Florida Law Review

Volume 4 | Issue 4 Article 2

December 1951

Certiorari in Florida

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CERTIORARI IN FLORIDA

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As the title implies, this article treats only of the law of Florida. There are two constitutional provisions, fourteen statutory provisions, six Supreme Court rules, one common law rule, and more than two hundred fifty Supreme Court decisions, all bearing on the subject. The constitutional provisions, the statutes, and the court rules are intrinsically plain enough; but the decisions are confusing. It is a striking aspect of the case law of certiorari, in Florida as elsewhere, that major portions of many opinions consist of dicta, wholly unnecessary to the decision.[1] These dicta mislead the bar and afford the bench "authority" for later decisions of questionable soundness.

During the past century the Supreme Court of Florida has considered more than two hundred fifty cases purporting to involve the law of certiorari. About sixty of these, however, all decided during the past decade, are interlocutory appeals in equity pursuant to Supreme Court Rule 34, and are certiorari in form only. Such cases are in no true sense of the word "in certiorari." Indeed, under Supreme Court Rule 28, which abrogated the common law practice and procedure in certiorari and substituted a summary proceeding therefor, interlocutory appeals in equity are, strictly speaking, merely in the form of the summary proceeding substituted by the Court for common law certiorari.

Of more than fifty thousand cases heretofore disposed of by our Court, only about three tenths of one percent have actually involved certiorari law. This may serve as a clue to the mystery of the unprecedented proliferation of dicta in court opinions in certiorari cases. Apparently the comparative rarity of cases involving the law of certiorari has somehow or other influenced the judges to write essay after essay on the general topic, when the mere statement of one simple proposition of the law of certiorari would have sufficed for disposition of the case at hand.[2] Even our old friend Judge "Per Curiam" has

[1]37 A.B.A.J. 56 (1951) devotes a whole page to the pronunciation of the word "certiorari." It is obvious that the pronunciation of the word is in the same chaotic state as is the law which deals with it. Pronounce it any way you like; the courts will surely know the word to which you refer.

[2]Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940), for instance, is a long essay on the general topic of certiorari. The facts of the case, however,

succumbed to the seemingly irresistible urge to disregard Lord Chancellor Bacon's warning against an "overspeaking judge." The frequency with which opinions are encountered setting forth numerous points of certiorari law recalls to mind Premier Clemenceau's exclamation when he first heard of Woodrow Wilson's Fourteen Points, *"Le bon Dieu, il n'avait que dix!"*

It will be the aim of this article to classify the decisions into types, and to sift the holdings from the plethora of dicta. But we can give no absolute assurance that we have accurately winnowed the grain from the chaff. If a credulous student should rely on our conclusions, he might flunk the subject in law school. But that should not discourage the practitioner. The avidity with which the Court has clasped to its bosom dictum after dictum as authoritative of the law of certiorari should encourage the practitioner to urge upon it any and every dictum, for such might well turn out to be the key to "substantial justice."

I. Types of Certiorari

In Florida, the student must learn, and the practitioner must cope with, a variety of distinct types of certiorari.[3] These are:

1. Statutory certiorari from the Supreme Court of the United States to the Florida courts for review of federal questions.
2. Common law certiorari from an appellate court to an inferior court to supplement an incomplete appellate record.
3. Common law certiorari from the Supreme Court of Florida to inferior tribunals.
4. Common law certiorari from the circuit courts to inferior tribunals.
5. Common law certiorari from the Supreme Court to the circuit courts to review judgments rendered on appeal from inferior courts, such as civil courts of record and county courts.
6. So-called "certiorari" under Supreme Court Rule 34 to review

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are not stated, and the reader is left without the slightest idea what had been decided in the lower court, what the case was about, and which parts of the opinion are holdings and which dicta. Thus the case is practically valueless to the bar as a precedent.

[3]See Justice Whitfield's catalogue of writs in Kilgore v. Bird, 149 Fla. 570, 579, 6 So.2d 541, 544 (1942).

interlocutory orders in chancery.

In disregard of the precise meaning of "certiorari" the law-makers have employed the term to mean different things. The result is confusion. The term "certiorari" connotes one thing in one kind of case and something different in another. Its different types are distinct; and the characteristics of one shed little light upon those of another.

II. Certiorari from the Supreme Court of the United States to the Florida Courts

No treatment of the law of certiorari in Florida would be complete without taking cognizance of certiorari from the Supreme Court of the United States to state courts. Section 1257 of Title 28 of the United States Code[4] vests jurisdiction in the Supreme Court of the United States to review on certiorari final judgments of the highest court of the state in which a decision could be had, involving the federal questions enumerated.[5] The review, however, is purely discretionary, and not a matter of right as it was prior to the original enactment of the statute on February 13, 1925. Unless four justices desire to hear the case, certiorari will be summarily denied and the merits of the federal questions decided by the state court will not be considered.

Section 1257 is succinct; but the student must not be misled into thinking that it is so simple that it speaks for itself. On the contrary, there is a vast body of case law construing and applying it.[6] When is a judgment final? What are the tests of finality in different types of cases? What is the "highest" court of the state in which a decision could be had in a particular case? What and where must the federal question be raised to make it available in the Supreme Court of the United States? How specifically must the federal question be raised below in order to be available in the Supreme Court of the United States? Despite the fact that a federal question is duly raised in the state courts, is the decision of the state court, perchance, based upon an adequate, independent, nonfederal ground? To what limited extent will the Supreme Court of the United States review findings of fact

[4]An amendment, effective Sept. 1, 1948, of 28 U.S.C. §344 (1946).

[5]28 U.S.C. §1257(3) (Supp. 1950).

[6]See, *e.g.*, the hundreds of cases construing it in 28 U.S.C.A., pp. 89-229 (1949).

by the state court? These are some, but not all, of the questions confronting the practitioner who contemplates review by certiorari in the Supreme Court of the United States.

The answers to all such questions are matters of federal law, beyond the scope of this article. The subject is well covered in texts.[7] But with reference to some questions, especially border-line questions, the practitioner may have to delve further into the numerous federal decisions.

It is to be remembered that certiorari from the Supreme Court of the United States to state courts is statutory, implemented by court rules, whereas certiorari in Florida is the common law writ[8] as modified by court rules and purportedly by statutes.[9]

The federal decisions construing and applying the federal statute are, of course, not conclusive of the Florida law of certiorari; but some of the principles there laid down may constitute persuasive authority in Florida in analogous situations in which the Florida law is not well settled.[10]

III. Certiorari to Supplement a Deficient Record

Obviously a court must have before it the record of the proceedings below when it reviews a case on appeal or certiorari. As discussed elsewhere in this article, only those parts of the record essential to consideration of the matters complained of are ordinarily to be sent up, and no further record is required unless shown by opposing counsel to be necessary.[11]

One of the classical uses of the writ of certiorari was to require that portions of a deficient record be supplied to the reviewing court. Thus, if a respondent, or appellee, considered a record before the superior court to be incorrect or not complete enough to give the

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[7]Notably Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1936); Stern and Gressman, Supreme Court Practice (1950).

[8]With the exception, of course, of interlocutory appeals in chancery, which are certiorari in form only; see Part X *infra*.

[9]As regards power to modify common law certiorari by statute see Part IV *infra*.

[10]For example, there is an excellent body of federal law prescribing the criteria for determining whether a judgment is "final," and indicating the extent to which the Court will review facts in order to determine the legal questions presented.

[11]See Part VII *infra*.

superior court a true picture of the proceedings below, he could petition that court for a writ of certiorari to require the inferior court to send up a corrected record or additional portions of the record.[12] The writ, when used for this purpose, was ancillary to the appeal.[13]

Ordinarily the appellate court would not, *sua sponte*, order a record to be corrected; application therefor was necessary.[14] And of course the clerk of the lower court could not be required, by mandamus, to certify an incorrect copy of a record prepared by an attorney.[15]

This type of certiorari has been used in Florida. In an early case,[16] the Court mentions the practice, saying ". . . if any portion of the record is omitted and the appellee wishes it supplied, he must do so by a motion for a certiorari to bring [it] up." In a more recent case,[17] an effort was made to use certiorari to compel the completion of a record in the Supreme Court on appeal. Although certiorari was in fact denied on the ground that the additional record requested was not necessary to disposition of the case, the implication nevertheless remains that certiorari would have been available if the additional record had been necessary.

Despite the comparative paucity of cases on this method of correcting or supplementing a record deficient for any reason,[18] there is

[12]The costs of the court clerk must be paid before he can be required to certify a record, Debary-Baya Merchants' Line v. Cotter, 34 Fla. 43, 15 So. 581 (1894).

[13]Writ of error has been abolished in Florida and appeal substituted therefor, R. PRAC. SUP. CT. FLA. 2. "Appeal" in this article includes "writ of error" appearing in the older cases cited.

[14]Merchants' Nat. Bank of Jacksonville v. Grunthal, 39 Fla. 388, 22 So. 685 (1897). *But cf.* Turman v. Whaley, 43 Fla. 284, 32 So. 811 (1901).

[15]State *ex rel.* Denman v. Brown, 83 Fla. 339, 91 So. 370 (1922).

[16]Hyer's Ex'rs v. Caro's Ex'tx, 17 Fla. 332, 351 (1879); *accord*, Debary-Baya Merchants' Line v. Cotter, 34 Fla. 43, 15 So. 581 (1894); Basnet v. Jacksonville, 18 Fla. 523 (1882).

[17]Scott v. National City Bank of Tampa, 98 Fla. 908, 124 So. 810 (1929).

[18]*E.g.*, Red Top Cab & Baggage Co. v. Dorner, 159 Fla. 366, 31 So.2d 409 (1947); Acree v. State, 111 Fla. 494, 149 So. 576 (1933); Cotter v. Holmes, 44 Fla. 162, 33 So. 246 (1902) (appeal dismissed when appellant failed to file assignments of error); Merchants' Nat. Bank of Jacksonville v. Grunthal, 39 Fla. 388, 22 So. 685 (1897); Hanover Fire Ins. Co. v. Lewis & Sons, 22 Fla. 568 (1886) (certiorari cannot be used to add matter to the record in the Supreme Court which was not a part of the proceedings below); Caulk v. Fox, 13 Fla. 147 (1869) (certiorari held not available to remedy a defect in the record when appellant filed no record at all); Underwood v. Underwood, 12 Fla. 432 (1868) (motion to dismiss denied on ground that certiorari will be

no logical reason why certiorari cannot still be used for this purpose, unless the present simplified practice provided in the Rules[19] can be said now to exclude the use of the older practice. Certainly, it is hard to conceive of circumstances which would make it expedient for a litigant to pass up this simpler relief in favor of the older, more cumbersome, method by certiorari.

Before discussing the present practice mention might be made, in passing, of a now obsolete method of accomplishing the completion or correction of a deficient record.[20] The practice was to suggest a diminution in the record,[21] upon which a certiorari would be awarded requiring a return to supplement the record; but the obsolescence of this procedure renders further discussion of it unnecessary here.[22]

Today there is ample provision for the completion or correction of a record,[23] and probably no occasion will again occur requiring resort to the old certiorari proceeding. It should be noted that the parties have a duty to use the procedure provided for getting a sufficient and correct record to the Court. If the respondent, or appellee, considers the record inadequate for proper review he should not merely sit back and hope that the Court will dismiss the appeal or petition.[24] And

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awarded to supply a deficiency in the record on suggestion of a diminution and upon a proper showing thereof). Note also that the appellate court may permit the parties to amend a record and that the court will not dismiss a cause because of defect or omission unless the adverse party insists upon it, FLA. STAT. §59.29 (1949).

[19]R. PRAC. SUP. CT. FLA. 11(8) applies in its terms to appeals. Since no separate rule governs the record on certiorari proceedings, however, this rule may be assumed to apply to these also.

[20]R. PRAC. SUP. CT. FLA. 14, adopted March 2, 1905, 37 So. vii, mentioned in Berry v. Barnett, 75 Fla. 268, 78 So. 46 (1918); *see* Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 393, 141 So. 322, 327 (1932); *cf.* Turman v. Whaley, 43 Fla. 284, 32 So. 811 (1901) (record ordered corrected by court *suo motu*); Simpson's Adm'r v. Barnard, 5 Fla. 528 (1854) (disapproving oral admissions in open court to correct defects and supply omissions in the record).

[21]*E.g.*, Red Top Cab & Baggage Co. v. Dorner, 159 Fla. 366, 31 So.2d 409 (1947); Scott v. National City Bank of Tampa, 98 Fla. 908, 124 So. 810 (1929); Berry v. Barnett, 75 Fla. 268, 78 So. 46 (1918); Caulk v. Fox, 13 Fla. 147 (1869); Underwood v. Underwood, 12 Fla. 432 (1868). See especially Merchants' Nat. Bank of Jacksonville v. Grunthal, 39 Fla. 388, 22 So. 685 (1897).

[22]A modern use of a suggestion of a diminution of the record appears in Red Top Cab & Baggage Co. v. Dorner, *supra* note 21; *cf.* Mingo v. Cain, 160 Fla. 254, 34 So.2d 456 (1948).

[23]See notes 19, 22 *supra.*

[24]*But cf.* Moorhead v. Moorhead, 159 Fla. 470, 31 So.2d 867 (1947); Cotter

certainly he should not complain in his brief or oral argument that the record is deficient. The essential record can be brought before the Court; and it should be.[25] If it is not, neither party is in any position to complain about his adversary's action or lack of action with respect to getting a proper record before the Court.[26] The Court has commended litigants for abbreviating records,[27] and has penalized them for failing to do so as required by the rule.[28] Recently the Court has stated that it will be liberal in permitting records to be supplemented where necessary, for the reason that it has encouraged attorneys to abbreviate them.[29]

IV. Constitutional Limitations

The present Constitution vests unqualified jurisdiction in certiorari in the Supreme Court and in the circuit courts.[30] These courts, by

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v. Holmes, 44 Fla. 162, 33 So. 246 (1902).

[25]*E.g.*, Matteson v. Eustis, 134 Fla. 455, 184 So. 15 (1938).

[26]As to what should be in a proper record, see Yandell v. Yandell, 160 Fla. 164, 33 So.2d 869 (1948); R. Prac. Sup. Ct. Fla. 11(12).

[27]*E.g.*, Red Top Cab & Baggage Co., 159 Fla. 366, 370, 31 So.2d 409, 411 (1947); Holland v. State *ex rel.* Goss, 151 Fla. 526, 531, 10 So.2d 338, 340 (1942); State *ex rel.* Watson v. Board of Pub. Instr'n, 144 Fla. 329, 332, 5 So.2d 594, 595 (1942).

[28]R. Prac. Sup. Ct. Fla. 11(2). *E.g.*, Rubinow v. Rubinow, 40 So.2d 561, 562 (Fla. 1949); Leavine v. State, 109 Fla. 447, 453, 147 So. 897, 900 (1933); Whidden v. Rogers, 78 Fla. 93, 97, 82 So. 611, 612 (1919); Anderson v. Harrison, 73 Fla. 1044, 1048, 75 So. 534, 535 (1917); Seaboard A.L. Ry. v. Rentz, 63 Fla. 257, 263, 57 So. 612, 614 (1912); West v. State, 53 Fla. 77, 83, 43 So. 445, 447 (1907); Brown v. State, 44 Fla. 28, 32, 32 So. 107, 108 (1902); Hawkins v. State, 28 Fla. 363, 370, 9 So. 652, 653 (1891).

[29]*See* Mingo v. Cain, 160 Fla. 254, 259, 34 So.2d 456, 458 (1948).

[30]Fla. Const. Art. 5, §§5, 11, 39. The Constitutions of 1838, 1861, and 1865 did not expressly confer jurisdiction in certiorari on the Supreme Court or the circuit courts; but they did expressly vest the Supreme Court with "general superintendence and control of all other courts." The Constitution of 1868, for the first time, expressly vested jurisdiction in certiorari in both the Supreme Court and the circuit courts, and also provided that the Supreme Court might issue all writs necessary "to the complete exercise of its appellate jurisdiction." Presumably the use of the phrase "appellate jurisdiction" excluded the notion that such writs might issue in aid of original jurisdiction. The Constitution of 1885 not only vests jurisdiction in certiorari in the Supreme Court and in the circuit courts but also drops out the word "appellate" in describing writs "necessary or proper to the complete exercise of its jurisdiction." This amend-

virtue of the Constitution, have complete jurisdiction in certiorari; and it is unquestionably concurrent,[31] with but one exception, namely, that certiorari to review judgments of the circuit courts must, of necessity, lie in the Supreme Court only.

The broad language of these provisions raises certain constitutional questions.

The Forum

The first problem with which the practitioner is faced is the question of forum. May certiorari be brought in the first instance in the Supreme Court, or must petitioner resort to the circuit court, with review of its action in the Supreme Court? To date there seems to be no definite answer. It would probably be a mistake to conclude that, since the jurisdiction is concurrent, the petitioner may always, at his option, elect which forum to invoke.

In 1855, an attempt was made to invoke the jurisdiction of the Supreme Court in certiorari to a justice of the peace.[32] The Supreme Court held that, since petitioner had ample remedy in the circuit court, he should apply to that court, and accordingly dismissed the writ; but it added that, in "an appropriate case" (of which this was not one), certiorari might lie from the Supreme Court to any inferior court. This decision seems to imply that, if an adequate remedy by appeal or by certiorari is available in the circuit court, the Supreme

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ment no doubt makes such writs available for all jurisdictional purposes, but such writs are merely "ancillary writs in aid" of jurisdiction and do not enlarge it, State *ex rel.* Watson v. Lee, 150 Fla. 496, 8 So.2d 19 (1942).

It should also be noted that, in *Ex parte* Cox, 44 Fla. 537, 542, 33 So. 509, 510 (1902), the Supreme Court observed that ". . . our present Constitution does not provide that the Supreme Court shall have general superintendence and control of all other courts." It is our view, however, that the specific inclusion of all the extraordinary writs, as well as ancillary writs in aid of jurisdiction, in Art. V, §5, affords ample jurisdiction under the present Constitution for "general superintendence and control of all other courts" as fully as if stated *in haec verba,* as it was in the Constitutions of 1838 and 1861, for it is by means of these writs that the Supreme Court always did, and still does, exercise superintendence and control of the inferior courts.

[31]In a dictum in State v. Sullivan, 95 Fla. 191, 200, 116 So. 255, 259 (1928), Justice Terrell so stated, and correctly so. Then he went on to indicate, though without expressly saying so, that the Legislature might prescribe a dividing line between the jurisdiction of the two courts.

[32]Halliday v. Jacksonville & A. Plank Road Co., 6 Fla. 304 (1855).

Court will ordinarily decline to entertain jurisdiction in certiorari to courts inferior to the circuit courts – except in an "appropriate case,"[33] whatever that may mean.

The only instance we have found in which the Supreme Court ever actually issued the writ to a court inferior to the circuit court occurs in *Harry E. Prettyman, Inc. v. Florida Real Estate Commission.*[34] The Real Estate Commission had brought statutory proceedings before a county judge to revoke a real estate broker's license, and petitioner sought review of the order. But the question of the propriety of the issuance of certiorari from the Supreme Court directly to a county judge was not decided, the writ being quashed on other grounds.

The Supreme Court has very generally entertained original jurisdiction in certiorari to review orders of quasi-judicial bodies, such as the various boards[35] and commissions,[36] notably the Railroad Commission.[37] Certiorari to the Real Estate Commission, however, from

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[33]The Court held in Postal Telegraph-Cable Co. v. Broome, 99 Fla. 272, 126 So. 149 (1930), that certiorari lies to the circuit court, and not to the civil court of record, when the circuit court has affirmed a judgment of a civil court of record.

[34]92 Fla. 515, 109 So. 442 (1926).

[35]*E.g.*, Tau Alpha Holding Corp. v. Board of Adjustments, 126 Fla 858, 171 So. 819 (1937); State *ex rel.* Tullidge v. Driskell, 117 Fla. 717, 158 So. 277 (1934).

[36]*E.g.*, State *ex rel.* Hathaway v. Williams, 149 Fla. 48, 5 So.2d 269 (1941); West Flagler Amusement Co. v. State Racing Comm'n, 122 Fla 222, 165 So. 64 (1935); Six Mile Creek Kennel Club, Inc. v. State Racing Comm'n, 119 Fla. 142, 161 So. 58 (1935); Sirmans v. Owen, 87 Fla. 485, 100 So. 734 (1924).

[37]*E.g.*, Petroleum Carrier Corp. v. Florida R.R. & P.U. Comm'n, 50 So.2d 528 (Fla. 1951); Atlantic C.L.R.R. v. King, 47 So.2d 514 (Fla. 1950); Atlantic C.L.R.R. v. United States Sugar Corp., 47 So.2d 513 (Fla. 1950); Orlando Trans. Co. v. Florida R.R. & P.U. Comm'n, 160 Fla. 795, 37 So.2d 321 (1948); Leonard Bros. Trans. & Storage Co. v. Douglass, 159 Fla. 510, 32 So.2d 156 (1947); Atlantic C.L.R.R. v. Railroad Comm'n, 149 Fla. 245, 5 So.2d 708 (1942); Great So. Trucking Co. v. Douglas, 147 Fla. 552, 3 So.2d 526 (1941); Tamiami Trail Tours, Inc. v. Florida Railroad Comm'n, 128 Fla. 25, 174 So. 451 (1937); *In re* Grubb, 116 Fla. 387, 156 So. 482 (1934); Seaboard A.L. Ry. v. Wells, 100 Fla. 1631, 131 So. 777 (1931); *In re* Edwards, 100 Fla. 989, 130 So. 615 (1930); Seaboard A.L. Ry. v. Wells, 100 Fla. 1027, 130 So. 587 (1930); Florida Motor Lines, Inc. v. Railroad Comm'rs, 100 Fla. 538, 129 So. 876 (1930). These are by no means all the illustrative cases in which the Supreme Court has entertained such jurisdiction, thus tacitly reaffirming its willingness to entertain such jurisdiction. It has apparently not held that the circuit courts lack jurisdiction in certiorari to the Railroad Commission; but this is unimportant, for almost every petitioner would prefer to invoke the

either the Supreme Court or a circuit court, is quite unnecessary, and should not be granted, because adequate appeals to the circuit court, and thence to the Supreme Court, are expressly provided by statute.[38]

On the other hand, in five cases the Supreme Court has reviewed certiorari proceedings in circuit courts involving the director of the beverage department, the Board of Medical Examiners, the State Treasurer, a board of public instruction and a civil service board;[39] and in none of them did it notice any impropriety in the assumption by the circuit court of jurisdiction to issue certiorari to these quasi-judicial bodies.[40] And in three other cases it has reviewed proceedings in circuit courts on certiorari to county courts and county judges' courts, without noting any impropriety in the assumption of jurisdiction by the circuit courts in the certiorari proceedings.[41]

The decisions shed very little light on the question of the ap-

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settled jurisdiction of the Supreme Court.

[38]FLA. STAT. §§475.35, 475.36 (1949). In Smith v. Burch, 159 Fla. 52, 30 So.2d 647 (1947), the Supreme Court held that in view of these statutes the order of the circuit court reversing an order of the Real Estate Commission might be reviewed in the Supreme Court either by certiorari or by appeal. This holding is directly contrary to the rule that certiorari will not lie if there is an adequate remedy by appeal. There is, of course, an exception to this rule, namely, judgments void for want of jurisdiction. These may be stricken on motion, attacked collaterally, reversed on appeal, or quashed on certiorari, *e.g.*, McGee v. McGee, 156 Fla. 346, 22 So.2d 788 (1945); Horn v. Miami Beach, 142 Fla. 178, 194 So. 620 (1940); Watkins v. Johnson, 139 Fla. 712, 191 So. 2 (1939); Kroier v. Kroier, 95 Fla. 865, 116 So. 753 (1928); Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926).

[39]Schott v. Brooks, 56 So.2d 456 (Fla. 1952); Pensacola v. Maxwell, 49 So.2d 527 (Fla. 1950); Laney v. Holbrook, 149 Fla. 670, 6 So.2d 623 (1942); Knott v. State *ex rel.* Hanks, 140 Fla. 713, 192 So. 472 (1939); State *ex rel.* Landis v. Simmons, 104 Fla. 487, 140 So. 187 (1932).

[40]Of course, proceedings in certiorari in circuit courts are reviewable in the Supreme Court by appeal only and not by another writ of certiorari, Schott v. Brooks, 56 So.2d 456 (Fla. 1952); Pensacola v. Maxwell, 49 So.2d 527 (Fla. 1950); Bernhart v. Peebles, 153 Fla. 431, 14 So.2d 722 (1943); Laney v. Holbrook, 149 Fla. 670, 6 So.2d 623 (1942); Knott v. State *ex rel.* Hanks, 140 Fla. 713, 192 So. 472 (1939); Jacques v. Wellington Corp., 135 Fla. 167, 184 So. 766 (1938); Tau Alpha Holding Corp. v. Board of Adjustments, 126 Fla. 858, 171 So. 819 (1937); Sirmans v. Owen, 87 Fla. 485, 100 So. 734 (1924); Deans v. Wilcoxon, 18 Fla. 531 (1882); Edgerton v. Green Cove Springs, 18 Fla. 528 (1882).

[41]Ragland v. State, 55 Fla. 157, 46 So. 724 (1908) (misdemeanor); Louisville & N.R.R. v. Sutton, 54 Fla. 247, 44 So. 946 (1907) (tort action in county judge's court); Deans v. Wilcoxon, 18 Fla. 531 (1882) (probate order for sale of real estate to pay debts of decedent).

propriate forum in certiorari. The answer is still a matter of guesswork in many instances. The criterion may eventually be established, as it already has been in some jurisdictions, that the Supreme Court will refuse original jurisdiction in certiorari in cases which can appropriately be handled by the circuit courts. Or it may — and it is not unlikely to do so — apply to certiorari the principle enunciated in mandamus cases,[42] and in an earlier quo warranto case,[43] namely, that it will not exercise its concurrent original jurisdiction unless there is ". . . involved some grave question of general law, possibly controlling in other cases of like character, and thereby necessitating an early decision in the interest of avoiding unnecessary litigation . . . ." Accordingly, when no such question appears, petitioner may be relegated to the circuit court, which has co-ordinate jurisdiction, subject of course to appropriate appellate review.

Statutes Prescribing the Forum

A cognate problem with respect to the appropriate forum for certiorari arises, and may arise in the future, from the enactment of statutes purporting to prescribe the forum in certiorari.[44] Three of these specifically accord jurisdiction in certiorari to the circuit courts, which already had such jurisdiction under the Constitution; and the other two vaguely point to the circuit courts. These statutes do not purport to deprive the Supreme Court of its co-ordinate jurisdiction. Accordingly, in this particular, they do not seem to infringe the Constitution;[45] the Court has apparently had no occasion to consider this constitutional question.[46]

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[42]*E.g.*, Newberry v. Harris, 114 Fla. 379, 153 So. 901 (1934); Humphreys v. State *ex rel.* Palm Beach Co., 108 Fla. 92, 110, 145 So. 858, 865 (1933).

[43]State *ex rel.* Watkins v. Fernandez, 106 Fla. 779, 143 So. 638 (1932).

[44]FLA. STAT. §§81.28, 176.16-21, 458.12, 462.15, 630.12 (1949). These five statutes designate a forum in certiorari. The first, an ancient statute appearing in THOMPSON'S DIGEST 364-365, provides for certiorari to justices of the peace from "the appropriate appellate court." The circuit courts had such jurisdiction without aid of the statute; and the Supreme Court also had such jurisdiction in "an appropriate case," Halliday v. Jacksonville & A. Plank Road Co., 6 Fla. 304 (1855). The other four sections are discussed later in the text of this Part IV.

[45]If, however, these statutes be construed, pursuant to the maxim *expressio unius est exclusio alterius*, to exclude the jurisdiction of the Supreme Court, then they will most likely be held unconstitutional in that particular.

[46]In State *ex rel.* Landis v. Simmons, 104 Fla. 487, 140 So. 187 (1932), however, the Supreme Court held jurisdictional the venue provision in what

It is to be remembered, in this connection, that the Constitution places no express limitation on the power of the Legislature to prescribe, in either general or specific terms, which court, that is, the Supreme Court or the circuit court, shall in various instances exercise the concurrent jurisdiction in certiorari provided in the Constitution. But the express grant of concurrent jurisdiction[47] necessarily places an implied limitation on the power of the Legislature to deprive either court of any of its constitutional jurisdiction.

The line of jurisdictional demarcation between the two courts is presently wavering and broken. As time passes, there should emerge from further decisions a rationalizing principle allocating discrete instances to their appropriate forum.

Legislative Regulation

Still a third problem confronts the practitioner: To what extent is the Legislature constitutionally competent to *regulate* certiorari (1) in the Supreme Court, and (2) in the circuit courts? This problem arises from the statutes discussed above as well as from others,[48] and is likely to arise from future statutes.

Before discussing the statutes and decisions in detail, it should be noted that, for some reason or other, the Supreme Court has seemingly adopted a "touch-me-not" attitude, with reference to legislation concerning its constitutional original jurisdiction in certiorari, altogether at variance with a hundred years' complacency with reference to much comparable legislative regulation of its constitutional appellate jurisdiction.

In what is now Section 33.12 of Florida Statutes 1949 the Legislature provided for review by certiorari, in the Supreme Court, of orders of circuit courts on appeals from civil courts of record, although of course, under the Constitution, the Supreme Court already had such jurisdiction without statutory aid. And in its exuberance, the Legislature provided further that the review by certiorari should be ". . . with the same power and authority in the case as if it had been

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is now FLA. STAT. §458.12 (1949), and prohibited certiorari proceedings in a circuit court other than the one specified in the statute. This is an approval of the constitutional power of the Legislature to prescribe venue in certiorari in the circuit courts.

[47]FLA. CONST. Art. V, §5 (to Supreme Court), §11 (to circuit court).

[48]*E.g.*, FLA. STAT. §§33.12, 350.641 (1949).

carried by writ of error to the supreme court . . . ," thus intending to afford two appeals from the judgments of civil courts of record. This provision was directly in the teeth of the settled common law rule that the scope of the inquiry, in certiorari to inferior courts, is limited to issues of jurisdiction and procedural regularity. So the question was bound to arise whether the Legislature was constitutionally competent to modify the scope of the inquiry in the common law writ, which the constitutional writ is; and it did arise.

In *Harrison v. Frink*,[49] the Supreme Court noticed this question and quoted from its earlier decisions to the effect that the writ of certiorari cannot be made to serve the purpose of an appeal or writ of error; but it did not expressly decide the question, finding instead that the lower court had committed no error. In order to make this very finding, however, it of necessity indulged in the very inquiry which it doubted its constitutional power to make.[50] Then came *American Railway Express Co. v. Weatherford*.[51] On the first writ a concurring opinion opined that this statute empowered the Court to examine the case, as if upon writ of error, in order to determine whether there was any substantial evidence to support the verdict. But on the second appearance of the case the Court repudiated this theory and stated that the scope of the inquiry on certiorari, despite the statute, should be confined to its well-settled limits. There again, however, the Court apparently considered the entire record, bill of exceptions and all, just as if the case were before it on writ of error, and, finding no error, quashed the writ.

Finally, in *Atlantic Coast Line R.R. v. Florida Fine Fruit Co.*,[52] it held what is now Section 33.12 of Florida Statutes 1949 unconstitutional to the extent that it purported to enlarge the scope of inquiry in certiorari to the equivalent of a writ of error or appeal, despite the fact that in more than forty instances[53] it had decided case after case on

[49]75 Fla. 22, 77 So. 663 (1918).

[50]*Cf.* Holmberg v. Toomer, 78 Fla. 116, 82 So. 620 (1919); First Nat. Bank of Gainesville v. Gibbs, 78 Fla. 118, 82 So. 618 (1919). In both, the Supreme Court indicated its mood to invalidate this statute.

[51]84 Fla. 264, 93 So. 740 (1922) (writ issued), 86 Fla. 626, 98 So. 820 (1924) (writ quashed).

[52]93 Fla. 161, 112 So. 66 (1927). Here again, however, the Court apparently considered the case as if before it on writ of error, and accordingly quashed the judgment below. *Cf.* Medlin-Peacock Buick Co. v. Broward, 101 Fla. 600, 135 So. 156 (1931).

[53]See Part V *infra*.

certiorari exactly as if the cases were before it on appeal. Then, when reminded of the constitutional common law limitation, it found that the Legislature lacked the power to direct it to consider cases in certiorari as if on appeal. In so holding it took no notice of its more than forty prior inconsistent decisions. In many of those cases it had reversed orders of the circuit courts in appeals from inferior courts, thereby depriving the successful litigants in the circuit courts of their constitutional right to rely on the finality of the appellate jurisdiction of the circuit courts.

In 1949 the Legislature enacted what is now Section 350.641 of Florida Statutes 1949, prescribing the practice and procedure in the Supreme Court in certiorari to the Railroad and Public Utilities Commission. Despite the strong language in *Brinson v. Tharin*,[54] it is believed that the Court will not strike down this statute, in view of the express constitutional grant to the Legislature of authority to clothe this particular commission with judicial powers.[55]

Sections 176.16-21, 458.12 and 462.15 of Florida Statutes 1949 are unique. They authorize certiorari from circuit courts (1) to municipal boards of adjustment in zoning, (2) to the Board of Medical Examiners, and (3) to the Board of Naturopathic Examiners. Of course, the circuit courts had such jurisdiction, under the Constitution, without aid of statute. The unique feature of these statutes, however, is that, in addition to a gratuitous and constitutionally superfluous grant of jurisdiction in certiorari to the circuit courts, the Legislature in each instance provided for trials de novo, including the taking of testimony, and for the entry of such judgments as the circuit courts might deem proper. This provision raises at least three major questions.

> First, do these statutes prescribe new types of statutory "certiorari," in which controversies are to be retried on both the facts and the law rather than reviewed on limited legal questions? If so, the word "certiorari" has lost all meaning.
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> Second, do not the circuit courts under Article V, Section 11, of the Constitution enjoy the identical constitutional immunity from legislative interference with their jurisdiction in certiorari which the Supreme Court enjoys under Article V, Section 5?
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> Third, if these statutes are unconstitutional, as unwarranted

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[54]99 Fla. 696, 127 So. 313 (1930).

[55]FLA. CONST. Art. V, §35.

> interference by the Legislature with the constitutional common law jurisdiction in certiorari, may they be rescued from oblivion by regarding them as statutory appeals, inept and misnamed as they are, which the Legislature is competent to authorize?[56]

The answers to the foregoing questions are anybody's guess.

In what is now Section 630.12 of Florida Statutes 1949 the Legislature has provided for certiorari from "the circuit court in and for Leon county" to review certain insurance rate orders of the Insurance Commissioner. The Supreme Court presumably will respect the venue provision of this statute.[57] But a serious question arises, under the Constitution, as to the effect of the statutory provision for *factual* review in certiorari. That constitutional question may be avoided if the Court holds that this statute provides a statutory appeal; but then the question may arise as to whether the Legislature may authorize review by the circuit court of orders of state officers.

The very peculiar nature of the circuit court review intended by the four statutes referred to above[58] makes it difficult to determine what form of proceedings the Supreme Court would entertain to review the action of the circuit courts under these statutes. If they are regarded as in certiorari, as the statutes denominate them, then review in the Supreme Court must be by appeal.[59] If, on the other hand, these statutes are construed as affording "appeals" to the circuit courts, then, under the Constitution, Supreme Court review of circuit court orders under Sections 176.16-21 must be by certiorari, for that statute does not provide for an appeal to the Supreme Court;[60] but review of circuit court orders under Sections 458.12, 462.15 and 630.12[61] will be by appeal to the Supreme Court in accordance with

[56]That the Court will so regard them seems to be indicated by State *ex rel.* De Gaetani v. Driskell, 139 Fla. 49, 190 So. 461 (1939); Page v. Watson, 140 Fla. 536, 192 So. 205 (1938); State *ex rel.* Tullidge v. Driskell, 117 Fla. 717, 158 So. 277 (1934); State *ex rel.* Tullidge v. Hollingsworth, 108 Fla. 607, 146 So. 660 (1933); State *ex rel.* Landis v. Simmons, 104 Fla. 487, 140 So. 187 (1932). *Cf.* FLA. CONST. Art. V, §11, as to legislative power to authorize appeals to circuit courts.

[57]See note 46 *supra.*

[58]FLA. STAT. §§176.16-21, 458.12, 462.15, 630.12 (1949).

[59]See note 13 *supra.*

[60]FLA. CONST. Art. V, §5; automatic right of appeal is limited to specified instances or to cases originating in the circuit courts.

[61]FLA. STAT. §630.12 (1949) does not expressly provide for an appeal to the Supreme Court, although it does do so by implication.

the provisions of those statutes.[62]

Having held that the Legislature was not constitutionally competent to *enlarge* the Supreme Court's powers or jurisdiction in certiorari, the Court logically decided that the Legislature could not curtail such powers or jurisdiction. Indeed, the lack of legislative power to curtail jurisdiction is more clearly indicated by the Constitution than the lack of legislative power to enlarge jurisdiction. In a uniform line of decisions, the Court has repeatedly held and declared that the Legislature may not curtail the powers of the Supreme Court in certiorari.[63] Four of the cases cited involved the question whether the power of the Supreme Court to entertain certiorari under Section 33.12 was subject to the thirty-day statute of limitations therein prescribed.[64] The Court uniformly held that the statute did not, and could not, apply. It is to be noted, however, that this holding involved only cases in which the judgments attacked were void for lack of jurisdiction in the lower courts. No case has been found applying the ruling to a judgment merely voidable for irregularity of procedure, or to an order of a board or commission contravening the essential requirements of the law. What position the Court would take in the case of a voidable judgment or order is yet to be decided. Thus, for example, in the absence of Supreme Court Rule 28(a), would the Court strike down as unconstitutional the sixty-day limitation prescribed by statute for certiorari to the Railroad Commission?[65]

If we may rely on the emphatic language in the opinions cited,[66] then each and every statutory interference with the Supreme Court's

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[62]South Atl. S.S. Co. v. Tutson, 139 Fla. 405, 190 So. 675 (1939), followed or cited with approval in Alcoma Citrus Cooperative v. Isom, 159 Fla. 10, 30 So.2d 528 (1947); Davis v. Artley Constr'n Co., 154 Fla. 481, 18 So.2d 255 (1944); Florida Forest & Park Serv. v. Strickland; 154 Fla. 472, 18 So.2d 251 (1944); Cone Bros. Contracting Co. v. Allbrook, 153 Fla. 829, 16 So.2d 61 (1943); Weaver-Loughridge Lumber Co. v. Coleman, 139 Fla. 823, 191 So. 16 (1939).

[63]Sinclair Ref. Co. v. Hunter, 139 Fla. 89, 190 So. 501 (1939); Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932); Edwards v. Knight, 100 Fla. 1704, 132 So. 459 (1931); Brinson v. Tharin, 99 Fla. 696, 127 So. 313 (1930); Palmer v. Johnson, 97 Fla. 479, 121 So. 466 (1929); *see* State *ex rel.* Buckwater v. Lakeland, 112 Fla 200, 206, 150 So. 508, 511 (1933) (a mandamus case, applying the law of certiorari by analogy).

[64]FLA. STAT. §33.12 (1949), enacted as Fla. Laws 1915, c. 6904.

[65]FLA. STAT. §350.641(1) (1949).

[66]See note 63 *supra.*

constitutional jurisdiction in certiorari is a nullity. But it is not to be overlooked that the opinions in which the Court has used such broad and sweeping language involved judgments void, or allegedly void, for want of jurisdiction; and of course such judgments are nullities and can be set aside in a number of ways, and at any time.[67] This being so, the doctrine of constitutional immunity from legislative regulation of certiorari may not actually be so broad as the language of the opinions seems to indicate; and in final analysis the Court may acquiesce in legislative regulation of certiorari in unpredictable instances.

V. Scope of the Inquiry in Common Law Certiorari

Review by certiorari is quite different in principle from review by appeal. On appeal all errors below may be corrected: jurisdictional, procedural, and substantive; and judgments below may be modified, reversed, remanded with directions, or affirmed.[68] But in common law certiorari, the review is supposed to be strictly limited. It comprehends only (1) jurisdiction below, and (2) the regularity of the procedure followed below. It does not afford complete review of the litigation nor does it extend to the correctness of rulings of inferior courts on substantive law.[69] The Supreme Court has so stated time

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[67]McGee v. McGee, 156 Fla. 346, 22 So.2d 788 (1945).

[68]Fla. Stat. §59.34 (1949). The rules of decision on appeals form no part of this article. Furthermore, this topic is limited to common law certiorari and does not embrace interlocutory appeals in chancery, which are merely in the form of certiorari and in which "any and all harmful errors whether upon the evidence or otherwise," *i.e.*, errors of fact or law, are reviewed. American Nat. Bank of Jacksonville v. Marks Lumber & Hardware Co., 45 So.2d 336, 337 (Fla. 1950). See Part X *infra*.

[69]On the other hand, whenever quasi-judicial actions of boards, bodies, officers, and commissions are reviewed by certiorari, the Supreme Court has said that the scope of review is not limited to questions of jurisdiction and regularity of procedure but extends to all questions of law, and that "simple errors" will be corrected, Seaboard A.L. Ry. v. Wells, 100 Fla. 1631, 131 So. 771 (1931); Seaboard A.L. Ry. v. Wells, 100 Fla. 1027, 130 So. 587 (1930); Florida Motor Lines, Inc. v. Railroad Comm'rs, 100 Fla. 538, 129 So. 876 (1930); *see* American Nat. Bank of Jacksonville v. Marks Lumber & Hardware Co., 45 So.2d 336, 337 (Fla. 1950). Between 1930, when the rule was first announced and applied, and 1950, when it was reiterated, the Supreme Court has repeatedly reviewed commission orders, in line with the doctrine announced, thus applying and tacitly reaffirming the rule. It has not discussed the rationale

and again.[70] More explicitly, it has said that if the lower court had jurisdiction and "proceeded" in conformity to law, the inquiry on certiorari is at an end, and the writ will be quashed.[71] It has restated the rule in other words, namely, that on certiorari the subject matter

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of the distinction, and some lawyers doubt the validity of making a distinction between the scope of the review of judicial and quasi-judicial action; however, the distinction is now well settled.

It should be mentioned in passing that mandamus will lie to command quasi-judicial boards or commissions to do, or not to do, acts concerning which they have no discretion, State *ex rel.* Allen v. Rose, 123 Fla. 544, 167 So. 21 (1936); State *ex rel.* R. C. Motor Lines v. Florida R.R. Comm'n, 123 Fla. 345, 166 So. 840 (1936); West Flagler Amusement Co. v. State Racing Comm'n, 122 Fla. 222, 165 So. 64 (1935). Certiorari is also available as a remedy under such circumstances, Orlando Transit Co. v. Florida R.R. & P.U. Comm'n, 160 Fla. 795, 37 So.2d 321 (1948). But when the matter complained of is discretionary, and abuse of discretion is alleged, then the sole remedy is certiorari, State *ex rel.* Allen v. Rose, 123 Fla. 544, 167 So. 21 (1936); *In re* Grubb, 116 Fla. 387, 156 So. 482 (1934), as is the case when abuse of discretion by an inferior court is charged, Edwards v. Knight, 104 Fla. 16, 139 So. 582, *aff'd*, 104 Fla. 16, 143 So. 441 (1932).

[70]*E.g.*, Cacciatore v. State, 147 Fla. 758, 3 So.2d 584 (1941); Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932); Vanderpool v. Spruell, 104 Fla. 347, 139 So. 892 (1932); Hamway v. Seaboard A.L. Ry., 101 Fla. 1483, 136 So. 628 (1931); Brundage v. O'Berry, 101 Fla. 320, 134 So. 520 (1931); Gilbert v. State, 98 Fla. 599, 124 So. 1 (1929); Peaden v. State, 90 Fla. 84, 105 So. 142 (1925); Harrison v. Frink, 75 Fla. 22, 77 So. 663 (1918); Seaboard A.L. Ry. v. Ray, 52 Fla. 634, 42 So. 714 (1906); Hunt v. Jacksonville, 34 Fla. 504, 16 So. 398 (1894); Jacksonville T. & K.W. Ry. v. Boy, 34 Fla. 389, 16 So. 290 (1894); Deans v. Wilcoxon, 18 Fla. 531 (1882). The recent case of Holland v. Miami Springs Bank, 53 So.2d 646 (Fla. 1951), is an example of jurisdiction in certiorari to quash an order involving procedural irregularity.

[71]*E.g.*, Nation v. State, 155 Fla. 858, 22 So.2d 219 (1945); Greater Miami Devel. Corp. v. Pender, 142 Fla. 390, 194 So. 867 (1940); Guaranty Life Ins. Co. of Fla. v. Hall Bros. Press, Inc., 138 Fla. 176, 189 So. 243 (1939); Mutual Ben. H. & A. Ass'n v. Bunting, 133 Fla. 646, 183 So. 321 (1938); Shayne v. Pike, 131 Fla. 71, 178 So. 903 (writ issued), 131 Fla. 862, 180 So. 382 (1938) (judgment quashed); Young v. Stoutamire, 131 Fla. 535, 179 So. 797 (1938); Atlantic C.L.R.R. v. Farris & Co., 111 Fla. 412, 149 So. 561 (1933); Florida E.C.R.R. v. Anderson, 110 Fla. 290, 148 So. 553 (1933); Whitlock v. American Cent. Ins. Co., 107 Fla. 13, 144 So. 412 (1932); Segel v. Staiber, 106 Fla. 946, 144 So. 875 (1932); Ferlita v. Fiagarrota, 106 Fla. 578, 145 So. 605 (1932); Myer-Kotkin v. Walker, 101 Fla. 455, 134 So. 538 (1931); Peaden v. State, 90 Fla. 84, 105 So. 142 (1925); Benton v. State, 74 Fla. 30, 76 So. 341 (1917); Seaboard A.L. Ry. v. Ray, 52 Fla. 634, 42 So. 714 (1906); Edgerton v. Green Cove Springs, 18 Fla. 528 (1882); Basnet v. Jacksonville, 18 Fla. 523 (1882).

of the suit in the lower court will not be reinvestigated, tried or determined on the merits.[72]

If a litigant has no right of appeal as such, he is not supposed to get the equivalent when his remedy is limited to certiorari. The Court has advanced a reason why the scope of inquiry on certiorari should be limited, as compared to appeal, and why it should not be extended so as to serve the same purpose as appeal. That reason is that if, in cases originating in courts inferior to the circuit courts, another appeal from the circuit court is afforded in the guise of certiorari, then a litigant will have two appeals from the court of lesser jurisdiction, and yet be limited to only one appeal in cases originating in the court of greater jurisdiction.[73] The writ does not issue to give an aggrieved party a second appeal.[74] Another and more important reason for this proposition is that the Constitution of Florida gives the circuit courts final appellate jurisdiction of most cases originating in inferior courts;[75] and if the Supreme Court gives what amounts to a second appeal, by means of certiorari, it is not complying with the Constitution, but is rather taking unto itself the circuit courts' final appellate jurisdiction, conferred upon them by the Constitution, and depriving litigants of final judgments there obtained.

As corollary to the foregoing, the Court has also repeatedly held that certiorari cannot serve as an appeal,[76] and furthermore that when-

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[72]Orlando Trans. Co. v. Florida R.R. & P.U. Comm'n, 160 Fla. 795, 37 So.2d 321 (1948); Wallendorf v. New York Life Ins. Co., 152 Fla. 574, 12 So.2d 585 (1943); Jacksonville Amer. Pub. Co. v. Jacksonville Paper Co., 143 Fla. 835, 197 So. 672 (1940); Knott v. State *ex rel.* Hanks, 140 Fla. 713, 192 So. 472 (1939); State *ex rel.* Associated Utilities Corp. v. Chillingworth, 132 Fla. 587, 181 So. 346 (1938); Jacksonville Beach v. Waybright, 130 Fla. 525, 178 So. 401 (1938); American Ry. Exp. Co. v. Fegenbush, 107 Fla. 145, 144 So. 320 (1932); Atlantic C.L.R.R. v. Florida Fine Fruit Co., 93 Fla. 161, 112 So. 66 (1927); American Ry. Exp. Co. v. Weatherford, 84 Fla. 264, 93 So. 740 (1922); Benton v. State, 74 Fla. 30, 76 So. 341 (1917); Ragland v. State, 55 Fla. 157, 46 So. 724 (1908); Basnet v. Jacksonville, 18 Fla. 523 (1882).

[73]Flash Bonded Storage Co. v. Ades, 152 Fla. 482, 12 So.2d 164 (1943).

[74]Nation v. State, 155 Fla. 858, 22 So.2d 219 (1945).

[75]FLA. CONST. Art. V, §11. Probate constitutes the one exception to this rule.

[76]*E.g.*, Nation v. State, 155 Fla. 858, 22 So.2d 219 (1945); Flash Bonded Storage Co. v. Ades, 152 Fla. 482, 12 So.2d 164 (1943); Laney v. Holbrook, 149 Fla. 670, 6 So.2d 623 (1942); Greater Miami Devel. Corp. v. Pender, 142 Fla. 390, 194 So. 867 (1940); Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940); Knott v. State *ex rel.* Hanks, 140 Fla. 713, 192 So. 472 (1939); Mutual Ben. H. & A. Ass'n v. Bunting, 133 Fla. 646, 183 So. 321 (1938);

ever there is an adequate[77] appellate remedy, the dissatisfied litigant must appeal and certiorari will not ordinarily be granted.[78]

It is also well settled that appeal is a matter of right, whereas review

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Young v. Stoutamire, 131 Fla. 535, 179 So. 797 (1938); Robbins Holding Co. v. Morris, 131 Fla. 205, 179 So. 404 (1938); Shayne v. Pike, 131 Fla. 71, 178 So. 903 (1938); Mitchell v. Shields, 128 Fla. 536, 175 So. 524 (1937); Des Rocher & Watkins Towing Co. v. Third Nat. Bank, 106 Fla. 466, 143 So. 768 (1932); Medlin-Peacock Buick Co. v. Broward, 101 Fla. 600, 135 So. 156 (1931); Edwards v. Knight, 100 Fla. 1704, 132 So. 459 (1931); Dowling v. State, 98 Fla. 523, 124 So. 12 (1929); Holmberg v. Toomer, 78 Fla. 116, 82 So. 620 (1919); First Nat. Bank of Gainesville v. Gibbs, 78 Fla. 118, 82 So. 618 (1919); Harrison v. Frink, 75 Fla. 22, 77 So. 663 (1918); Benton v. State, 74 Fla. 30, 76 So. 341 (1917); Seaboard A.L. Ry. v. Ray, 52 Fla. 634, 42 So. 714 (1906); Mernaugh v. Orlando, 41 Fla. 433, 27 So. 34 (1899); Hunt v. Jacksonville, 34 Fla. 504, 16 So. 398 (1894); Basnet v. Jacksonville, 18 Fla. 523 (1882).

[77]Howard v. Sharlin, 52 So.2d 417 (Fla. 1951); Lorenzo v. Murphy, 159 Fla. 639, 32 So.2d 421 (1947); Kilgore v. Bird, 149 Fla. 570, 6 So.2d 541 (1942).

[78]*E.g.*, Florio v. Colquitt Hardware Co., 160 Fla. 92, 33 So.2d 722 (1948); Lorenzo v. Murphy, 159 Fla. 639, 32 So.2d 421 (1947); Pennekamp v. Circuit Court, 155 Fla. 589, 21 So.2d 41 (1945); Lorenz v. Lorenz, 152 Fla. 779, 13 So.2d 806 (1943); Saffran v. Adler, 152 Fla. 405, 12 So.2d 124 (1943); Dade Realty Corp. v. Schoenthal, 149 Fla. 674, 6 So.2d 845 (1942); Cacciatore v. State, 147 Fla. 758, 3 So.2d 584 (1941); Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940); Storrs v. Storrs, 139 Fla. 270, 190 So. 512 (1939); Pasco County v. Lang, 129 Fla. 387, 176 So. 430 (1937); Sweat v. Waldon, 123 Fla. 478, 167 So. 363 (1936); Harrell v. Martin, 114 Fla. 147, 154 So. 186 (1934); Amos v. Powell, 108 Fla. 139, 146 So. 195 (1933); Coslick v. Finney, 104 Fla. 394, 140 So. 216 (1932); Gilbert v. State, 98 Fla. 599, 124 So. 1 (1929); Chambers v. St. Johns County, 94 Fla. 814, 114 So. 526 (1927); Haile v. Gardner, 82 Fla. 355, 91 So. 376 (1921); Holmberg v. Toomer, 78 Fla. 116, 82 So. 620 (1919); First Nat. Bank of Gainesville v. Gibbs, 78 Fla. 118, 82 So. 618 (1919); Harrison v. Frink, 75 Fla. 22, 77 So. 663 (1918); Edgerton v. Green Cove Springs, 18 Fla. 528 (1882). *But see* Smith v. Burch, 159 Fla. 52, 30 So.2d 647 (1947) (circuit court reversal of order of commission held reviewable by certiorari and also by appeal); McGee v. McGee, 156 Fla. 346, 350, 22 So.2d 788, 790 (1945) (a judgment or decree appearing on the face of the record to be void for lack of jurisdiction may be set aside and stricken from the record at any time on certiorari, even though other remedies may likewise be available).

Even though no right of appeal exists at the time of the petition for certiorari, if any such right ever did exist, certiorari will not lie; that is to say, if a litigant loses his right of appeal by failure to prosecute his appeal with due diligence, and lets the time for appeal expire, he cannot then get review by certiorari except where the right of appeal has been lost through no fault

by certiorari is discretionary with a court.[79] The older cases show that the discretion to be exercised by the court originally had two phases: (1) discretion as to whether the writ should issue; and (2), the writ having been issued, discretion as to whether the judgment or order below should be quashed. In modern practice under Supreme Court Rule 28 and Common Law Rule 55, however, the petition, record, and briefs are sent up, and the questions presented are argued in the first instance. No writ ever actually issues. Therefore, today, the court's discretion has only one phase, namely, discretion as to whether the order or judgment below should be quashed.

The Supreme Court has often proclaimed that it will not review and weigh conflicting evidence, and that when there is evidence to support the finding of the lower court the judgment will not be disturbed;[80] but it has not by any means always been ruled by the

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of petitioner, Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940); Amos v. Powell, 108 Fla. 139, 146 So. 195 (1933); Salario v. Latin-American Bank, 104 Fla. 256, 139 So. 899 (1932).

And see Pitts v. Pitts, 120 Fla. 363, 162 So. 708 (1935), stating that jurisdiction of circuit court in probate is both appellate and supervisory, and that therefore probate orders are subject to attack by direct appellate proceedings, or by certiorari, or by bill in equity, provided the invalid order was made without jurisdiction. Quaere: Would certiorari lie if the county judge's order was made with jurisdiction?

[79]*E.g.*, Lorenzo v. Murphy, 159 Fla. 639, 32 So.2d 421 (1947); Jacksonville Amer. Pub. Co. v. Jacksonville Paper Co., 143 Fla. 835, 197 So. 672 (1940); Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940); Young v. Stoutamire, 131 Fla. 535, 179 So. 797 (1938); Shayne v. Pike, 131 Fla. 71, 178 So. 903 (writ issued), 131 Fla. 862, 180 So. 382 (1938) (judgment quashed); State *ex rel.* Landis v. Simmons, 104 Fla. 487, 140 So. 187 (1932); Medlin-Peacock Buick Co. v. Broward, 101 Fla. 600, 135 So. 156 (1931); Gilbert v. State, 98 Fla. 599, 124 So. 1 (1929); Haile v. Gardner, 82 Fla. 355, 91 So. 376 (1921); Holmberg v. Toomer, 78 Fla. 116, 82 So. 620 (1919); First Nat. Bank of Gainesville v. Gibbs, 78 Fla. 118, 82 So. 618 (1919); Harrison v. Frink, 75 Fla. 22, 77 So. 663 (1918); Seaboard A.L. Ry. v. Ray, 52 Fla. 634, 42 So. 714 (1906); Jacksonville T. & K.W. Ry. v. Boy, 34 Fla. 389, 16 So. 290 (1894).

[80]Becker v. Merrell, 155 Fla. 379, 20 So.2d 912 (1944); London Guaranty & Accident Co. v. Helmly Furn. Co., 153 Fla. 453, 14 So.2d 848 (1943); Biscayne Beach Theatre, Inc. v. Hill, 151 Fla. 1, 9 So.2d 109 (1942); Metropolitan Life Ins. Co. v. Poole, 147 Fla. 686, 3 So.2d 386 (1941); Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940); Montmary, Inc. v. Sanderson, 139 Fla. 495, 190 So. 791 (1939); Robbins Holding Co. v. Morris, 131 Fla. 205, 179 So. 404 (1938); Jacksonville Beach v. Waybright, 130 Fla. 525, 178 So. 401 (1938); Blue Belt Fertilizer Co. v. Pullen, 125 Fla. 164, 169 So. 615 (1936); Mutual Life Ins. Co. v. Johnson, 122 Fla. 567, 166 So. 442 (1936);

foregoing principle.[81] On the contrary, the scope of substantive review by certiorari has often, for all practical purposes, been fully as broad as review by appeal in many of the cases, despite protestations by the Court to the contrary.

Frequently, in the very same case, the Court first states that it cannot review such-and-such a proposition on certiorari, although it could do so on appeal, and then does the very thing it says it cannot do, namely, treat the case on certiorari just as if it were an appeal. Not only does the Court often consider "errors" which are not supposed, by the Court's own pronouncements, to be cognizable on certiorari, but it takes other action ordinarily taken only on appeal. That is to say, on certiorari the Court will sometimes "affirm," or "reverse" or "give directions,"[82] whereas according to its own pronouncements it is supposed either to deny certiorari or to quash the judgment or order below.[83]

In addition, there are statements to the effect that the Court will quash judgments which are, for instance, "illegal," "essentially irregular," "prejudicial," or "materially harmful";[84] but it is difficult, if

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Seven Seas, Inc., v. Buckholtz, 121 Fla. 205, 163 So. 567 (1935); Atlantic C.L.R.R. v. Farris & Co., 111 Fla. 412, 149 So. 561 (1933); American Ry. Exp. Co. v. Fegenbush, 107 Fla. 145, 144 So. 320 (1932).

[81]What we have to say hereinafter in this section refers exclusively to common law certiorari to lower courts, and not to quasi-judicial boards and commissions. As regards these latter see note 69 *supra.*

[82]See, *e.g.*, Ross v. Calamia, 153 Fla. 151, 13 So.2d 916 (1943); Goodkind v. Wolkowsky, notes 112-114 *infra;* Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932); Dowling v. State, 98 Fla. 523, 124 So. 12 (1929). This terminology may be all right in Rule 34 cases, since they are merely interlocutory equity appeals; see, *e.g.*, Richard v. Tomlinson, 49 So.2d 798 (Fla. 1951); Atlantic C.L.R.R. v. Kickliter, 159 Fla. 516, 32 So.2d 166 (1947); Randall v. Randall, 158 Fla. 502, 29 So.2d 238 (1947); McMullen v. Orr, 147 Fla. 719, 3 So.2d 385 (1941). But such nomenclature seems strange in a proceeding named "certiorari." Actually, considering the true nature of Rule 34 review, the very use of the word "quash" is inappropriate.

[83]See Part IX *infra.*

[84]The Court apparently gets off on this tack first in American Ry. Exp. Co. v. Weatherford, 84 Fla. 264, 93 So. 740 (1922) (writ issued), 86 Fla. 626, 98 So. 820 (1924) (writ quashed). In that case the statements to the effect that judgments "illegal," "essentially irregular," "prejudicial," and "materially harmful," etc., will be reviewed are obiter; yet this case is cited in later cases as authority for these propositions, as, *e.g.*, in London Guaranty & Accident Co. v. Helmly Furn. Co., 153 Fla. 453, 14 So.2d 848 (1943); Goodkind v. Wolkowsky, notes 112-114 *infra;* Biscayne Beach Theatre, Inc. v. Hill, 151 Fla. 1,

not impossible, to derive a definition of these terms from reading the cases. Many times, when judgments have been quashed on certiorari for these "reasons," the only possible conclusion is that, in truth, the Supreme Court has simply differed with the lower court and, consciously or unconsciously, undertaken to correct the judgments. In short, it has decided that the judgments were "wrong" or "right," despite the fact that the matters complained of had no relation to jurisdiction or regularity of procedure in the lower courts, thus affording "appeals" in the guise of certiorari. And this has sometimes been done without any attempt to justify the departure from the Court's own pronouncements as to the scope of review on certiorari. In other cases, presumably those in which the respondent has foreseen the importance of urging that the matters complained of are not cognizable on certiorari and that the Court should not treat the case as an appeal, the Court has disregarded the clear, basic principle that, in certiorari, only jurisdiction and regularity of procedure will be examined. It has justified the deviation by statements to the effect that certiorari is "appellate in character";[85] that it is not limited to an inquiry into jurisdiction but "extends to the manner in which that jurisdiction is exercised"; that the evidence in the lower court may be

9 So.2d 109 (1942); Jacksonville Amer. Pub. Co. v. Jacksonville Paper Co., 143 Fla. 835, 197 So. 672 (1940); Police & Firemen's Ins. Ass'n v. Hines, 134 Fla. 298, 183 So. 831 (1938); Mutual Ben. H. & A. Ass'n v. Bunting, 133 Fla. 646, 183 So. 321 (1938); Young v. Stoutamire, 131 Fla. 535, 179 So. 797 (1938). The Court has said again and again that the office of a writ of certiorari is to review *questions of law* only, Lorenzo v. Murphy, 159 Fla. 639, 32 So.2d 421 (1947); Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940); Police & Firemen's Ins. Ass'n v. Hines, *supra;* Mutual Ben. H. & A. Ass'n v. Bunting, *supra;* United Mut. Life Ins. Co. v. Sholtz, 121 Fla. 260, 163 So. 690 (1935). The dicta contained in the preceding five cases are too broad if construed to mean that *all* questions of law decided in a lower court will be reviewed. These dicta are appropriate to review of quasi-judicial actions of boards and commissions only. See note 69 *supra.* To add to the confusion, a dictum in Lorenzo v. Murphy, *supra,* states that an appellate court should on certiorari, provided there is no adequate remedy by appeal or writ of error, inquire only into errors of law affecting the merits of the case. What this means is unfortunately left unexplained. Furthermore, a short time prior to the *Lorenzo* case the Court held that a void judgment could be tested on certiorari even though other remedies might also be available, McGee v. McGee, 156 Fla. 346, 22 So.2d 788 (1945).

[85]*E.g.,* State *ex rel.* Associate Utilities Corp. v. Chillingworth, 132 Fla. 587, 181 So. 346 (1938); Atlantic C.L.R.R. v. Florida Fine Fruit Co., 93 Fla. 161, 112 So. 66 (1927); Basnet v. Jacksonville, 18 Fla. 523 (1882).

considered on certiorari whenever it "affects" the jurisdiction; that although questions of fact are not reviewed the evidence may be examined in order to determine whether it "justified the finding" of the inferior court,[86] and that it may also be examined in order to determine whether it is "manifestly contrary to the finding," or was not "duly considered"; and that the Court may determine whether there was "misconduct in the finding" or "abuse of power to determine facts," or "whether an erroneous rule of law was applied" to the evidence.[87]

It may be proper to quash a judgment after a finding that there was no evidence at all upon which it could stand,[88] despite the existence of jurisdiction in the inferior court. Such a judgment may well seem to smack of a complete disregard of procedure tantamount to excess of jurisdiction. As noted above, the Court has said that if there is some evidence to support the finding of the lower court its judgment will not be disturbed on certiorari. But when the Court qualifies this principle by saying that it does not, on certiorari, review and weigh conflicting evidence, or sufficiency of evidence, "unless a wrong rule of law is enforced as to its application,"[89] then, with respect to the quoted portion of the stated rule, the Court is plainly converting certiorari into an appeal.

It would appear that each of the forty cases cited in the margin, although each was brought before the court by petition for certiorari, was treated exactly as if there for review by appeal.[90] In each the

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[86]Lorenzo v. Murphy, 159 Fla. 639, 645, 32 So.2d 421, 424 (1947).

[87]Schott v. Brooks, 56 So.2d 456 (Fla. 1952); Western Union Tel. Co. v. Michel, 120 Fla. 511, 163 So. 86 (1935); Medlin-Peacock Buick Co. v. Broward, 101 Fla. 600, 135 So. 156 (1931); Atlantic C.L.R.R. v. Florida Fine Fruit Co., 93 Fla. 161, 112 So. 66 (1927); American Ry. Exp. Co. v. Weatherford, 84 Fla. 264, 93 So. 740 (1922).

[88]*Cf.* State Beverage Dep't v. Willis, 159 Fla. 698, 32 So.2d 580 (1947); Flash Bonded Storage Co. v. Ades, 152 Fla. 482, 12 So.2d 164 (1943); State *ex rel.* Hathaway v. Williams, 149 Fla. 48, 5 So.2d 269 (1941); E. B. Elliott Co. v. Turrentine, 113 Fla. 210, 151 So. 414 (1933); Seaboard A.L. Ry. v. Wells, 100 Fla. 1631, 131 So. 777 (1931); Brinson v. Tharin, 99 Fla. 696, 127 So. 313 (1930).

[89]American Ry. Exp. Co. v. Fegenbush, 107 Fla. 145, 151, 144 So. 320, 322 (1932); *accord,* Mutual Life Ins. Co. v. Johnson, 122 Fla. 567, 166 So. 442 (1936).

[90]The Supreme Court quashed the order or judgment in: Lohmeyer v. Williams, 37 So.2d 419 (Fla. 1948); Flash Bonded Storage Co. v. Ades, 152 Fla. 482, 12 So.2d 164 (1943); Biscayne Beach Theatre, Inc. v. Hill, 151 Fla. 1, 9 So.2d 109 (1942); State *ex rel.* Hathaway v. Williams, 149 Fla. 48,

Court considered matters beyond the scope of review on common law certiorari, that is, matters having nothing to do with either jurisdiction or regularity of procedure in the lower court. There are other such cases, but those cited amply illustrate the aberration.

In twenty-three of these the Court denied certiorari, or quashed the writ, so no harm was done the respondent on the merits; the Court merely wasted a lot of its own time and that of respondent's attorneys. But, in the seventeen cases in which the order or judgment complained

5 So.2d 269 (1941); Hallowes v. New York Life Ins. Co., 133 Fla. 872, 184 So. 7 (1938); Tamiami Trail Tours, Inc. v. Florida Railroad Comm'n, 128 Fla. 25, 174 So. 451 (1937); Miami Poultry & Egg Co. v. City Ice & Fuel Co., 126 Fla. 563, 172 So. 82 (1936); Western Union Tel. Co. v. Michel, 120 Fla. 511, 163 So. 86 (1935); Hodges v. Lamar, 119 Fla. 566, 161 So. 81 (1935); Lafayette Fire Ins. Co. v. Camnitz, 111 Fla. 556, 149 So. 653 (1933); American Ry. Exp. Co. v. Fegenbush, 107 Fla. 145, 144 So. 320 (1932); Miami Transit Co. v. Stephens, 106 Fla. 353, 143 So. 325 (1932); Seaboard A.L. Ry. v. Wells, 100 Fla. 1631, 131 So. 777 (1931); Seaboard A.L. Ry. v. Wells, 100 Fla. 1027, 130 So. 587 (1930); Florida Motor Lines, Inc. v. Railroad Comm'rs, 100 Fla. 538, 129 So. 876 (1930); Atlantic C.L.R.R. v. Florida Fine Fruit Co., 93 Fla. 161, 112 So. 66 (1927); Coe-Mortimer Co. v. State, 81 Fla. 701, 88 So. 475 (1921); State v. Live Oak, P. & G.R.R., 70 Fla. 564, 70 So. 550 (1915).

The Court denied certiorari, or quashed the writ, in: Florio v. Colquitt Hardware Co., 160 Fla. 92, 33 So.2d 722 (1948); Nation v. State, 155 Fla. 858, 22 So.2d 219 (1945); Ross v. Calamia, 153 Fla. 151, 13 So.2d 916 (1943); Wallendorf v. New York Life Ins. Co., 152 Fla. 574, 12 So.2d 585 (1943); Atlantic C.L.R.R. v. Railroad Comm'n, 149 Fla. 245, 5 So.2d 708 (1942); Standard Mutual Benefit Corp. v. Cox, 147 Fla. 787, 3 So.2d 521 (1941); Metropolitan Life Ins. Co. v. Poole, 147 Fla. 686, 3 So.2d 386 (1941); Jacksonville Amer. Pub. Co. v. Jacksonville Paper Co., 143 Fla. 835, 197 So. 672 (1940); Robinson v. Miami, 138 Fla. 696, 190 So. 35 (1939); Marriott v. Meadows, 138 Fla. 436, 189 So. 415 (1939); Guaranty Life Ins. Co. v. Hall Bros., 138 Fla. 176, 189 So. 243 (1939); Police & Firemen's Ins. Ass'n v. Hines, 134 Fla. 298, 183 So. 831 (1938); Mutual Ben. H. & A. Ass'n v. Bunting, 133 Fla. 646, 183 So. 321 (1938); New England Mutual Life Ins. Co. v. Huckins, 127 Fla. 540, 173 So. 696 (1937); Lockwood v. L. & L. Freight Lines, Inc., 126 Fla. 474, 171 So. 236 (1936); Mutual Life Ins. Co. v. Johnson, 122 Fla 567, 166 So. 442 (1936); Grand Lodge v. Williams, 122 Fla. 147, 165 So. 688 (1936); Seven Seas, Inc. v. Buckholtz, 121 Fla. 205, 163 So. 567 (1935); Bringley v. C.I.T. Corp., 119 Fla. 529, 160 So. 680 (1935); Fidelity and Casualty Co. v. Plumbing Dep't Store, Inc., 117 Fla. 119, 157 So. 506 (1934); General Accident, Fire & Life Assur. Corp. v. Colyer, 111 Fla. 771, 151 So. 717 (1933); Palmer v. Johnson Constr'n Co., 97 Fla. 479, 121 So. 466 (1929); American Ry. Exp. Co. v. Weatherford, 84 Fla. 264, 93 So. 740 (1922) (writ issued), 86 Fla. 626, 98 So. 820 (1924) (writ quashed).

of was quashed after consideration of other than jurisdictional or procedural irregularities below, the losing litigant was unconstitutionally deprived of a right. A litigant who wins a case in which the circuit court has "final appellate jurisdiction" is entitled to the benefit of the judgment there obtained, whether it is "right" or "wrong," provided there is no jurisdictional or procedural defect in the proceedings. Under the Constitution, the circuit court has just as much right to be "wrong" in such cases as the Supreme Court has when it has final appellate jurisdiction;[91] regardless of any purported improvement in "justice," the merits of litigation should be finally decided by the circuit court, as the Constitution clearly provides.

The Court has recently held, in *American National Bank of Jacksonville v. Marks Lumber & Hardware Co.*,[92] that on certiorari it will review only questions of jurisdiction or irregular procedure in the lower court. This holding, if adhered to, will at long last result in getting back to the basic principles of common law certiorari so often proclaimed by the Court in its opinions, but so often disregarded in actual practice; and the judgments of circuit courts exercising final appellate jurisdiction under the Constitution will again indeed be "final."

VI. Review of Interlocutory Orders at Law

The Supreme Court has repeatedly held that common law certiorari lies only to final judgments of inferior courts.[93] Traditionally this is

[91]Jacksonville Beach v. Waybright, 130 Fla. 525, 178 So. 401 (1938); Des Rocher & Watkins Towing Co. v. Third Nat. Bank, 106 Fla. 466, 143 So. 768 (1932).

[92]45 So.2d 336 (Fla. 1950). The Chief Justice, after setting forth the correct rule, indulges in a remarkable understatement. Obviously referring to the cases cited above, in which the Court itself had disregarded the rule, he says at p. 337: "While there have been many variations on the application of this rule, it has necessarily remained unaltered because of our Constitution."

[93]Atlantic C.L.R.R. v. Gamble, 155 Fla. 678, 21 So.2d 348 (1945); Davis v. First Nat. Bank of Miami, 153 Fla. 864, 16 So.2d 46 (1943); Okeechobee Co. v. Norton, 149 Fla. 651, 6 So.2d 632 (1942); Mathers v. Provident Life & Acc. Ins. Co., 143 Fla. 701, 197 So. 390 (1940); Robinson v. Miami, 138 Fla. 696, 190 So. 35 (1939); Rifas v. Gross, 106 Fla. 708, 143 So. 600 (1932); Brundage v. O'Berry, 101 Fla. 320, 134 So. 520 (1931); Hartford Acc. & Indem. Co. v. Thomasville, 100 Fla. 748, 130 So. 7 (1930); Kroier v. Kroier, 95 Fla. 865, 116 So. 753 (1928); Holmberg v. Toomer, 78 Fla. 116, 82 So. 620 (1919); First Nat. Bank of Gainesville v. Gibbs, 78 Fla. 118, 82 So. 618

one of the first principles of the law of certiorari, but the Court has by no means followed this principle consistently. In some cases the Court has declared that there are what it calls "exceptions" to the rule. Many of these so-called exceptions are merely definitive of what the Court considers the term "final judgment" to mean. Such cases cause little if any difficulty, since it is only necessary to realize that certain orders and judgments, though not in terms "final," nevertheless to all intents and purposes dispose of the controversy. Such orders are properly reviewable as "final" judgments, and are not actually true "exceptions" to the general rule.

A typical example of this class of cases is a reversal by the circuit court, on appeal from a civil court of record, with directions to the lower court to enter a specified judgment.[94] In such a case, nothing is left for the trial court to do except to carry out the mandate as a mere ministerial act. Although it might be said that the "final" judgment in the cause is yet to be entered by the trial court in obedience to the mandate, nevertheless, since it has no power to do anything else, its action is a mere formality. The appellate order really disposes of the case; and so it is logical to consider it "final."[95]

When, however, a circuit court reverses the judgment of an inferior court and simply remands the cause generally for further proceedings, such action is not a final judgment and therefore is not reviewable by certiorari.[96] And, if a circuit court affirms an inferior court's judgment

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(1919).

[94]Florio v. Colquitt Hardware Co., 160 Fla. 92, 33 So.2d 722 (1948); Saffran v. Adler, 152 Fla. 405, 12 So.2d 124 (1943); North Miami v. Seaway Corp., 151 Fla. 301, 9 So.2d 705 (1942); Goodkind v. Wolkowsky, notes 112-114 *infra;* Hallowes v. New York Life Ins. Co., 133 Fla. 872, 184 So. 7 (1938); Bringley v. C.I.T. Corp., 119 Fla. 529, 160 So. 680 (1935); Grodin v. Railway Exp. Agency, 116 Fla. 378, 156 So. 476 (1934); Butler v. Tunnicliffe, 104 Fla. 477, 140 So. 201 (1932); Ulsch v. Mountain City Mill Co., 103 Fla. 932, 138 So. 483 (1931); Brundage v. O'Berry, 101 Fla. 320, 134 So. 520 (1931); Waddell v. McAllister, 97 Fla. 1054, 122 So. 578 (1929).

[95]Bringley v. C.I.T. Corp., 119 Fla. 529, 160 So. 680 (1935); Ulsch v. Mountain City Mill Co., 103 Fla. 932, 138 So. 483 (1931). The decisions of the Supreme Court of the United States as to what is a "final" judgment, reviewable by it on certiorari, are to the same effect.

Note also that orders supplementary to final decree in equity, although seemingly interlocutory in form, are actually final, Theo Hirsch Co. v. Scott, 87 Fla. 336, 100 So. 157 (1924); *accord,* Hollywood, Inc. v. Clark, 153 Fla. 501, 15 So.2d 175 (1943).

[96]Atlantic C.L.R.R. v. Gamble, 155 Fla. 678, 21 So.2d 348 (1945); Janet

on condition of remittitur, the judgment is, in truth, a reversal until the remittitur is entered, whereupon it becomes an affirmance. Such a judgment is not reviewable by certiorari until the remittitur has been entered.[97]

To summarize generally, there are three basic principles: (1) common law certiorari lies to final judgments only; (2) when an intermediate court on appeal orders an inferior court to enter a certain judgment, and nothing is left to be done except to carry out such mandate, the order is final and is reviewable on certiorari under the general rule; (3) when an intermediate appellate court remands a cause generally for further proceedings in the inferior court, such action is not a final judgment and is not reviewable by certiorari.

The difficult aspects of this subject are found in the cases where the Court has undertaken to lay down true "exceptions" to these well-defined general principles.

It has already been pointed out that the Supreme Court, although paying lip service to the rule that only lack of jurisdiction or irregular procedure below will be examined on certiorari, has actually gone into many other questions, and has quashed circuit court orders simply because it considered them wrong on the law, the facts, or both.[98]

Much of the Florida case law having to do with the reviewability by certiorari of interlocutory orders at law exhibits the same tendency. The explanation probably is that when the Supreme Court thinks the circuit court has come to the wrong conclusion, it oftentimes is unable to resist the human temptation to "correct" the lower court's "erroneous" judgment or order, final or not final, and set everything right, rule or no rule. This is the trait which the late lamented Judge

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Realty Corp. v. Hoffman's Inc., 154 Fla. 144, 17 So.2d 114 (1944); Whitaker v. C.I.T. Corp., 148 Fla. 263, 4 So.2d 255 (1941); Robinson v. Miami, 138 Fla. 696, 190 So. 35 (1939); Hallowes v. New York Life Ins. Co., 133 Fla. 872, 184 So. 7 (1938); Perlman v. Ryden, 131 Fla. 66, 178 So. 911 (1938); Miami Poultry & Egg Co. v. City Ice & Fuel Co., 126 Fla. 563, 172 So. 82 (1936); Bringley v. C.I.T. Corp., 119 Fla. 529, 160 So. 680 (1935); Grodin v. Railway Exp. Agency, 116 Fla. 378, 156 So. 476 (1934); Kilgore v. Dimmitt, 114 Fla. 69, 153 So. 138 (1934); Waddell v. McAllister, 97 Fla. 1054, 122 So. 578 (1929); Holmberg v. Toomer, 78 Fla. 116, 82 So. 620 (1919); First Nat. Bank of Gainesville v. Gibbs, 78 Fla. 118, 82 So. 618 (1919). The same test is applied by the Supreme Court of the United States on the question of finality.

[97]Harrell v. Martin, 114 Fla. 147, 154 So. 186 (1934).

[98]See Part V *supra*.

James F. Glen, of Tampa, used to call the "parens patriae complex."

The so-called "exceptions" to the rule that only final judgments are reviewable by certiorari have been judicially classified as follows: (1) judgments of circuit courts rendered without or in excess of jurisdiction or unduly extending the jurisdiction; (2) judgments of circuit courts which are palpable miscarriages of justice; (3) judgments resulting in substantial injury to the legal rights of petitioners; (4) judgments illegal or essentially irregular and violative of established principles of law, resulting in substantial injury to the legal rights of petitioners, and where no other adequate means of review is afforded by law; and (5) judgments requiring the trial court to proceed in violation of the essential requirements of the law.

One or two cases actually contain point-blank statements to the effect that certiorari lies to interlocutory orders at law.[99] And, in *Kilgore v. Bird*,[100] the lower court had ordered the defendant to answer certain interrogatories; but, despite the fact that the order was not a final order disposing of the controversy, the Supreme Court examined the order and quashed it. The reasons given by the Court for this action were (1) that requiring answers to certain of the questions might violate the defendant's civil rights; and (2) that review by appeal would be inadequate because on appeal the wrong could not be righted, since the other party would have the information to which he was not entitled. *Atlantic Coast Line R.R. v. Allen*[101]

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[99]*See, e.g.*, Tamiami Trail Tours, Inc. v. Florida Railroad Comm'n, 128 Fla. 25, 32, 174 So. 451, 454 (1937) (concurring opinion).

[100]149 Fla. 570, 6 So.2d 541 (1942); *accord*, Bloomhuff v. Miami Jockey Club, 150 Fla. 411, 7 So.2d 447 (1942) (interlocutory order at law quashed).

[101]40 So.2d 115 (Fla. 1949); *cf.* Miami Transit Co. v. Hurns, 46 So.2d 390 (Fla. 1950). In the recent case of Howard v. Sharlin, 52 So.2d 417 (Fla. 1951), the Court declined, per curiam, to review an order of the circuit court denying a motion for a directed verdict for petitioner in an action in trover. An inspection of the Supreme Court file of the case reveals that the Court merely looked in the record for a final judgment and, failing to find one, correctly denied certiorari, without going into the merits. In a concurring opinion, Justice Barns passes over without mention the many cases cited by petitioner in which interlocutory orders at law have been reviewed. He distinguishes three of the cases, however, Caudell v. Leventis, 43 So.2d 853 (Fla. 1950), Kilgore v. Bird, 149 Fla. 570, 6 So.2d 541 (1942), and Miami Transit Co. v. Hurns, *supra*, on the basis that in each of these cases review by appeal would have been inadequate, and emphasizes that, in the case at bar, in the event of an adverse final judgment petitioner's right to review by appeal *will* be adequate. However, Caudell v. Leventis, *supra*, was a case in which the

holds that interlocutory orders requiring discovery can be quashed if the discovery sought "was not only beyond the discovery rule but exceeded what might be the subject matter of discovery . . . ." Specifically the Court explains that discovery will not be refused only "because the subject matter is privileged or irrelevant" but will be refused if "it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." The Court said that it would quash interlocutory orders requiring discovery of matters obtained by the adverse party in the preparation of his action or defense.

Perhaps the rationale of these discovery cases is that the orders did finally determine certain rights of the parties, that is to say, whether petitioner was or was not required to give, or entitled to get, the information called for in the discovery proceedings. Or perhaps these decisions rest on the broader ground of protection of civil rights at all stages of litigation. Nevertheless, it is difficult to see how the situation here is different from the situation in the case of most other interlocutory orders.

There is a dictum to the effect that "special" and "summary" proceedings may be reviewed on certiorari, whether the order or orders complained of are final or not.[102] Exactly what is comprehended within the terms "special" and "summary" is not revealed. It has also been stated that in certain types of cases certiorari will issue to review preliminary or interlocutory orders in statutory proceedings incidental to cases at law which depart from the essential requirements of the law and may reasonably cause serious injury to the complaining party throughout all subsequent proceedings in the case, in violation of his civil rights, when no other adequate remedy exists.[103]

The other so-called "exceptions" are equally difficult to understand. It is hard to understand why, in many cases, the Court has been willing to review orders not final but has refused to consider other

lower court had no jurisdiction and it should, therefore, have dismissed the case instead of entering an order transferring the cause to another court, as it did. Since an order made without jurisdiction can be set aside at any time and in a great number of ways (see note 67 *supra*), this case does not appear to have been in point.

[102]*See* Waddell v. McAllister, 97 Fla. 1054, 1056, 122 So. 578 (1929).

[103]*See* Miami Transit Co. v. Hurns, 46 So.2d 390, 391 (Fla. 1950); Atlantic C.L.R.R. v. Allen, 40 So.2d 115, 116 (Fla. 1949); Saffran v. Adler, 152 Fla. 405, 409, 12 So.2d 124, 126 (1943).

such orders in cases which appear to be equally meritorious.[104] The rulings on the subject are irreconcilable; and the "rules" stated for the "exceptions" are of little help. The practitioner who has an important interlocutory order at law which he wishes to have reviewed by certiorari should try to fit the case within one of the "exceptions" as best he can. Possibly the "justice" of the case will appeal to the Court, and it may again find an "exception" to the general rule that only final judgments at law are reviewable on certiorari. The cases in which interlocutory orders at law have been held reviewable on certiorari are not classifiable generically. From reading the opinions in the light of these remarks, the practitioner will have to guess for himself his chances of getting an interlocutory order reviewed.

One of the first cases mentioning the "exceptions" is *Hartford Accident & Indemnity Co. v. Thomasville,*[105] in which the petitioner contended that any order or judgment of an inferior court having the effect of "unduly extending the jurisdiction of that court" might be reviewed on certiorari without awaiting the final outcome of the litigation. The Supreme Court, although refusing to find in this case such an exception, says in a dictum that the contention of petitioner is "well supported" in other jurisdictions. And, in *Midland Motor Car Co. v. Willys-Overland,*[106] a civil court of record sustained a demurrer to a plea of privilege, and on appeal the circuit court reversed. Certiorari was granted to review the order of reversal, although the judgment did not dispose of the controversy, for the reason that the Supreme Court thought that the ". . . ruling, if erroneous, would require the trial court to proceed in violation of the essential requirements of the law . . . ."[107]

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[104]For examples of orders refused consideration because not final, see note 93 *supra.*

[105]100 Fla. 748, 130 So. 7 (1930). In a prior case, Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926), the Court had reviewed an interlocutory order in a condemnation case, the "taking" of the property having been authorized prior to the ascertainment of damages. The Court held that, as to the property right, the order was "so far final" as to warrant the issuance of a writ of certiorari to test its validity. And in Kroier v. Kroier, 95 Fla. 865, 116 So. 753 (1928), a judgment "final in nature," setting aside a default judgment entered over a year before, was quashed on a showing that the lower court had no jurisdiction to make the vacating order.

[106]101 Fla. 837, 132 So. 692 (1931).

[107]*Id.* at 837, 132 So. at 693. The writ was quashed, however, since the

In *Bringley v. C.I.T. Corp.*,[108] a replevin suit in the civil court of record resulted in a judgment for defendant, and his damages for the taking of the property were set at $750. The circuit court reversed on a point of law, and ordered a new trial. A writ of certiorari issued, though the order was obviously not final, but the writ was quashed when the Supreme Court decided that the trial court's judgment was erroneous and that the circuit court was right in reversing. And in *Hodges v. Lamar*,[109] judgment had been entered for plaintiff in the civil court of record after an equitable plea had been stricken. The circuit court reversed with directions to reinstate the plea. This was obviously not a final order disposing of the controversy; yet the Supreme Court quashed the judgment, after deciding merely that the plea was not good.

In *Miami Poultry & Egg Co. v. City Ice & Fuel Co.*,[110] a most extreme example, the Supreme Court seems merely to have wanted to review an interlocutory order at law; accordingly it found an "exception" to the general rule. The circuit court reversed a judgment for plaintiff in the civil court of record. The Supreme Court on certiorari held that no question of jurisdiction was presented, and conceded that the judgment was not final. Nevertheless it considered the case on the merits, saying that the judgment was a miscarriage of justice and substantially harmed petitioner; found that the civil court of record was right, and the circuit court wrong; and quashed the judgment of reversal, because it thought that failure to do so would result in "substantial injury to the legal rights of petitioner."

It is obvious that any "wrong" judgment is "a miscarriage of justice," and "substantially harms" the losing party, and naturally results in "substantial injury to legal rights." Then why should the Court single out particular interlocutory orders for review while denying review in other such cases? Moreover, it is impossible for the Court to discover all instances where there has been "a miscarriage of justice," or where the losing party has been "substantially harmed" or his "legal rights" injured, unless the Court examines the merits of all cases — a thing it cannot do if it follows its professed rule that, on certiorari,

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Court found that the action of the circuit court did in fact accord with the essential requirements of the law. Quaere: Did not the Court really just decide that the lower court was "right"? See also Perrin v. Enos, 56 So.2d 920 (Fla. 1951).

[108]119 Fla. 529, 160 So. 680 (1935).

[109]119 Fla. 566, 161 So. 81 (1935).

[110]126 Fla. 563, 172 So. 82 (1936).

it will consider only questions of jurisdiction and irregular procedure. This is made evident in *Robinson v. Miami.*[111] The Court first held that the order, since it was not final, was prima facie not reviewable on certiorari; then it went on to examine the merits of the case at length to see if it could find "a palpable miscarriage of justice," or some other reason for fitting the case into one of the "exceptions"; and then, finding that justice had been served in the circuit court, it decided not to interfere with the judgment. Obviously, under such circumstances, certiorari becomes merely an "appeal" from an interlocutory order at law. If some petitioners are to have interlocutory orders at law reviewed, all should receive the same consideration from the court; otherwise, the "palpable miscarriage of justice" may really be in the Supreme Court and not in the court below.

Goodkind v. Wolkowsky was in the courts for eight years, and came before the Supreme Court three times on certiorari. First, a demurrer to plaintiff's declaration in the civil court of record had been sustained and affirmed in the circuit court. The Supreme Court quashed, holding that the declaration stated a cause of action.[112] The case was then tried, and resulted in a verdict for plaintiff; but a new trial was awarded. On writ of error, the circuit court awarded a new trial on the sole issue of amount of damages. This interlocutory order was reviewed by the Supreme Court on a second petition for certiorari, and was quashed "with directions."[113] The circuit court then awarded a new trial in toto. This latter interlocutory order was quashed on a third certiorari proceeding.[114]

In *Janet Realty Corp. v. Hoffman's Inc.*,[115] the circuit court reversed an order of the civil court of record holding that a plea failed to constitute a legal defense. This interlocutory order was quashed as a "departure from the essential requirements of the law," the review being characterized as an "exception" to the general rule. Again, in *Florio v. Colquitt Hardware Co.*,[116] the Court quashed an order which it admitted was not final. In *Atlantic Coast Line R.R. v. Allen*,[117] a subpoena duces tecum was quashed as an "exception," on authority of

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[111]138 Fla. 696, 190 So. 35 (1939).
[112]Goodkind v. Wolkowsky, 132 Fla. 63, 180 So. 538 (1938).
[113]Goodkind v. Wolkowsky, 147 Fla. 415, 2 So.2d 723 (1941).
[114]Goodkind v. Wolkowsky, 151 Fla. 62, 9 So.2d 553 (1942).
[115]154 Fla. 144, 17 So. 2d 114 (1944).
[116]160 Fla. 92, 33 So.2d 722 (1948).
[117]40 So.2d 115 (Fla. 1949).

Kilgore v. Bird.[118] And in *Miami Transit Co. v. Hurns*[119] an interlocutory order for discovery was quashed on certiorari as requiring disclosure of privileged matter.[120]

The upshot of this whole matter is that, although only final judgments are subject to review by certiorari at common law, which is the *only* jurisdiction in certiorari accorded the Supreme Court by the Constitution, nevertheless the Court has time and again overstepped its constitutional common law jurisdiction and assumed to correct the supposed mistakes of others which are not its concern. Under the Constitution, the circuit courts have just as much right to be wrong, within their final jurisdiction, as the Supreme Court has within its jurisdiction.

A ray of hope may be discerned in a case mentioned in Part V *supra.*[121] The opinion states that review of lower court judgments by common law certiorari is limited strictly to questions of jurisdiction and irregular procedure, as distinguished from erroneous judgments. The Court found no lack of jurisdiction nor illegality of procedure; and therefore, in accordance with the rule announced, it declined to go into the merits and consider the correctness of the judgment. This decision reviews generally the law of certiorari and constitutes a return to settled principles announced and followed more than sixty years ago, but which in recent years have been disregarded more often than not.

This holding will also have a very important effect upon the review by certiorari of interlocutory orders at law. Virtually all of the exceptions which the Supreme Court has engrafted on the rule that certiorari lies only to final judgments of inferior courts involve merely the merits of the case. Now, if henceforth the Court does not look

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[118]149 Fla. 570, 6 So.2d 541 (1942).

[119]46 So.2d 390 (Fla. 1950).

[120]Nothing was made of the fact that the order was not a final order; this feature was apparently overlooked, as also in Perrin v. Enos, 56 So.2d 920 (Fla. 1951). Compare the rather strange contention of petitioner in Segel v. Staiber, 106 Fla. 946, 144 So. 875 (1932), that he should have a writ of certiorari because no remedy by writ of error existed, the error complained of being a non-final judgment. The Court could have denied certiorari on the well-settled doctrine that certiorari does not lie to other than final judgments, but it apparently did not notice this feature. Instead it issued the writ and then quashed it because no jurisdictional or procedural defect in the judgment below was apparent.

[121]American Nat. Bank of Jacksonville v. Marks Lumber & Hardware Co., 45 So.2d 336, 337 (Fla. 1950). See the last paragraph of Part V *supra.*

into the merits of cases, then such "exceptions" will never be apparent. The result will be that, almost without exception, the rule will again prevail that only final judgments may be reviewed by certiorari.

VII. The Record on Certiorari

It has repeatedly been said that at common law the writ of certiorari issued, in the sound judicial discretion of a court, to an inferior court, to cause the entire record to be brought up by certified copy for inspection, so that the superior court could determine from the face of the record[122] whether the inferior court had exceeded its jurisdiction or had not "proceeded" according to "the essential requirements of the law."

Traditionally, a petition for certiorari set forth that the court below had acted without jurisdiction[123] or had proceeded irregularly in violation of "the essential requirements of the law." If the petition impressed the higher court, it would issue a writ of certiorari commanding the lower court to certify up a transcript of the record. In actual practice today, however, the court clerk does not prepare the record himself; the petitioner has this responsibility,[124] and usually all that the clerk does is to certify it as correct.[125]

Actually, only the pertinent part of the record is sent up; immaterial

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[122]*See, e.g.*, Yandell v. Yandell, 160 Fla. 164, 165, 33 So.2d 869 (1948); Farnham v. Caldwell, 141 Fla. 416, 417, 193 So. 286, 287 (1940); Dowling v. State, 98 Fla. 523, 526, 124 So. 12, 13 (1929); Harrison v. Frink, 75 Fla. 22, 26, 77 So. 663, 664 (1918); Seaboard A.L. Ry. v. Ray, 52 Fla. 634, 637, 42 So. 714, 715 (1906).

[123]Lack of jurisdiction is similar to and often termed "excess" of jurisdiction, or at times an "undue extension" of jurisdiction.

[124]Matteson v. Eustis, 134 Fla. 455, 184 So. 15 (1938); *cf.* Bridger v. Thrasher, 22 Fla. 383 (1886); Simpson's Adm'r v. Barnard, Adams & Co., 5 Fla. 528 (1854).

[125]See R. Prac. Sup. Ct. Fla. 11(6); Fla. Stat. §§59.21-59.26 (1949). Of course, the clerk cannot be required to certify a copy of a record prepared by an attorney unless it is literally correct, State *ex rel.* Denman v. Brown, 83 Fla. 339, 91 So. 370 (1922). If a part of a record has been lost, the appellee who wishes it transmitted should request that it be re-established rather than move for dismissal of the appeal on the ground that the record is not complete, Supervisors, Inc. v. Arcadia Citrus Growers Ass'n, 101 Fla. 804, 135 So. 296 (1931). The court, in deciding one case, will not take judicial notice of what may be contained in the record of another and distinct case unless such other record is made a part of the record in the case under consideration, Atlas Land

portions may be omitted.[126] Supreme Court Rule 28 now requires that a petition for certiorari ". . . be accompanied by a certified transcript of the record of the proceedings the petitioner seeks to have reviewed or so much thereof as is essential"; and further provides that "Unless shown by opposing counsel to be necessary, no other record shall be required." Common Law Rule 55,[127] governing certiorari in the circuit courts, is essentially the same, except that the original record may accompany the petition, thereby saving the litigant the expense of a certified transcript.

Section 59.16 of Florida Statutes 1949 and Supreme Court Rule 11(5) permit the parties to an "appeal" to prepare and sign a statement of the cause showing how the questions arose and were decided, together with any assignments of error relied on; and this "stipulated record," when certified, constitutes the entire record on appeal. It is probable that most records could, and accordingly should, be stipulated, thus saving time for the courts and expense for the litigants. In one case involving several points of law, the record in the lower court consisted of 190 pages; but the stipulated record submitted to the Supreme Court required only eight double-spaced typewritten pages.[128] The submission of cases in such brief form is welcomed by the Court, and the matters at issue can be made very clear by means of a stipulated record.

Do this statute and rule permit a record on certiorari to be stipulated? In terms, they do not; but we believe that the Supreme Court should, and probably would, accept a stipulated record on certiorari. There is no good reason why the record in certiorari should differ in form from the record on an appeal. Without question, on Rule 34 certiorari, a stipulated record would be acceptable, because

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Corp. v. Norman, 116 Fla. 800, 156 So. 885 (1934).

[126]In fact, on appeal a record is required to be abbreviated, R. PRAC. SUP. CT. FLA. 11(2), Rubinow v. Rubinow, 40 So.2d 561 (Fla. 1949); Mingo v. Cain, 160 Fla. 254, 34 So.2d 456 (1948); Moorhead v. Moorhead, 159 Fla. 470, 31 So.2d 867 (1947). As explained in Part IX *infra*, the Court today by no means follows the old common law practice in certiorari; it never actually issues the writ, and no return to it is actually made.

[127]FLA. C.L.R. and FLA. EQ. R. were adopted by the Supreme Court of Florida Nov. 22, 1949, effective Jan. 1, 1950. See Wigginton, *New Florida Common Law Rules*, 3 U. OF FLA. L. REV. 1 (1950).

[128]See Anderson v. Anderson, 44 So.2d 652 (Fla. 1950), 3 U. OF FLA. L. REV. 242 (1950); Holland v. State *ex rel.* Goss, 151 Fla. 526, 10 So.2d 338 (1942).

this type of "certiorari" is nothing more than an interlocutory appeal.[129] Furthermore, the similarity between records on appeal and records on certiorari is demonstrated by the statute providing that, when a case is "appealed" which should have been taken to the Court by certiorari, the very same record may be regarded and acted upon as if on petition for certiorari.[130] The requirements as to the record are therefore essentially the same in both proceedings. Although no ruling on the point has been discovered, it would seem that the Court should be willing to accept a stipulated record submitted with a petition for certiorari.

Bills of exceptions on appeal from inferior courts to the circuit court are a part of the record and may be reviewed on certiorari by the Supreme Court.[131]

The Court has set forth its ideas as to what is required in a good petition and transcript in *Yandell v. Yandell.*[132] It is interesting to note, however, that, although the record and petition were considered poorly prepared, the Court proceeded to adjudicate the case anyway. Yet in *Moorhead v. Moorhead*[133] certiorari was denied, apparently because the record was not properly prepared, the Court stating that a Supreme Court Rule[134] had been violated, thereby indicating strongly that, at least under some circumstances, Rule 11 must be substantially complied with on pain of denial of the petition.

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[129]See Part X *infra.*

[130]FLA. STAT. §59.45 (1949); see also R. PRAC. SUP. CT. FLA. 11(2)(f), 11(5). See, *e.g.*, Atlantic C.L.R.R. v. Lake County Citrus Sales, Inc., 48 So.2d 922 (Fla. 1950); Atlantic C.L.R.R. v. King, 47 So.2d 514 (Fla. 1950); Atlantic C.L.R.R. v. United States Sugar Corp., 47 So.2d 513 (Fla. 1950); Smehl v. Hammond, 44 So.2d 678 (Fla. 1950); Dade County v. Brigham, 40 So.2d 835 (Fla. 1949).

[131]Biscayne Beach Theatre, Inc. v. Hill, 151 Fla. 1, 9 So.2d 109 (1942).

[132]160 Fla. 164, 33 So.2d 869 (1948). With respect to the advisability of abbreviating the record, *see* Rubinow v. Rubinow, 40 So.2d 561, 563 (Fla. 1949). See Finston v. Finston, 41 So.2d 549 (Fla. 1949), for an example of a petition approved by the Court.

[133]159 Fla. 470, 31 So.2d 867 (1947); *cf.* Bass v. Addison, 40 So.2d 466 (Fla. 1949) (evidence on Rule 34 certiorari presumed to support judgment below unless set forth in record); Cotter v. Holmes, 44 Fla. 162, 33 So. 246 (1902) (appeal dismissed for failure to file assignments of error).

[134]R. PRAC. SUP. CT. FLA. 11(2)(a),(b). But see Holland v. Miami Springs Bank, 53 So.2d 646 (Fla. 1951), and Cacciatore v. State, 147 Fla. 758, 3 So.2d 584 (1941), indicating that minor infractions of the rule relating to filing of a transcript and assignments of error do not require a circuit court, sitting as an appellate court, to dismiss appeals.

A case must be fully briefed before the application for certiorari may be acted upon;[135] and the Court will consider the record alone, and not matters in pais.[136] The petition should point out the basis of certiorari on the face of the record,[137] because certiorari, in theory at least, cannot be employed to undo judgments which are not, on the face of the record, void or in violation of the essential requirements of the law.[138]

Ordinarily the respondent must be given notice of the petition for certiorari.[139] Although service on the adverse party is not a jurisdictional defect, and a petition will not be dismissed for lack of service, nevertheless the Court will not act on it until all parties are duly notified, or appear before the Court.[140]

It should be noticed in passing that, in the usual case, only the parties to the litigation in the court below may be parties of record on certiorari. But when one, although not a party below, is nevertheless interested because his property rights are vitally affected by the judgment, he may have the judgment reviewed on certiorari, no appellate remedy being available to him.[141]

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[135]R. PRAC. SUP. CT. FLA. 28, General Accident Fire & Life Assur. Corp. v. Colyer, 111 Fla. 771, 151 So. 717 (1933).

[136]*E.g.*, Nation v. State, 155 Fla. 858, 22 So.2d 219 (1945); Biscayne Beach Theatre, Inc. v. Hill, 151 Fla. 1, 9 So.2d 109 (1942); Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940); Segel v. Staiber, 106 Fla. 946, 144 So. 875 (1932); Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932); Hamway v. Seaboard A.L. Ry., 101 Fla. 1483, 136 So. 628 (1931); *Ex parte* Jones, 92 Fla. 1015, 110 So. 532 (1926); Haile v. Gardner, 82 Fla. 355, 91 So. 376 (1926); Harrison v. Frink, 75 Fla. 22, 77 So. 663 (1918); Ragland v. State, 55 Fla. 157, 46 So. 724 (1908).

[137]Nation v. State, 155 Fla. 858, 22 So.2d 219 (1945); Atlantic C.L.R.R. v. Railroad Comm'n, 149 Fla. 245, 5 So.2d 708 (1942); Robinson v. Miami, 138 Fla. 696, 190 So. 35 (1939); Miami Poultry & Egg Co. v. City Ice & Fuel Co., 126 Fla. 563, 172 So. 82 (1936); Coe-Mortimer Co. v. State, 81 Fla. 701, 88 So. 475 (1921); Harrison v. Frink, 75 Fla. 22, 77 So. 663 (1918); State v. Live Oak, P. & G.R.R., 70 Fla. 564, 70 So. 550 (1915).

[138]Nation v. State, 155 Fla. 858, 22 So.2d 219 (1945); Jacksonville Beach v. Waybright, 130 Fla. 525, 178 So. 401 (1938); *Ex parte* Knights of Pythias, 128 Fla. 315, 174 So. 464 (1937); New England Mut. Life Ins. Co. v. Huckins, 127 Fla. 540, 173 So. 696 (1937); United Mut. Life Ins. Co. v. Sholtz, 121 Fla. 260, 163 So. 690 (1935); Gilbert v. State, 98 Fla. 599, 124 So. 1 (1929).

[139]R. PRAC. SUP. CT. FLA. 28(b), State Beverage Dep't v. Willis, 159 Fla. 698, 32 So.2d 580 (1947).

[140]Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932).

[141]Ryan's Furniture Exchange, Inc. v. McNair, 120 Fla. 109, 162 So. 483

VIII. Supersedeas in Certiorari

Despite the rules and statutes hereinafter discussed, the following dictum appeared in 1947:[142]

> "Certiorari should not be issued without *notice* of application and *the granting of the writ operated as a supersedeas . . . .*"

The cases cited in support of this statement contain dicta to the effect that at common law certiorari has the effect of supersedeas, since it takes the record and the cause itself out of the inferior tribunal's custody, thus precluding further proceedings below.[143]

This dictum may be historically correct; but it was not only irrelevant to the decision but obsolete as well. Effective March 1, 1942, Supreme Court Rule 35(f) abrogated the common law as regards supersedeas in certiorari in the Supreme Court; and in 1945 the Legislature adopted the same rule[144] in a comprehensive revision of the law of appellate practice, including, inter alia, supersedeas in certiorari in all courts. In order to obtain supersedeas today, petitioner must take affirmative action, and must do so within a limited time.

By Supreme Court Rule, a petition for certiorari must be filed in the Supreme Court ". . . within sixty days from the date of the proceeding, order, judgment or decree sought to be reviewed."[145] But another rule provides that, although the lower court may grant supersedeas upon application, the petitioner must give a bond conditioned that he will present his petition within twenty days and will pay all costs, damages, and expenses occasioned by reason of the stay.[146]

(1935); Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932); State *ex rel.* Landis v. Crawford, 104 Fla. 440, 140 So. 333 (1932).

[142]State Beverage Dep't v. Willis, 159 Fla. 698, 701, 32 So.2d 580, 582 (1947) (italics supplied). *But cf.* Wyman v. Nussbaum, 159 Fla. 813, 32 So.2d 824 (1947), in which, in the same year, the Court recognized that supersedeas is controlled by rules and statutes and is not automatic.

[143]*See* State *ex rel.* Tullidge v. Driskell, 117 Fla. 717, 721, 158 So. 277, 279 (1934); Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 391, 141 So. 322, 327 (1932).

[144]Fla. Stat. §59.13(7),(9) (1949).

[145]R. Prac. Sup. Ct. Fla. 28(a); *cf.* Fla. Stat. §59.08 (1949).

[146]R. Prac. Sup. Ct. Fla. 35(f); Fla. Stat. §59.13(7) (1949) is substan-

Ordinarily a petitioner has sixty days to present a petition for certiorari to the Supreme Court. But if he applies for supersedeas he is required to file his petition for certiorari within twenty days of his application for supersedeas, with the result that the time allowed for preparing and filing the petition – and sixty days is little enough time in a complicated proceeding – is ordinarily shortened.[147] No reason for this reduction of time is apparent, especially since the Court has held that supersedeas should be granted as a matter of right if the record presents a question that petitioner is entitled to have reviewed.[148] It is suggested that these provisions[149] should be amended by eliminating "within 20 days" and substituting such words as "within the time limited by law."

The purpose of Rule 35 was to revoke the cumbersome and expensive practice of applying to the Supreme Court itself for supersedeas. Now, by this rule, the circuit courts have the same prerogative in granting supersedeas that the Supreme Court has.[150]

IX. Disposition of Proceedings in Certiorari

When a case reaches the Supreme Court on certiorari to a circuit court, board, commission, or other agency, how does the Court dispose of it?

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tially identical.

[147]Unless, of course, at the time of application, 40 days since rendition of judgment have elapsed.

[148]Wyman v. Nussbaum, 159 Fla. 813, 32 So.2d 824 (1947). There is no Florida common law rule expressly providing for supersedeas in certiorari from the circuit courts, but Fla. C.L.R. 60 may be held to afford a similar basis for supersedeas in the circuit courts. Moreover, Fla. Stat. §59.13(7),(9) (1949) seems, from the generality and comprehensiveness of its language, to provide effectively for supersedeas in such certiorari proceedings. It is interesting to note that Fla. Stat. §73.14 (1949) provides that an appeal from a condemnation judgment shall in no case operate as a supersedeas if the petitioner has paid the amount of compensation into court. In such case, despite the statute, the equivalent of supersedeas can be obtained by injunction, Astca Inv. Co. v. Lake County, 86 Fla. 639, 98 So. 824 (1922); Peacock v. Feaster, 52 Fla. 563, 45 So. 1038 (1906). Such injunction can be obtained pending disposition of a certiorari proceeding, Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926).

[149]See note 146 *supra*.

[150]Fla. Stat. §59.13(9); *cf.* Wyman v. Nussbaum, 159 Fla. 813, 32 So.2d 824 (1947).

Under the common law procedure followed in Florida prior to the time Supreme Court Rule 28 went into effect,[151] a petition for a writ of certiorari would set forth reasons why the Court should grant the writ; and, if the Court was sufficiently impressed and wanted in its discretion to hear the case, it would issue the writ to require the lower court to send up the record, by certified copy, for inspection. In theory at least, the petitioner would not in the first instance argue the merits of his case at all, but would simply attempt to persuade the Court that it should hear the case. At this point, if it did not want to hear the case, it would "deny" the writ; and that ended the matter.

If, however, petitioner persuaded the Court to hear the case, it would "grant" or "issue" or "allow" the writ, commanding the lower court to certify up the record. The record constituted the "return" to the writ and, as has been mentioned,[152] the petitioner had the responsibility of seeing to it that the record reached the higher court.[153]

The writ having been issued and return made, the Court then, for the first time, got to the merits of the case. Petitioner and respondent submitted briefs and the Court heard oral argument. Having considered the respective contentions of petitioner and respondent, it disposed of the case either by quashing the writ, if respondent prevailed, or by quashing the judgment complained of, if petitioner prevailed.[154] On certiorari the Court was supposed to do either one thing or the other,[155] whereas on appeal, of course, it could reverse or affirm, or give such judgment as the court below ought to have given or as might appear lawful.[156] The determination on certiorari was that the lower court's judgment either was or was not valid

[151]Approved Jan. 17, 1939, effective Feb. 15, 1939.

[152]See Part VII *supra.*

[153]*E.g.,* Matteson v. Eustis, 134 Fla. 455, 184 So. 15 (1938).

[154]Cacciatore v. State, 147 Fla. 758, 3 So.2d 584 (1941); Mutual Ben. H. & A. Ass'n v. Bunting, 133 Fla. 646, 183 So. 321 (1938); Tamiami Trail Tours, Inc. v. Florida Railroad Comm'n, 128 Fla. 25, 174 So. 451 (1937); Bringley v. C.I.T. Corp., 119 Fla. 529, 160 So. 680 (1935); Ellis v. State, 100 Fla. 27, 129 So. 106; Pick v. Adams, 98 Fla. 140, 123 So. 547 (1929); Atlantic Shell Co. v. Welded Steel Prod. Co., 98 Fla. 6, 122 So. 787 (1929); First Nat. Bank of Gainesville v. Gibbs, 78 Fla. 118, 82 So. 618 (1919); Basnet v. Jacksonville, 18 Fla. 523 (1882).

[155]Tamiami Trail Tours, Inc. v. Florida Railroad Comm'n, 128 Fla. 25, 174 So. 451 (1937).

[156]FLA. STAT. §59.34 (1949). The Court has held that this statute, enacted as Sec. 5 of the Act of Feb. 10, 1832, is not affected by any of the Florida Constitutions.

according to the criteria already discussed.[157] The Court did not, in theory at least, and according to the rule to which it paid lip service, direct the lower court's judgment,[158] nor did it attempt to enforce rights growing out of the lower court's proceedings.[159]

When a judgment was quashed, the controversy before the lower tribunal was left as if no order or judgment had been rendered, and the parties could then proceed accordingly.[160] Still, in theory, the Court would not assume the burden of completing the adjudication of a cause,[161] the purpose of certiorari being to determine whether the judgment sought to be reviewed came from a court not having jurisdiction, or resulted from essentially irregular procedure.[162] Even when only a portion of an indivisible judgment was improper, the Court would quash the entire judgment, not merely that part of it which was improper.[163] Furthermore, petitioner had to show, so the Court has said, that the error complained of was an "error of law," that it had caused "substantial harm," and that he had not been guilty of "laches" in seeking redress by certiorari.[164] He had to be specific

[157]See Part V *supra.*

[158]Okeechobee Co. v. Norton, 149 Fla. 651, 6 So.2d 632 (1942); Tamiami Trail Tours, Inc. v. Florida Railroad Comm'n, 128 Fla. 25, 174 So. 451 (1937); Bringley v. C.I.T. Corp., 119 Fla. 529, 160 So. 680 (1935); Ulsch v. Mountain City Mill Co., 103 Fla. 932,, 140 So. 218 (1932). *But cf.* Atlantic C.L.R.R. v. Lake County Citrus Sales, Inc., 48 So.2d 922 (Fla. 1950), and Goodkind v. Wolkowsky, notes 112-114 *supra* (judgments quashed "with directions").

[159]Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932); State *ex rel.* Landis v. Simmons, 104 Fla. 487, 140 So. 187 (1932).

[160]*E.g.*, Tamiami Trail Tours, Inc. v. Florida Railroad Comm'n, 128 Fla. 25, 174 So. 451 (1937).

[161]Farnham v. Caldwell, 141 Fla. 416, 193 So. 286 (1940). But when the Court explicitly lays down the "law of the case," with directions to the court below, as in Goodkind v. Wolkowsky, notes 112-114 *supra*, does it not, in effect, "complete the adjudication" of the cause?

[162]Benton v. State, 74 Fla. 30, 76 So. 341 (1917); Basnet v. Jacksonville, 18 Fla. 523 (1882); see Parts V, VI *supra.* But the Court has also said that the inquiry on certiorari is not limited to jurisdiction but extends to the manner iu which that jurisdiction is exercised, and that, although questions of fact are not examined, the evidence may be examined to determine whether it justifies the finding of the inferior court, Pensacola v. Maxwell, 49 So.2d 527 (Fla. 1950); State Beverage Dep't v. Willis, 159 Fla. 698, 32 So.2d 580 (1947); Lorenzo v. Murphy, 159 Fla. 639, 32 So.2d 421 (1947); Seaboard A.L. Ry. v. Wells, 100 Fla. 1631, 131 So. 777 (1931). Quaere: Is this not a contradiction?

[163]*E.g.*, Goodkind v. Wolkowsky, notes 112-114 *supra*; American Ry. Exp. Co. v. Fegenbush, 107 Fla. 145, 144 So. 320 (1932).

[164]*E.g.*, Leonard Bros. Trans. & Storage Co. v. Douglass, 159 Fla. 510, 32

in showing exactly the essential errors;[165] and if he failed to do so, or it was apparent to the Court that he was complaining of only formal errors which, if corrected, would result in no significant change in the disposition of the cause, certiorari was denied.[166]

When the writ had issued, the respondent could attack it by motion. Before the return, the proper method of attack was by "motion to supersede"; after the return, a motion to quash was proper.[167] But such motions were not ordinarily necessary,[168] because even without them the Court, having issued the writ, would either quash it or quash the judgment below.[169] And when the court had improvidently allowed the writ, it could be quashed either on motion of the respondent or by the Court on its own motion.[170]

Rule 28 changed all this. A summary procedure has now been substituted for the common law procedure formerly in use. No longer does any "writ" issue, and no "return" to any writ is made. Today, instead of petitioning for the issuance of a writ, procuring a return thereto consisting of the record below, and then arguing the merits of the case orally and by brief, petitioner files with his petition, in the first instance, both the transcript of record and his brief;[171] and in the petition, as well as in the brief, he argues the merits of his petition.

Rule 28 went into effect on February 15, 1939. From that date on, there seems to have been no reason why the Court should pretend to follow the details of the old procedure or use much, if any, of the old terminology. Decisions reciting that "the writ is issued and the order quashed,"[172] in cases since that date, are anachronistic. Neither is

So.2d 156 (1947); Young v. Stoutamire, 131 Fla. 535, 179 So. 797 (1938).

[165]*E.g.*, Leonard Bros. Trans. & Storage Co. v. Douglass, *supra* note 164.

[166]*E.g.*, General Accident, Fire & Life Assur. Corp. v. Colyer, 111 Fla. 771, 151 So. 717 (1933); Ferlita v. Figarrota, 106 Fla. 578, 145 So. 605 (1932); General Motors Accep. Corp. v. Judge of Cir. Ct., 102 Fla. 924, 136 So. 621 (1931).

[167]*E.g.*, Great Amer. Ins. Co. v. Peters, 105 Fla. 380, 141 So. 322 (1932); Salario v. Latin-American Bank, 104 Fla. 256, 139 So. 899 (1932).

[168]They were of some use, of course, in pointing out a specific reason for denying or quashing the writ, which might escape attention unless so emphasized.

[169]*E.g.*, Fidelity and Casualty Co. v. Plumbing Dep't Store, Inc., 117 Fla. 119, 157 So. 506 (1934); Atlantic Shell Co. v. Welded Steel Prod. Co., 98 Fla. 6, 122 So. 787 (1929); First Nat. Bank of Gainesville v. Gibbs, 78 Fla. 118, 82 So. 618 (1919).

[170]*E.g.*, Felita v. Figarrota, 106 Fla. 578, 145 So. 605 (1932).

[171]R. PRAC. SUP CT. FLA. 28 requires these.

[172]See, *e.g.*, Atlantic C.L.R.R. v. Railroad Comm'n, 149 Fla 245, 5 So.2d

there any apparent reason why the judgment in common law certiorari, at the present time, should be other than one of the following: (1) "certiorari denied," or (2) "certiorari granted and the judgment (or order) of the court below quashed."[173] The writ need no longer be quashed, for in actual fact there is no writ. Neither is there now any basis for "superseding" a non-existent writ.[174]

As regards interlocutory appeals in chancery "in the manner . . . relating to . . . certiorari"[175] or "in the nature of certiorari,"[176] it would be a boon to the bench and bar if the Supreme Court would discontinue the use of the outmoded terminology of certiorari and dispose of such appeals by simply saying that the order below is affirmed, modified, reversed, or reversed with directions.

X. Interlocutory Appeals in Chancery "by Certiorari"

Prior to 1852, appeals in chancery, like writs of error at common law, could be had from final decrees only. In that year the Legislature authorized appeals from interlocutory orders in chancery.[177] We are not now vouchsafed the reasons which impelled the enactment of the statute; but many years' experience in the practice of law indicates a very good reason for the enactment, namely, that in chancery cases controlling principles of law are very generally determined in early stages of the litigation, and accordingly authoritative settlement of such legal points by the Supreme Court, as the law of the case, will very frequently either entirely dispose of the case or at least delineate the issues to the advantage of the litigants.

On balance, the question to be weighed is whether the time and

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708 (1942); Nelms v. St. Petersburg, 149 Fla. 197, 5 So.2d 408 (1941); State *ex rel.* Hathaway v. Williams, 149 Fla. 48, 5 So.2d 269 (1941). In some cases the Court even goes on and, after "quashing the writ," "affirms" the judgment of the lower court, Ross v. Calamia, 153 Fla. 151, 13 So.2d 916 (1943) (one of the cases treating certiorari as a straight appeal).

[173]*E.g.*, Biscayne Beach Theatre, Inc. v. Hill, 151 Fla. 1, 9 So.2d 109 (1942).

[174]See Tivas v. Tivas, 140 Fla. 385, 191 So. 774 (1939) (containing language wholly inappropriate to the actual practice under Rules 28 and 34). Even scholars are confused by the practice and sometimes fail to notice the changes resulting from Rule 28 and otherwise; see *e.g.*, Comment, 4 Miami L.Q. 367 (1950).

[175]R. Prac. Sup. Ct. Fla. 34(a).

[176]Fla. Stat. §59.02(3) (1949).

[177]Fla. Laws 1852, c. 521, §3.

expense of the consideration of a certain number of unmeritorious or even frivolous interlocutory appeals outweigh the time and expense of trying all chancery cases in the circuit courts on all issues of law and fact to final decree, to be followed by omnibus appeals. It is our considered opinion that the Legislature of 1852 acted wisely in authorizing interlocutory appeals in chancery as a matter of right. True, this right may have added somewhat to the volume of cases in the Supreme Court; but this disadvantage is largely offset by the fact that many interlocutory appeals either dispose of cases or obviate the necessity of appeals from the final decrees.

For the last quarter of a century, the volume of litigation in Florida has increased enormously.[178] Since 1925, the number of trial judges in the state has been more than doubled, and litigation has more than grown apace. As a result, the docket of the Supreme Court has at times become seriously in arrears. Temporary expedients were devised. First, Supreme Court commissioners were installed. These were glorified law clerks who wrote one-man, prefabricated opinions which disposed of cases, provided the opinions seemed plausible to a majority of the Court. Next, the personnel of the Court was increased from five to six members. This often resulted in 3-3 decisions which decided nothing as to the law of the State and little as to the particular case. Later, the membership of the Court was increased to seven. But this increase in the personnel of the Court has not kept pace with the steadily accelerating increase in the volume of litigation. Obviously the Court is overburdened. Nothing short of a complete reorganization of the appellate judiciary will ever afford any real relief to judges, lawyers, and litigants.

Apparently thinking that interlocutory appeals in chancery unduly burdened its docket, the Court adopted Rule 34, effective May 1, 1939.[179] The French peasants have an aphorism which goes like this: "There are two reasons for everything, a good reason and the true reason." We have already stated the true reason for Rule 34: a grievously overburdened Court. The good reason, according to the

[178] See Sebring, *The Appellate System of Florida,* 25 FLA. L.J. 141 (1951). *See* State Road Dep't. v. Forehand, 56 So.2d 901, 905 (Fla. 1952) (concurring opinion).

[179] By Fla. Laws 1945, c. 22,854, the Legislature codified much of the law of appellate proceedings, and in what is now FLA. STAT. §59.02(3) (1949) gave legislative support to Rule 34. Prior to 1945, Rule 34 was inconsistent with statutes governing equity appeals; but it was nonetheless duly recognized by Fla. Laws 1929, c. 13,870, and was legally effective despite inconsistent statutes.

opinions, is to "hasten litigation" and "dispatch appeals," to provide a "more expeditious manner" of appeal, and to "discourage unmeritorious appeals."[180]

Supreme Court Rule 34 does hasten litigation and dispatch appeals somewhat, but really not enough to boast about. The lawyer for an appellant is hard pressed for time to get up his petition and the supporting record and prepare his brief under Rule 34. It does save some time in getting cases to the Court. But, if this is a desideratum, then consideration should be given to the obvious fact that time could likewise be saved in all cases if the theory of Rule 34 were applied to appeals from final judgments at law and *final* equity decrees as well. The bottle-neck is not in the time it takes to get a case to Tallahassee, but in getting it back home.[181]

Does Rule 34 really "discourage unmeritorious appeals"? It is suggested that it does not. No pestiferous litigant is deterred by reason of the fact that his lawyer must work overtime in order to get an interlocutory appeal to Tallahassee some few days earlier than under the statute and rules in effect prior to the effective date of Rule 34. Nor is the pestiferous litigant deterred by the ten-minute limitation on oral argument prescribed in paragraph (c) of Rule 34. He always asks for "more time," and is entitled to it under the rule. An unmeritorious interlocutory appeal avails the pestiferous litigant nothing unless he posts a good and sufficient supersedeas bond in the circuit court. How Rule 34 has discouraged "unmeritorious appeals" is hard to understand; no good reason for any such discouragement is apparent. On the other hand, able and experienced lawyers have discouraged clients from taking truly meritorious interlocutory appeals on the ground that such appeals, because of the scant consideration afforded by Rule 34, may result in an unfortunate ruling becoming "the law of the case." When Rule 34 was promulgated in 1939, many

[180]*See, e.g.*, Eristavetchitcherine v. Miami Beach Fed. Sav. & Loan Ass'n, 154 Fla. 100, 110, 16 So.2d 730, 735 (1944); Hunter v. Tyner, 151 Fla. 707, 710, 10 So.2d 492, 493 (1942); Greater Miami Devel. Corp. v. Pender, 142 Fla. 390, 393, 194 So. 867, 868 (1940); Knabb v. Duner, 140 Fla. 483, 485, 192 So. 182, 183 (1939).

[181]While the Court has been pointing with pride to Rule 34 as a time-saver and as a deterrent to interlocutory appeals in chancery, it has gone serenely along deciding case after case, in common law certiorari to the circuit courts to review judgments on appeal from the civil courts of record, when the common law judgment reviewed was really not final, thus in effect actually encouraging interlocutory appeals at law.

lawyers were skeptical of its expediency. It now appears that the Court had much better heeded Hamlet's soliloquy at Elsinore Castle, where he said: "And makes us rather bear the ills we have, than fly to others that we know not of."

For eighty-seven years prior to the promulgation of Rule 34, every attorney knew exactly how to take an interlocutory appeal; he took it just as he took an appeal from a final decree. He filed his notice of appeal, his assignments of error, and his directions to the clerk. His adversary could file cross-assignments and further directions, but these were rarely necessary on interlocutory appeals. The transcript went to Tallahassee, briefs were filed, and there was oral argument. All this took some time in getting the case to Tallahassee; and, of course, the case had to take its turn after it got there. But generally attorneys were not forced to work nights, holidays and Sundays to get their appeals perfected quickly – and clients don't pay lawyers time-and-a-half for overtime, and double-time for holidays and Sundays.

Then came Rule 34, which provides that interlocutory appeals in chancery shall be "by certiorari," ordinarily with ten minutes to a side to argue the case. The ten-minute provision is illusory. No responsible lawyer would ever permit his client to submit an interlocutory appeal, at the risk of an adverse decision finally settling the law of the case, upon a ten-minute argument. Experienced practitioners all agree that a law point simply cannot be well stated in ten minutes; and that leaves no time at all to argue the point. The Court was conscious of this. And so it provided, in paragraph (c) of Rule 34, that "If more time is desired, it will be set for a day certain." Every lawyer worth his salt knows that he must have more than ten minutes to present a case worth taking to the Supreme Court, and he always asks for it. Those who do not know this fact of life represent clients whose meritorious substantial legal rights may well be irrevocably lost by a ten-minute argument followed by a brief conference, resulting in "certiorari denied" without the Court's having had time to find out precisely what's before it.

Confusion Caused by Rule 34

Supreme Court Rule 34 has been a veritable Pandora's Box. When promulgated, it looked innocent enough. But once the lid was opened, the evils that Zeus had placed in the jar carried by Pandora to Epimetheus encompassed the bench and the bar. The mere use of

the phrase "certiorari" in Rule 34 has confused everybody – lawyers, legal editors, and even the judges themselves.[182]

The 39 cases cited below[183] are all digested by legal editors as components of the case law of "certiorari." No one of these cases has any remote relationship to the law of certiorari. True, some of these opinions are replete with dicta of the law of certiorari, almost all wholly irrelevant, and also with the nomenclature of the law of certiorari, likewise irrelevant. But none of these cases decides anything as to the law of certiorari. What they do decide is (1) a question of equity jurisprudence, or (2) a question of appellate practice in equity. The law student reading these cases, illuminated with dicta and the

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[182][Editor's Note: It thoroughly confuses law students too.]

[183]Pearce v. Flagler Memorial Park, Inc., 160 Fla. 661, 36 So.2d 273 (1948); Weiss v. Marcus, 160 Fla. 283, 34 So.2d 550 (1948); Cassara v. Wofford, 159 Fla. 293, 31 So.2d 276 (1947); Burnett v. Burnett, 158 Fla. 464, 28 So.2d 878 (1947); Vocelle v. Sun Sales Corp., 158 Fla. 159, 28 So.2d 112 (1946); Bryant v. Lakeland, 158 Fla. 151, 28 So.2d 106 (1946); Hart v. Kapnias, 157 Fla. 846, 27 So.2d 145 (1946); Jacksonville v. Wilson, 157 Fla. 838, 27 So.2d 108 (1946); Beauville Corp. v. Blount, 157 Fla. 753, 26 So.2d 884 (1946); Lichtenberg v. Perrine Grant Land Co., 154 Fla. 812, 18 So.2d 787 (1944); Holland v. Wilson Cypress Co., 154 Fla. 113, 16 So.2d 815 (1944); Martinez v. Martinez, 153 Fla. 753, 15 So.2d 842 (1943); Sheffield v. Barry, 153 Fla. 144, 14 So.2d 417 (1943); Friedman v. Feller, 152 Fla. 428, 12 So.2d 117 (1943); Bituminous Casualty Corp. v. Williams, 152 Fla. 53, 10 So.2d 714 (1942); First Nat. Bank of Miami v. Davis, 152 Fla. 10, 10 So.2d 435 (1942); Charles v. Wood, 151 Fla. 777, 10 So.2d 431 (1942); Howard Nat. Bank & Trust Co. v. Lodwick, 151 Fla. 747, 10 So.2d 429 (1942); Gribbel v. Henderson, 151 Fla. 712, 10 So.2d 734 (1942); Roney v. Miami Beach, 151 Fla. 518, 10 So.2d 325 (1942); Watson v. Cochrane, 150 Fla. 733, 8 So.2d 664 (1942); St. Joseph Tel. & Tel. Co. v. Southeastern Tel. Co., 149 Fla. 14, 5 So.2d 55 (1941); Oceanic Villas, Inc. v. Godson, 148 Fla. 454, 4 So.2d 689 (1941); Elvins v. Seestedt, 148 Fla. 408, 4 So.2d 532 (1941); Warren v. Warren, 148 Fla. 439, 4 So.2d 524 (1941); McAllister v. McAllister, 147 Fla. 647, 3 So.2d 351 (1941); Wolkov v. L. W. Pickering Constr'n Co., 147 Fla. 506, 3 So.2d 350 (1941); Daoud v. Miami Beach, 145 Fla. 449, 199 So. 582 (1941); Brickell v. DiPietro, 145 Fla. 23, 198 So. 806 (1940); Miller v. Security-Peoples Trust Co., 144 Fla. 425, 198 So. 73 (1940); Florida Dry Clean. & Laun. Bd. v. Economy Cash & Carry Cleaners, Inc., 143 Fla. 859, 197 So. 550 (1940); Wakulla County v. Cone, 143 Fla. 879, 197 So. 537 (1940); Becker v. McCabe, 143 Fla. 353, 196 So. 858 (1940); Peacock v. Roberts, 142 Fla. 701, 195 So. 914 (1940); Valdez v. State *ex rel.* Farrior, 142 Fla. 123, 194 So. 388 (1940); Knabb v. Duner, 140 Fla. 483, 192 So. 182 (1939); Tivas v. Tivas, 140 Fla. 385, 191 So. 774 (1939); La Vechia v. Madeira Holding Co., 140 Fla. 200, 191 So. 304 (1939); Atkins v. Kendrick, 138 Fla. 776, 190 So. 248 (1939).

nomenclature[184] of common law certiorari, might wander like Moses of old "for forty years in the wilderness," only to discover in the end that, like Jacob's "strange gods," they apparently portray the law of certiorari, but in reality portray something quite different, namely, equity jurisprudence and practice.

The practitioner cannot afford to rely on any statement made in any of these cases as authoritative of the law of certiorari. He must, however, expect to be confronted with them either by attorneys who do not know any better or by attorneys in extremis, and must be prepared to distinguish them before judges who have not already noticed their deceptive appearance.

A literal reading of the anachronistic provisions of Rule 34 would naturally lead one to suppose that the classical procedure of common law certiorari obtains in the review of interlocutory orders in equity under the rule, but such is not the case. Legal scholars have been confused by Rule 34.[185] When it was adopted no one supposed that trouble might arise as to the effect of the denial of certiorari under the rule. But shortly it developed that the justices themselves could not agree about the effect of such denial.[186] To use the vernacular, lawyers are "in a fix" when the Supreme Court makes a rule, and its own members cannot agree as to its significance.

Rule 34 looked innocent enough in 1939. About all that it provided was that interlocutory appeals in equity should no longer be taken by appeal, as theretofore, but "by certiorari"; and Rule 28 specified a summary procedure in certiorari. Rule 34 boded trouble for the unfortunate lawyer who had a borderline case presenting quandary as to whether the order sought to be reviewed was final or interlocutory. He had to hunt for cases in point and read case after case, not all of them consistent. His client was not paying him to try to find out how to get to Tallahassee but merely to go there. Rule 34, by drawing a novel and unnecessary distinction between interlocutory and final appeals, placed a serious burden on the bar in all borderline cases.

[184]A review of the numerous cases in which interlocutory appeals have been taken under Rule 34 discloses no uniformity in the nomenclature employed by the Supreme Court. The esoteric phraseology of certiorari is employed with numerous variations; the customary phraseology used in disposing of equity appeals is also used at times; and, on occasion, the Court uses hybrid phrases combining the two. The cases in point are too numerous for citation.

[185]See Comment, 4 MIAMI L.Q. 367 (1950).

[186]The details of this intramural controversy are presented *infra* in this Part X.

Why, indeed, should there ever be any procedural rule or statute which vexes intelligent and educated members of the bar? It is respectfully suggested for the consideration of all rule-making bodies, legislative and judicial, that no rule or statute be adopted or maintained which requires lawyers to waste time finding out in which of two ways an appeal is to be taken. Every hour which a lawyer must spend trying to reassure himself as to how to appeal a particular case is a total loss to him. Drawing fine distinctions between "interlocutory" and "final" is a waste of time of the judiciary, and is tragic for the lawyer who is forced to guess, and guesses wrong.

Rule 34 undoubtedly presupposed that the distinction between interlocutory appeals and final appeals would be clear to all. But it hasn't worked out that way. Lawyers and judges alike have entertained conflicting views.[187] This confusion has been a costly thing for the bar. The time consumed and money spent trying to ascertain the precise location of the dividing line between "interlocutory" and "final" in close cases has all been wasted.

Locus Penitentiae

It didn't take the Supreme Court long to discover that it had put the bar "in a fix" by the adoption of Rule 34. But rather than rescind or amend the rule, as it should have, it set about to alleviate the hardship. In four successive cases it condoned "appeals" which it held should have been brought "by certiorari," and treated the appeals as petitions for certiorari.[188] Then at last the Court's patience seemed to be exhausted. If it persisted in condonation, Rule 34 seemingly

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[187]See, *e.g.*, Cottrell v. Amerkan, 160 Fla. 390, 35 So.2d 383 (1948); Eristavitchitcherine v. Miami Beach Fed. Sav. & Loan Ass'n, 154 Fla. 100, 16 So.2d 730 (1944); Hollywood, Inc. v. Clark, 153 Fla. 501, 15 So.2d 175 (1943); Dudemaine v. Shaw, 153 Fla. 16, 13 So.2d 444 (1943); Miami Bridge Co. v. Miami Beach Ry., 152 Fla. 458, 12 So.2d 438 (1943); Spivey v. Huss, 147 Fla. 527, 3 So.2d 127 (1941); Alderman v. Puritan Dairy, Inc., 145 Fla. 292, 199 So. 44 (1940); Finlayson v. Monticello, 144 Fla. 724, 198 So. 577 (1940); Cone v. Benjamin, 142 Fla. 604, 195 So. 416 (1940).

[188]Eristavitchitcherine v. Miami Beach Fed. Sav. & Loan Ass'n, 154 Fla. 100, 16 So.2d 730 (1944) (kindly Justice Brown noted the "comparatively recent" adoption of Rule 34 – 14 years before – as ground for disregarding it); Carr v. Carlisle, 146 Fla. 201, 200 So. 529 (1941); Boyd v. Mutual Ben. H. & A. Ass'n, 146 Fla. 15, 200 So. 399 (1941); Stephens v. Stickel, 146 Fla. 104, 200 So. 396 (1941).

would become futile. Accordingly, in *Randall v. Randall*,[189] for the fifth time it treated an "appeal" as a "petition for certiorari"; but it said that it was through, and that henceforth, on motion, it would dismiss appeals which should in its view have been brought by petition for certiorari under Rule 34.

Enactment of Section 59.45

The warning in the *Randall* case produced an instantaneous reaction. The bar appealed to the 1947 Legislature, which promptly enacted Section 59.45 of Florida Statutes 1949.[190] This statute was intended to relieve the bar from having to pre-guess the Court as to whether an equity order sought to be reviewed was interlocutory or final, on pain of having the appeal dismissed without consideration of the merits. The situation was one of the Court's own making, and one which, at least by the time of the decision in the *Randall* case, it should itself have remedied.

The statute itself is only a half-way measure. It provides that if an appeal be improvidently taken when the proper remedy is by petition for certiorari, then such appeal shall be regarded as a petition for certiorari. But it does not provide for the converse situation, namely, if a petition for certiorari be improvidently taken when the proper remedy is appeal. In this second class of cases, the Supreme Court will dismiss the petition "without prejudice" to an appropriate appeal.[191]

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[189]158 Fla. 502, 29 So.2d 238 (1947). A few months prior to the warning in the *Randall* case, the Court had before it Krajci v. Krajci, 157 Fla. 205, 25 So.2d 380 (1946). After hearing the case on the merits it dismissed a formal appeal *ex mero motu*, on the ground that Rule 34 required the appeal to be presented by petition for certiorari. The question raised by the appeal concerned the jurisdiction of the circuit court; accordingly the appellant did not lose his right to question the decree below in subsequent proceedings. But the singular thing is the glaring inconsistency between the Court's action in this case and in the subsequent *Randall* case. Furthermore, in this case it refused to consider a jurisdictional question informally raised, although in Martinez v. Martinez, 153 Fla. 753, 15 So.2d 842 (1943), it had, *sua sponte*, considered and determined a jurisdictional question not raised by appellant.

[190]Enacted as Fla. Laws 1947, c. 23,826.

[191]See, *e.g.*, Alderman v. Puritan Dairy, Inc., 145 Fla. 292, 199 So. 44 (1940). In such cases, however, it is practically a certainty that the time for taking appeal will have expired; and accordingly the ill-fated litigant will be remediless despite the dismissal "without prejudice."

It is accordingly suggested that in all cases involving doubt as to the finality of an equity order sought to be reviewed the only safe thing to do is to take an "appeal," and not petition for certiorari. If the Supreme Court happens to consider the doubtful order "interlocutory," then Section 59.45 may save the day.[192] If, on the other hand, a petition for certiorari has been taken and the Supreme Court considers the order "final," the petition for certiorari will be dismissed "without prejudice" to an appeal, the time for which will in most instances have long since expired. And that will be an embarrassing thing for the lawyer to explain to his hapless client.

Judicial Application of Section 59.45

The Supreme Court has not been at pains to define the limits of Section 59.45. In *Smehyl v. Hammond*,[193] the statute was applied in an *equity* case, the type of case at which the statute was aimed, and an improvident appeal was treated as a petition for certiorari.

But the language of the statute does not expressly limit its application to equity cases. The language is so general that it is readily susceptible to the construction that it applies to all appeals in all cases, not only to equity appeals but also to common law appeals and appeals from orders of boards and commissions.[194] And the Supreme Court has so applied the statute.[195]

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[192]*See* Atlantic C.L.R.R. v. King, 47 So.2d 514, 515 (Fla. 1950).

[193]44 So.2d 678 (Fla. 1950).

[194]FLA. STAT. §§59.02(2),(3) (equity), 59.02(1) (common law), 59.02(4) (boards and commissions) (1949).

[195]See Dade County v. Brigham, 40 So.2d 835 (Fla. 1949) (order denying stay of execution in action at law for condemnation held not a final judgment subject to common law appeal under FLA. STAT. §59.02(1) (1949), and thereupon treated as petition for certiorari pursuant to §59.45). But note Atlantic C.L.R.R. v. Lake County Citrus Sales, Inc., 48 So.2d 922 (Fla. 1950) (order denying a motion to vacate a final judgment in action at law held not reviewable by common law appeal under Sec. 59.02(1) and thereupon treated as a petition for common law certiorari pursuant to Sec. 59.45); First Nat. Bank v. Bebinger, 99 Fla. 1290, 128 So. 862 (1930) (order in proceedings supplementary to execution held final and subject to old writ of error); Southern Fla. Lbr. & Sup. Co. v. Read, 65 Fla 61, 61 So. 125 (1913); McCulloch v. Dekle, 59 Fla. 330, 52 So. 610 (1910); Clinton v. Colclough, 54 Fla. 520, 44 So. 878 (1907) (orders on motion for stay of execution held reviewable by old writs of error).

In Atlantic C.L.R.R. v. United States Sugar Corp., 47 So.2d 513 (Fla. 1950), and Atlantic C.L.R.R. v. King, 47 So.2d 514 (Fla. 1950), the Supreme Court

Since the adoption of Rule 34, and more especially since the 1945 statute,[196] the bar has frequently been vexed to distinguish between "final" decrees and "after final" decrees. The former are appealable; the latter are to be taken up "by proceedings in the nature of certiorari." But lawyers will frequently differ, as the judges have, as to whether the order in question is "final" or "after final." In case of doubt an appeal should be taken; and Section 59.45 ought to safeguard against improvidence. But if a petition for certiorari be "improvidently taken," this section will be unavailing.

Effect of Denial of Certiorari under Rule 34

Authority need hardly be cited to the proposition that review of interlocutory orders under Rule 34 is not discretionary but a matter of right, and that Rule 34 merely provides a novel method of exercising the right.[197]

But the novelty of the method of such review, after having confused the bar and the legal editors, finally produced still further confusion in the bench.[198] In *Davis v. Strople*[199] the Supreme Court, in a 5-1

held that orders of the Railroad and Public Utilities Commission are not reviewable by appeal; whereupon, pursuant to Sec. 59.45, the Court treated the improvident appeals as petitions for common law certiorari. In the latter case the Court concluded its per curiam opinion with an admonition to the bar, saying that its application of Sec. 59.45 in those two cases would not likely be followed. This caveat seems to indicate that the words of the statute, "improvidently taken," are sometimes to be narrowly construed. And thus another peril looms on the horizon: If the Court does not consider that your improvidence in taking an appeal was really improvidence, the statute will not protect you against your "improvidence"!

[196]FLA. STAT. §59.02(3) (1949), enacted as part of Fla. Laws 1945, c. 22,854.

[197]*E.g.*, Sirman v. Conklin, 154 Fla. 304, 17 So.2d 298 (1944); Eristavitchitcherine v. Miami Beach Fed. Sav. & Loan Ass'n, 154 Fla. 100, 16 So.2d 730 (1944); Greater Miami Devel. Corp. v. Pender, 142 Fla. 390, 194 So. 867 (1940). Quaere: Did the enactment of Fla. Laws 1945, c. 22,854, now FLA. STAT. c. 59 (1949) "repeal" the uniform line of decisions referred to, and render interlocutory appeals in equity no longer a matter of right? The statute is not so clear as might be desired; but it is our view that interlocutory appeals in equity still remain a matter of right. We venture this opinion despite the contrary view expressed in Davis v. Strople, 39 So.2d 468, 473 (Fla. 1949) (dissenting opinion).

[198]The justices of the Supreme Court have not always found themselves in agreement as to the finality of a decree to support an appeal, or as to its interlocutory nature requiring certiorari under Rule 34.

[199]39 So.2d 468 (Fla. 1949).

decision, held that an earlier decision in that case holding merely "petition for certiorari denied" conclusively settled the law of the case on the point raised. The Court cited as authority *Hunter v. Tyner*[200] and *Hager v. Butler*.[201]

The dissent in the *Davis* case argued that a denial of certiorari without opinion, in a prior interlocutory appeal, should not be considered as an affirmance of the order reviewed, establishing the law of the case, but on the contrary should be considered merely the exercise of discretion not to consider the merits of the legal point raised, as is inherent in common law certiorari. The dissent urged, by way of analogy, the holdings of the United States Supreme Court as to the legal effect of "certiorari denied" in review sought there.[202]

The practice of the United States Supreme Court in disposing of petitions for certiorari has recently been summarized in *Maryland v. Baltimore Radio Show*.[203] An examination of this opinion will disclose that that practice has no remote analogy to that of the Supreme Court of Florida in deciding interlocutory appeals taken under Rule 34.

When the United States Supreme Court is petitioned to grant certiorari, the only question presented and briefed is the question whether or not it will hear the case later on the merits. The granting of certiorari is a discretionary decision to put the case on its docket, and thereafter, in due course, to hear it on the merits. The denial of certiorari is a discretionary decision to let the final judgment of the lower court stand.

On the contrary, when an interlocutory order in equity is appealed to the Florida Supreme Court under Rule 34, the merits are presented by the petition and supporting brief, and controverted in the brief of respondent; the case is orally argued on the merits; and what the Court takes under consideration for determination is the merits of the order reviewed. No question is presented or considered as to whether or not the Court will later hear the merits; the Court actually hears the merits; and when it rules, of necessity it decides the merits.[204]

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[200]151 Fla. 707, 10 So.2d 492 (1942).

[201]156 Fla. 113, 22 So.2d 631 (1945); *accord*, Harvey Corp. v. Universal Equip. Co., 158 Fla. 644, 29 So.2d 700 (1947).

[202]28 U.S.C. §1257(3) (Supp. 1950); see Part II *supra*.

[203]338 U.S. 912 (1950).

[204]Practical considerations of fairness, which constitute the very foundation

The distinction between the two types of certiorari is obvious. There is no analogy. But here's the rub. The fact that any justice of the Florida Supreme Court should think that the federal practice bears the slightest resemblance to the Florida practice is, in and of itself, a condemnation of Rule 34 as a source of unjustifiable confusion resulting from the mere use of the word "certiorari" in the rule.

Mysterious Enactment of Section 59.021

The decision in *Davis v. Strople* became final April 7, 1949. House Bill No. 281 was immediately introduced, and became law without the Governor's approval on May 21, 1949.[205] This statute was enacted as an amendment to Chapter 67 of Florida Statutes 1941 relating to chancery appeals, and particularly as an amendment to the section relating to interlocutory appeals,[206] and was obviously calculated to perpetuate, as statute law, the ill-fated dissent in *Davis v. Strople.*[207]

It is to be noted that this statute presumes to construe legislatively the meaning of "certiorari denied" in interlocutory equity appeals decided by the Supreme Court — and this despite the fact that Rule

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of procedural due process, compel the conclusion that the mere denial of certiorari in interlocutory appeals, generally without opinion, as in, *e.g.*, American Nat. Bank of Jacksonville v. Marks Lumber & Hardware Co., 45 So.2d 336 (Fla. 1950), cannot be considered as a mere discretionary declination to consider the legal question raised. The reason is that, on any such assumption, if the Court rules with petitioner-appellant he has won his legal point on the merits; but if it rules adversely he loses nothing, for he can present the point again on final appeal. On the same ruling, however, respondent-appellee loses the controversy on the merits; yet if the Court rules for him he can win nothing and must risk a later decision of the point against him on final appeal. This procedure would afford petitioner-appellant a "heads-I-win-tails-you-lose" advantage over the respondent-appellee, a complete lack of the fairness essential to due process.

[205]FLA. STAT. §59.021 (1949), enacted as Fla. Laws 1949, c. 25116.

[206]FLA. STAT. §67.02 (1941).

[207]39 So.2d 468, 469 (Fla. 1949). In Howey-in-the-Hills v. Graessle, 44 So.2d 90 (Fla. 1949), the same justice dissented again, reiterating his thesis that "certiorari denied" in an interlocutory equity appeal under Rule 34 should be construed to mean merely that the Supreme Court, after having heard and considered the merits of the point at issue, had finally decided merely to do nothing about it. In this dissent two additional converts were picked up; one more vote would have established the heretical thesis that, in interlocutory appeals in equity, the dice are to be loaded against the respondent-appellee. That would constitute confusion worse confounded.

34(b) expressly provides that ordinarily opinions will not be written in such appeals. In other words, the Legislature has undertaken to dictate to the Supreme Court that, unless it writes an opinion in every such appeal, its decisions are to be construed in a manner directly contrary to that in which the Court itself has uniformly interpreted such decisions in five comparatively recent cases.[208]

It is suggested that this statute is an obvious attempt to breathe life into the hapless dissent in *Davis v. Strople*, and is an unconstitutional attempt by the Legislature to interfere with the functioning of the judiciary.[209]

The pellucid language of the Supreme Court in *American National Bank of Jacksonville v. Marks Lumber & Hardware Co.*[210] is indicative of the prospect that under Rule 34 interlocutory appeals in equity will continue to be heard as a matter of right, and that, despite the statute, decisions reading "certiorari denied" will continue to constitute affirmances as the law of the case.[211]

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[208]Howey-in-the-Hills v. Graessle, 44 So.2d 90 (Fla. 1949); Davis v. Strople, 39 So.2d 468 (Fla. 1949); Harvey Corp. v. Universal Equip. Co., 158 Fla. 644, 29 So.2d 700 (1947); Hager v. Butler, 156 Fla. 113, 22 So.2d 631 (1945); Hunter v. Tyner, 151 Fla. 707, 10 So.2d 492 (1942).

[209]It is beyond the scope of this article to brief the constitutional point suggested; but the reader may be interested, in this connection, in the following supporting decisions: Simmons v. State, 160 Fla. 626, 36 So.2d 207 (1948); Nelson v. McMillan, 151 Fla. 847, 10 So.2d 565 (1942); Petition of Florida State Bar Ass'n, 145 Fla. 223, 199 So. 57 (1940); Mitchell v. Mitchell, 139 Fla. 634, 190 So. 758 (1939); Sivort Co. v. State, 136 Fla. 179, 186 So. 671 (1939); Petition of Florida State Bar Ass'n, 134 Fla. 851, 186 So. 280 (1938); State *ex rel.* Powell v. Leon County, 133 Fla. 68, 182 So. 639 (1938); *In re* Florida Conference Ass'n of Seventh Day Adventists, 128 Fla. 677, 175 So. 715 (1937); State *ex rel.* Payson v. Chillingworth, 122 Fla. 339, 165 So. 264 (1936); Lee v. Harllee, 119 Fla. 274, 161 So. 405 (1935); Otto v. Harllee, 119 Fla. 266, 161 So. 402 (1935); Bigham v. State *ex rel.* Ocala Brick & Tile Co., 115 Fla. 852, 156 So. 246 (1934); State *ex rel.* Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508 (1933); Hay v. Isetts, 98 Fla. 1026, 125 So. 237 (1929); State *ex rel.* Fulton v. Ives, 123 Fla. 401, 167 So. 394 (1936); Sydney v. Auburndale Constr'n Corp., 96 Fla. 688, 119 So. 128 (1928); Bryan v. State, 94 Fla. 909, 114 So. 773 (1927); Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926); Ruff v. Georgia S. & F. Ry., 67 Fla. 224, 64 So. 782 (1914); State *ex rel.* Chestnut v. King, 20 Fla. 399 (1884); Dickerson v. Acosta, 15 Fla. 614 (1876); McNealy v. Gregory, 13 Fla. 417 (1869); Trustees v. Bailey, 10 Fla. 238 (1863).

[210]45 So.2d 336 (Fla. 1950).

[211]The latest case, McClosky v. Johnston, 54 So.2d 517 (Fla. 1951), is further indicative that the denial of certiorari in interlocutory appeals under Rule

Rule 34 Procedure

Since Supreme Court Rule 34 did not abrogate interlocutory appeals, but merely provided a novel method for bringing them, some of the law relating to appeals still obtains. Rule 34 impliedly refers to Rule 28, and thence to Rule 27; and those rules are controlling. They do not treat the subject exhaustively, however; much of their substance merely provides the equivalent of the former practice. Thus Rule 28 requires the petition for certiorari to set forth succinctly the errors supposed to inhere in the order appealed; this is simply the equivalent of the assignment of errors of the earlier practice. The transcript of the record and the briefs must still meet the requirements of the Supreme Court Rules relating to those two subjects.

As under the former practice relating to appeals, questions not raised and decided below may not be raised on a petition for certiorari, except the question of jurisdiction of the lower court.

The sixty-day limitation prescribed by statute and rule for taking appeals likewise applies to petitions for certiorari under Rule 34, although it does not invariably apply to the common law writ.[212]

Rule 34 Should Be Amended

For years the cry *Carthago delenda est* rang through the halls of the Roman Senate. Finally, the cry was heeded, and Carthage was destroyed by Scipio Africanus in the third Punic War.

This article has criticized Rule 34, and urges its amendment. Rule 34 and Sections 59.02, 59.021, and 59.45 of Florida Statutes 1949, as interpreted and applied, cry out for amendatory unification. The unfortunate use of the phrase "petition for certiorari" in Rule 34, the predilection of the Court to include inappropriate dicta of the law of

34 establishes the law of the case. Fernandez v. Fernandez, 54 So.2d 238 (Fla. 1951), is not inconsistent. In this case the issue before the Supreme Court on the interlocutory appeal was a different question from that raised on the subsequent appeal.

[212]The following cases, among others, deal generally with these subjects: Bass v. Addison, 40 So.2d 466 (Fla. 1949); Westervelt v. Istokpoga Consol. Subdrainage Dist., 160 Fla. 535, 35 So.2d 641 (1948); Schupler v. Eastern Mtg. Co., 160 Fla. 72, 33 So.2d 586 (1948); Moorhead v. Moorhead, 159 Fla. 470, 31 So.2d 867 (1947); Sirman v. Conklin, 154 Fla. 304, 17 So.2d 298 (1944); Martinez v. Martinez, 153 Fla. 753, 15 So.2d 842 (1943); Nelms v. St. Petersburg, 149 Fla. 197, 5 So.2d 408 (1941).

federal and common law certiorari and the unfortunate tendency to cite common law certiorari principles as authority for rulings in Rule 34 cases, the confusing nomenclature employed in the Supreme Court's decisions, the almost insoluble problem of trying accurately to preguess the view of the Supreme Court as to whether a particular order is (1) "interlocutory," (2) "final," or (3) "after final," the haunting question of what "petition for certiorari denied" now means in a Supreme Court decision since the sudden enactment of Section 59.021,[213] and the inadequacy of Section 59.45, enacted by the Legislature to relieve the bar from the intransigence exhibited in *Randall v. Randall*,[214] unite in a chorus calling for a complete re-examination of the whole subject and the adoption of a simple rule understandable by all — a rule which "he who runs may read" without fear of pitfalls. a rule which will obviate hours, yes even days, of time wasted by lawyer after lawyer in case after case in uncompensated research concerning how to appeal and whether or not to appeal in view of legal uncertainties. It is hoped that this reform will not take as long as the three Punic Wars. But even if it does, our grandchildren will some day benefit.

What is needed is just this: A rule eliminating the word "certiorari," for it is a source of confusion; a rule which will obviate all necessity of guessing about the finality of the order to be reviewed; a rule which repeals Section 59.021; a rule which completely remedies the inadequacy of Section 59.45; in short, a rule which lets lawyers utilize all their time and energy on the merits of their appeals without unnecessary worries or perils as to procedure.[215]

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[213]FLA. STAT. §59.021 (1949), enacted as Fla. Laws 1949, c. 25116.

[214]158 Fla. 502, 29 So.2d 238 (1947).

[215]Interlocutory appeals may be handled by "petition for appeal" with all the advantages and none of the disadvantages of "petition for certiorari."