upon the change in beneficiary clause of the life insurance policy under consideration. . . ." (*Id.* at 569). The conclusion in the instant case is contrary to the result reached by the Florida Supreme Court in other cases which appear to be, but which, after careful analysis, are found not to be, factually similar. The insurer was, therefore, understandably unwilling to select between the two conflicting claimants until the change of beneficiary provision had been judicially construed. Consequently, the insurer did not wrongfully withhold payment of the proceeds of the policy, and absent a wrongful refusal to pay by the insurer, the widow was not entitled to recover attorney's fees. The trial court properly granted the insurer's motion for summary judgment on the issue of the widow's right to recover attorney's fees.

However, the dissenting judge concluded, in the event the insurer was not entitled to summary judgment, the mere fact that he and the trial judge arrived at an opposite conclusion from the majority of the court on the basis of the same evidence would seem to indicate that the evidence and the reasonable inferences to be drawn therefrom were in conflict, thus precluding a summary judgment for the widow on the question of her right to attorney's fees.

713. *Notes of the Subcommittee on Civil Procedure Rules*, 39 FLA. B.J. 1132, 1136 (1965).

714. *State v. Pearson*, 156 So.2d 4 (Fla. 1963).

pellate Rule 1.3 clearly and specifically provides that a final decree shall not be deemed to have been rendered until a timely motion or a petition for a rehearing has been disposed of, nor does the time for taking an appeal commence to run before such time.

The purpose of the Rule is to afford the trial court a reasonable opportunity to correct its mistakes, thereby avoiding needless appellate litigation. Jurisdiction must be exclusively in one court or the other; it cannot be in both courts at the same time. "The proper and timely filing of a petition for a rehearing after the filing of a notice of appeal is a subsequent event which destroys the efficacy of the notice of appeal."⁷¹⁵ The trial court decides in the first instance whether a petition for a rehearing has been timely and properly filed.

I. *Process in Behalf of and against Persons not Parties*

Rule 3.18 has been more succinctly restated. A comma has been inserted after the phrase "not a party," which appears in the second half of the sentence, to conform the rule to its original meaning when adopted as Equity Rule 9 in 1873.⁷¹⁶

J. *Injunctions*

1. AMENDMENTS

Rule 3.19. *Injunctions.*

(a) *Issuance.* No injunction shall be granted until a complaint therefor is filed.

(b) *Temporary Injunction; Notice; Bond.* No temporary injunction shall be granted except after notice to the adverse party unless it is manifest from the allegations of a verified complaint or supporting affidavits that the injury will be done if an immediate remedy is not afforded and in such event the court may grant a temporary injunction until a hearing or further order of court. When a temporary injunction is granted, the court shall require the party obtaining it to give bond conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is wrongfully enjoined unless the court, after taking evidence from all parties of the truth of the complaint and the fact that the party seeking the temporary injunction is unable to give bond, finds such to be true, in which event a temporary injunction without bond may be granted. When any injunction is issued on the complaint of a municipality or the State or any officer, agency or political subdivision thereof, the court, in its discretion having due regard to the public interest, may require or dispense with

715. *Id.* at 7.

716. *Notes of the Subcommittee on Civil Procedure Rules, supra* note 20, at 1136.

the requirement of a bond, with or without surety, and conditioned as the circumstances may require.

(c) *Motion to Dissolve.* Any party against whom an injunction has been granted may move to dissolve it at any time.

(d) *Evidence.* Either party may present evidence at any hearing on an application for or motion to dissolve an injunction. On hearing the court may grant, dissolve or continue the injunction or may require bond.

(e) *To Stay Other Proceedings.* No injunction to stay other proceedings shall issue except on motion and notice to the adverse party, nor unless the party applying therefor has previously paid all costs of the other proceeding and gives a bond payable to the adverse party in the other proceeding and conditioned (1) to pay to plaintiff all damages, losses, expenses and charges which he may have sustained or have been put to by reason of the issuing of the injunction if the injunction is dissolved, or if the complaint upon which it was granted is dismissed, if the application is to stay proceedings before verdict or inquest of damages; or (2) to pay the debt, interest and such damages as may be occasioned by the wrongful issuing of said injunction, if said injunction is dissolved, or the complaint upon which it is granted is dismissed if the application is to stay the proceedings after verdict or inquest of damages.⁷¹⁷

Subsection (e) is section 64.02 of the Florida Statutes; "with redundant language eliminated and made applicable to 'other proceedings' because of the recommendation to consolidate law and equity."⁷¹⁸ The subcommittee suggested that the subsection should be restored in application to actions at law if the recommended merger did not occur. Nevertheless, the supreme court retained the modified terminology directing its application to "other proceedings."

The subcommittee further recommended the repeal of section 64.01-.06, with the exception of section 64.04, which, the subcommittee suggested, should be transferred to the chapters on municipalities and taxing districts after "injunction" is deleted.

2. TEMPORARY RESTRAINING ORDER IN A DIVORCE SUIT

The husband appealed from two interlocutory orders in a divorce suit. The wife obtained the first order upon an emergency application,

717. This rule has been expanded to eliminate the need for 64.01-03 and 64.05-06 Florida Statutes. Subsection (a) is 64.01 Florida Statutes omitting the last clause which is obsolete.

Subsection (b) combines present Rule 3.19, 64.021 and 64.03 Florida Statutes and some of the language of Federal Rule 65(c).

Subsection (c) is 64.05 Florida Statutes from which redundant language has been deleted.

Subsection (d) is 64.06 Florida Statutes with redundant language removed.

718. *Supra* note 716.

before service of process and without notice to the defendant husband. It restrained the husband from interfering with his wife, directed him to deliver an automobile for her use, to remove himself from the parties' residence, to pay necessary expenses and temporary alimony, and his pregnant wife's future medical and hospital expenses. The defendant's motion to vacate that order for want of notice and on its merits was heard after notice and denied. No evidence was presented, and the initial order was adhered to. The district court affirmed.⁷¹⁹

. . . An injunction for a wife's protection from interference or molestation by her husband may be granted without notice properly on a verified divorce complaint which contains sufficient allegations and an adequate showing under rule 3.19, F.R.C.P., 31 F.S.A.; and without bond when inability to make bond is shown as required under §§ 64.02 and 64.03, Fla. Stat., F.S.A.⁷²⁰

K. *Receivers*

Rule 3.20 has been more succinctly and clearly restated, but no substantive changes have been made.

L. *Declaratory Decree*

The parties to the instant suit entered into an alleged leasing agreement pursuant to the terms of which the plaintiff was alleged to have rented a screen tower to the defendants at a stipulated total rental. The lease provided that in the event of the defendants' default in making rental payments, the plaintiff should have the right to enter the defendants' property and repossess the screen tower without the interference of the lessor, its successors or assigns. Upon the defendants' default, the plaintiff cancelled the lease and demanded that they permit him to enter the property pursuant to the terms of the parties' alleged agreement. They refused. Thereupon the plaintiff brought the instant suit for a declaratory decree⁷²¹ to determine whether he and his employees might enter the defendants' property "without being guilty of trespass or any criminal act, or the incurring of any obligation on the plaintiff's part for the removal of the screen tower." After denying the defendants' motion to dismiss, the chancellor tried the cause upon its merits and entered an order in which he found that the court had jurisdiction of the parties and the subject matter, and that the plaintiff could re-enter and repossess his property without interference by any of the defendants. On appeal, the district court reversed⁷²² and remanded the cause to be dismissed without prejudice.

Where the lease agreement provided in clear and unambiguous

719. *Voss v. Voss*, 169 So.2d 351 (Fla. 3d Dist. 1964).

720. *Ibid.*

721. FLA. STAT. ch. 87 (1965).

722. *M. & E. Land Co. v. Siegel*, 177 So.2d 769 (Fla. 1st Dist. 1965).

language that, in the event of default, the lessor should at all times have the right to enter and retake possession of the leased property without interference from the lessee, the allegation of a default and a refusal of the lessee to permit the lessor to enter and retake possession is not a sufficient showing of "doubt" as to the lessor's rights to state a cause of action under chapter 87 of Florida Statutes. Although the declaratory judgment act is a remedial statute which should be liberally construed, it was not intended to circumvent the traditional routes of judicial relief that might be available to the plaintiff, such as the law action of replevin or a bill for injunctive relief in equity, and thereby to evade posting the bond which is required in such cases. In the instant case there was no ambiguity as to the terms or meaning of the lease. The plaintiff's only doubt was as to how to get possession of his property. Therefore, no bona fide question was presented as to the proper construction of a contract "with respect to any act not yet done or any event which has not yet happened," as contemplated by section 87.05. Doubt, because of disputed questions of fact, is not sufficient to make available to litigants the provisions of the declaratory judgments act.⁷²³ "The special objective of chapter 87 should not be perverted by permitting it to be used as a catch-all for any type of proceeding at law or in equity."⁷²⁴

Although our Declaratory Decree Act is broad in its scope and should be liberally construed in order to effectuate its purpose, it was never intended that it *should supplant all other types of civil procedure known to our jurisprudence.*⁷²⁵

The case contained a cogent dissent by Judge Wigginton who would have found that the facts presented a proper case for a declaratory decree. The order appealed was entered after a full hearing on the merits of which the chancellor listened to nearly forty hours of testimony. The mere fact that the terms and provisions of the lease agreement entered into between the parties are clear, unequivocal and unambiguous does not necessarily foreclose the plaintiff's right to seek a declaratory decree. His right to maintain the action arose because of a genuine dispute between the parties as to the existence or non-existence of the plaintiff's rights, status, and other equitable or legal relations under the agreement. A sufficient controversy arose from extrinsic facts to activate the trial court's authority to entertain the declaratory judgment suit.

The mere fact that the contract is clear and unambiguous on its face does not prevent one from seeking a declaration of his rights under such contract where there exist extrinsic facts which would affect the clear and unambiguous language of the written agreement.⁷²⁶

723. Barrett v. Pickard, 85 So.2d 630 (Fla. 1956).

724. Mayes Printing Co. v. Flowers, 154 So.2d 859, 862 (Fla. 1st Dist. 1963).

725. Stark v. Marshall, 67 So.2d 235, 236 (Fla. 1953). (Emphasis supplied.)

726. Bacon v. Crespi, 141 So.2d 823, 825 (Fla. 3d Dist. 1962).

The fact that the plaintiff might also pursue other traditional remedies under the facts of the case does not preclude him from maintaining a suit for a declaratory decree if such suit is otherwise proper. The declaratory judgment act expressly provides: "The existence of another adequate remedy shall not preclude a decree, judgment or order for declaratory relief. . . ."⁷²⁷

727. FLA. STAT. § 87.12 (1965).