IN THE FLORIDA SUPREME COURT

CASE NO.: SC19-1118

BRENT A. DODGEN,

Petitioner,

vs.

L.T. Case Nos.:
4D19-1010; 2016-CA-018196

KAITLYN P. GRIJALVA,

Respondent.
_____/

APPENDIX TO AMICUS BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF RESPONDENT KAITLYN P. GRIJALVA

Bryan S. Gowdy
Amicus Chair for the
Florida Justice Association
Florida Bar No. 176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
Facsimile: (904) 503-0441

Attorney for Amicus Curiae Florida Justice Association

INDEX

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CONSTITUTIONAL JURISDICTION OF THE SUPREME COURT OF FLORIDA: 1980 REFORM

ARTHUR J. ENGLAND, JR.*
ELEANOR MITCHELL HUNTER**
RICHARD C. WILLIAMS, JR.***

TABLE OF CONTENTS

*B.S., University of Pennsylvania 1955; LL.B., University of Pennsylvania 1961; LL.M. (Taxation), University of Miami 1971; Justice of the Supreme Court of Florida (Chief Justice 1978-1980).

**B.A., Bennett College (North Carolina) 1968; Certificate, Johns Hopkins University School of Advanced International Studies 1970; J.D., Florida State University 1975; Administrative Assistant to Chief Justice England 1978-1980 and Supreme Court liaison with the Appellate Structure Commission.

***B.A., Davidson College 1976; J.D., Columbia University 1979; Research aide to Justice England.

INTRODUCTION

The practical aspects of "justice" to most citizens mean speedier, less costly and more conclusive adjudications of property and liberty rights. To achieve these objectives, the chief justice of the Supreme Court of Florida in 1978 appointed a commission to study judicial reform in the state's appellate system, including jurisdictional changes for the Florida Supreme Court.

The efforts of the commission and many others culminated on March 11, 1980, when the voters of Florida were given the opportunity to approve an amendment to Florida's Constitution which would redefine the jurisdiction of the Supreme Court of Florida.[1] Believing the amendment would eliminate delay and costs in appellate proceedings, and expedite the careful resolution of important decisions emanating from the supreme court, the voters overwhelmingly adopted this constitutional amendment.

Principally this article explores the extent to which the voters' expectations have been or will be met by their adoption of the 1980 amendment to article V of the Florida Constitution. A subsidiary purpose is to chronicle the history of this amendment, identify reference sources for later use in construing the amendment, and suggest procedures and rules which should be established to effect the framers' and the voters' wills.

Properly understood and implemented, the 1980 amendment potentially offers an effective, expeditious appellate system geared to the uniqueness of Florida's judiciary. Dedicated appellate jurists, a cooperative appellate bar, and a vigilant public are necessary to assure the efficacy of the amendment. Principal responsibility for the success or failure of the intended changes, however, rests squarely on the seven members of the Florida Supreme Court. Their construction and application of the amendment, particularly in its formative years, will either realize or frustrate the voters' hopes for a new day in Florida appellate justice.

I. ESTABLISHING THE ROLE OF THE SUPREME COURT OF FLORIDA: 1851-1957

From 1851, when a permanent supreme court with three justices was established, until 1957, the state experienced a growing number of civil and criminal courts of record.[2] Various means were devised to enable the high tribunal to

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1. See appendix A for the full text of this amendment. Unless otherwise noted, all materials cited in this article are available in the Florida Supreme Court Library, Supreme Court Building, Tallahassee, Florida 32304.

Other major appellate court reforms had been suggested by the Appellate Structure Commission and were adopted in 1979. These reforms included: the creation of a new appellate district and district court of appeal for Florida, *see In re* The Creation of The District Court of Appeal, Fifth District, 374 So. 2d 972 (Fla. 1979); the establishment of eleven new district court judgeships, *see* 1979 Fla. Laws, ch. 79-413 § 3; the adoption of an en banc hearing and rehearing rule for the district courts of appeal, *see In re* Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 374 So. 2d 992 (Fla.), *modified*, 377 So. 2d 700 (Fla. 1979); and the elimination of direct supreme court review of workmen's compensation cases, *see* 1979 Fla. Laws, ch. 79-312, § 1.

2. *See* FLA. CONST. art. V, § 1 (1838), for the court's former appellate jurisdiction.

review cases appealed from these courts. At various times the court relied on commissioners, was expanded in size, or sat in separate panels or divisions to manage the increasing number of appeals.[3]

In 1954, the Judicial Council[4] established a task force to study the appellate system and to consider "the question of intermediate courts to hear and determine appeals in the usual cases, at or near the source, not only to diminish the cost but also to curtail the docket of the supreme court where appeals are being filed at the rate of more than one thousand each year."[5] The task force intended to enable the supreme court to sit en banc for oral arguments and decisions in all cases within its jurisdiction. Additionally, the task force sought to restrict supreme court appellate jurisdiction so "that there might not be any possibility of merely offering two appeals, one to the district court of appeal and one to the Supreme Court, and thereby making litigation even more costly and prolonged."[6]

With these objectives in mind, the Council recommended that more than two-thirds of the appeals jurisdiction of the supreme court (then over approximately 1,300 cases) be shifted to three district courts of appeal, each composed of three judges. Applying the 1954 statistics, the supreme court would retain jurisdiction over 7 capital cases, 40 constitutional appeals, 6 certified questions, 18 railroad commission cases, 49 workmen's compensation cases, 117 original matters, and varying numbers of bar admission or discipline petitions, advisory opinion requests, and constitutional writs, not to exceed approximately 450 cases in the aggregate.[7] In 1956, the Council's suggestions to divide appeals between the supreme court and the newly created district courts were endorsed by The Florida Bar, approved by the legislature, and ratified by the voters.[8]

II. The Developing Dilemma: 1957-1977

A. *Classes of Jurisdiction*

The 1956 Constitution assigned the court essentially three classes of jurisdiction — mandatory, discretionary, and constitutional writs. The courts "mandatory" jurisdiction, which encompassed a narrower class of cases after the 1956 constitutional amendment, was further limited by the 1980 amendment. It consists, generally, of those cases for which the court provides plenary review — that is, the court must accept and render a decision on the merits in these pre-

3. *See* A. Morris, Florida Handbook 224 (17th ed. 1979-80).

4. The Judicial Council of Florida was created by 1953 Fla. Laws, ch. 28062, which now appears as Fla. Stat. § 43.15 (1979). Although an active leader in judicial reform when it was created, the Council had little to do with judicial reform in Florida after 1972. The fact that no appellate justices or judges have been appointed to the Judicial Council by recent governors, and the gradual shift of judicial data collection functions to the Office of the State Courts Administrator explain the court's frequent use of ad hoc study commissions such as the Appellate Structure Commission. *See* notes 28-30 and accompanying text, *infra*. The Judicial Council was abolished by the 1980 Legislature. H.B. 1777 (Reg. Sess. 1980).

5. First Annual Report of the Judicial Council of Florida at 5-6 (June 30, 1954).

6. *Id.* at 14.

7. *See* Second Annual Report of the Judicial Council of Florida at 2-3 (June 30, 1955).

8. Fourth Annual Report of the Judicial Council of Florida at 3 (June 30, 1957).

scribed cases. The court's "discretionary" jurisdiction was created in 1956 for designated classes of cases — a form of structured, supervisory review — which the 1980 amendment continues. Generally, discretionary jurisdiction cases offer the court an opportunity to accept or reject for substantive consideration those cases presumed sufficiently important for supreme court resolution.

A third category, properly characterized as discretionary but more frequently described as the court's "writ" jurisdiction, authorizes the court to consider extraordinary requests to accelerate or halt some action of a statewide commission or an inferior court. The court's writ jurisdiction is extraordinary in that it is not a substitute for a direct appeal,[9] and other forms of relief typically must be unavailable in another forum.[10] Because the 1980 amendment has left the court's writ jurisdiction virtually unchanged, the amendment's background and effects are conveniently discussed in terms of the first two of these general jurisdictional categories.

B. *Expansion of the Classes*

Although the 1956 amendment contemplated that the court's jurisdiction would be relatively narrow, the supreme court itself created two exceptions to its restricted role. The exceptions severely flawed the court's ability to perform the constitutional role which had been selected for the court by the people. Both exceptions, in fact, contributed to a dilemma which was accurately predicted by dissenting members of the court at the time they were adopted. Both, it developed, impeded the court's later efforts to identify and explain the causes of delay and a rapidly increasing backlog of cases.[11]

The constitution mandated the review of orders or decisions which "directly" passed on the validity of a statute, whether from trial courts or from district courts of appeal. The court, however, in 1959, adopted a policy of reviewing cases in which a challenge to the validity of a statute was not necessarily identified in the lower court's decision, but rather was only "inherent" in the court's ultimate action. In *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*,[12] the court assumed jurisdiction over a zoning case based on an assertion in the trial court that the statute creating the zoning board was invalid. Although the central issue at trial was the validity of a height limitation on buildings near a runway, a majority of the court accepted direct appellate jurisdiction because the statutory creation of the board was approved "inherently." The dissenting opinion of Justice Thomas described the so-called "doctrine of inherency" as "a usurpation of the power of the District Court of Appeals."[13]

In effect, this early expansion of the constitution's directive potentially provided for direct review in the supreme court of all criminal cases, where a statute necessarily underpins a criminal charge and can always be attacked as

9. Jenkins v. Wainwright, 322 So. 2d 477 (Fla. 1975).

10. *See, e.g.*, Shevin *ex rel.* State v. Public Serv. Comm'n, 333 So. 2d 9 (Fla. 1976) (mandamus); State *ex rel.* Turner v. Earle, 295 So. 2d 609 (Fla. 1974) (prohibition).

11. These efforts are discussed in detail in section III *infra*.

12. 111 So. 2d 439 (Fla. 1959).

13. *Id.* at 445 (Thomas, J., dissenting).

invalid, and of a majority of civil cases in which statutory rights are applied. The court's adoption of and continued adherence to the inherency doctrine thus created a procedure by which attorneys could bypass the district courts of appeal. In effect, it judicially authorized forum-shopping.

The second, more devastating exception to a restrictive view of the court's jurisdictional limitations was announced in the 1965 decision of *Foley v. Weaver Drugs, Inc.*[14] *Foley* began with a trial court complaint for damages as a result of injuries sustained in 1959. The court granted a motion for summary judgment in favor of one of the defendants and the district court affirmed without opinion.[15] Two years later, the supreme court responded to a petition seeking certiorari review based on an alleged conflict with another district court's opinion by temporarily relinquishing jurisdiction and requesting the district court to "prepare and adopt an opinion setting forth the theory and reasoning upon which a decision in this cause is reached. . . ."[16] The dissenters called the procedure "a distortion of the provisions of the constitution and an arrogation by this Court of power it does not possess."[17]

The district court refused to comply with the request to prepare an opinion, noting that supreme court jurisdiction is supplied by a conflict of decision, not of opinions or reasons. The court also refused to reconsider the cause because after two years, the panel members might be unable to recall the disclosures in the record and arguments, the law might have changed, and the results of reconsideration could only be permeated with uncertainty and instability. The district court concluded that the plaintiffs had no cause of action against one of the defendants under either theory of the complaint, and returned the cause to the supreme court to discern the reasons for its decision from the early affirmance.[18] The supreme court's second review of *Foley*, approving the district court's decision on the merits, demonstrated the court's willingness to accept for review cases without written opinions by the district court. It also created the concept of "record proper" — defined as "the written record of the proceedings in the court under review except the report of the testimony" — as a basis to ascertain the source of alleged direct conflicts in the decisions of the district courts.[19]

Foley had a tremendous impact on the number of cases filed in the court, producing an attitude among attorneys that a district court decision was never final. Thus, practitioners began to perceive the court's conflict jurisdiction as a mechanism by which to seek review of any district court decision. The increased number of filings necessitated a two-step screening process within the court. Files in conflict jurisdiction cases circulated to a minimum of five justices' offices at least twice — once for a vote on jurisdiction, and a second time either for an often sought rehearing on a denial or, if certiorari was granted, for a decision on the merits.

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14. 177 So. 2d 221 (Fla. 1965).
15. Foley v. Weaver Drugs, Inc., 146 So. 2d 631 (Fla. 3d D.C.A. 1962).
16. Foley v. Weaver Drugs, Inc., 168 So. 2d 749, 750 (Fla. 1964).
17. *Id.* at 751.
18. Foley v. Weaver Drugs, Inc., 172 So. 2d 907, 909 (Fla. 3d D.C.A. 1965).
19. 177 So. 2d 221, 225 (Fla. 1965).

Although the court's caseload slowly grew from 482 filings in 1958 to 1,288 filings by 1972,[20] court reform efforts in the early 1970s did not identify the supreme court's jurisdiction as a problem when the judicial structure of the state underwent critical analysis in 1971-1972. Reformers, including the court itself, concentrated on the need to consolidate and establish uniform jurisdiction for trial courts. (An attitude also lingered among some justices[21] and commentators[22] that, unlike the court's pre-1957 predicament, the court could at any time relieve its growing caseload merely by overruling its decisions in *Harrell's Candy Kitchen* and in *Foley*.)

Internal efforts were made to cope with the court's rising caseload. The court expedited procedures to screen appeals, limited oral arguments to cases where the court deemed them essential rather than those in which argument was requested by counsel, sat in five-man panels on many cases orally argued, and created a pool of attorneys to summarize certiorari petitions. The court attempted to distinguish substantial from insubstantial questions of constitutional construction and statutory validity.[23] The court wrestled with extensions of the *Foley* doctrine to decisional conflicts created by dicta,[24] dissenting opinions,[25] and concurring opinions.[26] It also struggled with efforts to enlarge the doctrine of "record proper" to include statements by the trial judge, depositions, and testimony.[27]

III. Fashioning a Solution: 1977-1979

The mistaken impression that internal devices alone could alleviate the court's problem was finally corrected in the spring of 1979. Review of the data revealed by a commission appointed to study Florida's appellate structure indicated that alternative devices were necessary.

In his 1978 Report to the Legislature, then Chief Justice Ben Overton[28]

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20. Statistics obtained from the Clerk of the Supreme Court of Florida.

For an analysis of the detrimental effects of this increasing caseload on the quality of appellate justice, *see* England & McMahon, *Quantity Discounts in Appellate Justice*, 60 Jud. 442 (1977).

21. *See generally* Letter from Justices of the Supreme Court of Florida to Talbot D'Alemberte, Chairman, Florida Constitution Revision Commission (Nov. 16, 1977).

22. *See generally* Commentary, *Establishing New Criteria for Conflict Certiorari in Per Curiam District Court Decisions: A First Step Toward a Definition of Power*, 29 U. Fla. L. Rev. 335 (1977); Comment, *Conflict Certiorari: Is the Supreme Court of Florida Following its Constitutional Mandate?*, 32 U. Miami L. Rev. 435 (1977); Note, *The Erosion of Final Jurisdiction in Florida's District Courts of Appeal*, 21 U. Fla. L. Rev. 375 (1969).

23. *See* Simmons v. State, 354 So. 2d 1211 (Fla. 1978), discussed in Borgognoni & Keane, *Practice Before the Supreme Court of Florida: A Practical Analysis*, 8 Stetson Intra. L. Rev. 318, 330-36 (1979). *See also* Jordan v. State, 334 So. 2d 589 (Fla. 1976).

24. See note 248 *infra*.

25. See note 246 *infra*.

26. See note 247 *infra*.

27. *See* State *ex rel.* Ranalli v. Johnson, 277 So. 2d 24, 25 (Fla. 1973); AB CTC v. Morejon, 324 So. 2d 625 (Fla. 1974); Commerce Nat'l Bank v. Safeco Ins. Co. of America, 284 So. 2d 205 (Fla. 1973).

28. Justice Overton served as chief justice from March 1, 1976 through June 30, 1978. The members of the supreme court elect one justice to serve as chief justice. Fla. Const. art. V,

recommended the creation of a commission with a broad based participation to determine the need for an additional district court and to consider district court rather than supreme court review of workmen's compensation cases.[29] In the summer of 1978, newly-elected Chief Justice Arthur England implemented Justice Overton's recommendation by appointing an Appellate Structure Commission chaired by Justice Overton and composed of district, circuit and county court judges, legislators, laymen and members of the bar. Justice England expanded the scope of the commission's inquiry, however, to include a review of the entire appellate system in light of the 1956 goal "to ensure that the district courts of appeal are courts of final appellate review as contemplated by Article V of the Constitution."[30]

In response to its expanded duty, the commission analyzed each category of the supreme court's jurisdiction to determine if the encompassed cases were significant or important enough to justify the attention of a then overloaded state high court. Tentative votes at the October 12, 1978, meeting indicated that ideally, mandatory jurisdiction should be restricted to death penalty cases, decisions invalidating statutes or construing the constitution, and bond validations.[31] Nonetheless, after six months of work, the commission rejected constitutional change to achieve this goal and recommended only that the supreme court's jurisdiction be modified by statute and by rule. In light of the overwhelming defeat of all constitutional reforms, the commission feared that legislative and voter approval of an amendment to the constitution would be virtually impossible.[32]

After weeks of intense internal discussion and numerous drafts of proposed changes within the court, the chief justice, on behalf of a unanimous court, presented virtually every aspect of the commission's recommendations for appellate court reforms to the 1979 legislature. The most notable exception was the court's rejection of the commission's proposal to alter the jurisdiction of the supreme court solely by rule and by statute.[33] The court viewed the commission's data as conclusive of the need for a constitutional adjustment and it refused to deny the voters of Florida the right to refine the jurisdictional role which the constitution had created in 1956.

For the first time, the commission's statistics had demonstrated that the court's growing problems were not (as generally believed) attributable to the court's liberality in accepting cases for review, but rather to the ramifications

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§ 2(b). Traditionally, a chief justice is elected for two years beginning in July of each even-numbered year. SUP. CT. MANUAL OF INTER. OPER. PROC. art. I, § B.

29. 1978 Report to the Legislature, submitted by Chief Justice Ben F. Overton, to the Florida Legislature.

30. *In re* Commission on The Florida Appellate Court Structure, (filed July 26, 1978, as amended Aug. 15, 1978 and Nov. 28, 1978), app. F.

31. Minutes of the Supreme Court Commission on Florida Appellate Court Structure, Oct. 12, 1978 [hereinafter cited as Appellate Structure Commission minutes] at app. E.

32. *See* Tapes of the Supreme Court Commission on Florida Appellate Court Structure, Nov. 16, 1978 [hereinafter cited as Appellate Structure Commission tapes].

33. 1979 Report on the Florida Judiciary, submitted by Chief Justice Arthur J. England, Jr., to the Florida Legislature, April 1979, *reprinted in* 53 FLA. B.J. 296 (1979) [hereinafter cited as 1979 Report].

of its constitutionally assigned mandatory jurisdiction and the numbers of cases being brought as a result, among others, of the *Foley* doctrine. The commission found that "the Court has in reality exercised great restraint in accepting for review the cases over which it has any freedom of choice" and "granted [discretionary petitions] in less than 5 percent of the cases. . . ."[34]

A second exception was the court's rejection of the commission's recommendation that the supreme court screen statutory validity and constitutional construction cases for substantiality. The court regarded this as a circumvention of the constitution. Additionally, the device would prove to be inefficient, requiring another screening procedure in the court and shuttling seemingly insubstantial cases between the dockets of two successive courts.

The court proposed a constitutional amendment in April 1979, filed as Senate Joint Resolution 714 (SJR 714),[35] for consideration at the 1979 regular session of the Florida Legislature. The court's proposal limited the categories of mandatory review to death penalty cases, bond validation proceedings, and district court decisions expressly passing on the validity of a statute or expressly construing a constitutional provision. The court's discretionary jurisdiction under SJR 714 was predicated on district court certifications of decisions in conflict or of questions of great public importance, plus a "safeguard" provision authorizing the supreme court, on its own initiative, to reach down and obtain for review trial court orders and district court decisions which had substantial importance and required immediate statewide resolution.

The Judicial Council endorsed and supported SJR 714.[36] Under pressure to accept or reject the court's proposal on very short notice, however, the Board of Governors of The Florida Bar by a vote of eighteen for and twelve against failed to endorse SJR 714 with the two-thirds vote required by the Board's bylaws.[37] The members of the Board objected to SJR 714 principally because attorney-filed petitions for conflict certiorari review were eliminated, and because the initiative, or so-called "reach down" provision, did not appear to allow attorney-filed suggestions to the court.

During two Senate Judiciary-Civil Committee hearings Justice Alan Sundberg,[38] on behalf of the court, explained the need to limit mandatory jurisdiction. Despite the court's expressed intent to limit severely the exercise of the safeguard or "reach down" provision, that provision was ridiculed by opponents of SJR 714 as "pluck up" power which would destroy finality in all cases throughout the judicial system.[39] Opposition to SJR 714 also developed from

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34. 53 FLA. B.J. at 298.

35. Fla. S.J. Res. 714 (Reg. Sess. 1979, introduced by S. Hair) *reprinted in* 53 FLA. B.J. 304 (1979).

36. Twenty-Fifth Annual Report of the Judicial Council of Florida at 7-9 (Feb. 1, 1980). As noted later, its chairman publicly opposed constitutional reform. *See* note 58 and accompanying text, *infra.*

37. Fla. Bar Integr. Rules By laws, art. VI, § 2. *See* Minutes of the Florida Bar Board of Governors meeting, April 18, 1979 (available from The Florida Bar).

38. Justice Sundberg was elected to serve as chief justice for a two year term commencing July 1, 1980.

39. *Proposed Amendment to Section 3, Article V of the State Constitution: Tapes of*

attorneys who expressed a lack of trust in district court judges' ability or willingness to recognize, concede, and certify conflicting decisions. SJR 714 was then withdrawn from further consideration during the 1979 regular session, in order to give the court an opportunity to discuss alternatives with opponents and critics and to seek a consensus substitute in time for an announced special legislative session in the fall of 1979.[40] No comparable bill was introduced into the House of Representatives, and no House committee considered the court's recommendations.

Notwithstanding the fate of SJR 714, the court gained support for its position that structural change was essential to avoid a potential decline in the quality of its work and increasing backlogs and delays. In an effort to review the controversial aspects of the court's original proposal, Justice Sundberg scheduled a series of meetings with a committee[41] appointed by the president of The Florida Bar. Eventually the bar committee and Justice Sundberg drafted a statement of agreed principles[42] to advise the bar's Board of Governors and the court of a consensus that could be reached. This included a proposal to retain discretionary review of written opinions of district courts invoked by attorney-filed petitions asserting decisional conflict. The bar committee made clear its intent to overrule the *Foley* decision regarding conflict, however, by declaring that only an opinion which "articulates a rule of law . . ." should qualify for discretionary review.

To replace the much-maligned "reach down" provision, the bar committee recommended a mechanism for direct supreme court review of some trial court orders which required immediate resolution. Designed to allow a bypass of the district courts, this procedure would be initiated by certification of the cause by the chief judge of the judicial circuit. The bar committee also suggested that the court propose more severe limitations on mandatory appeals than the court itself had originally proposed, recommending that district court decisions upholding the validity of statutes be reviewed on a discretionary rather than a mandatory basis. Finally, at the urging of attorneys Tobias Simon and others who feared too severe a narrowing of the court's review authority, the bar committee presented an alternative plan for discretionary review of "decisions of a district court of appeal which substantially affect the general public interest or the proper administration of justice throughout the state" — a standard based on the American Bar Association model for constitutionally unlimited discretionary review.[43]

After the bar's deliberations, Justice Overton reconvened the Appellate Structure Commission to review the bar committee's statement of principles. At its meeting on September 5, 1979, the commission agreed that mandatory

Hearings on S.J. Res. 714 Before the Senate Judiciary-Civil Committee, 6th Legis., Reg. Sess., May 3, 1979 [hereinafter cited as *Senate Committee Hearings on S.J. Res. 714*].

40. *Id.*

41. The members of the Select Committee of The Florida Bar were: Benjamin Redding, Chairman; Edwin C. Cluster, Vice-Chairman; Gerald Brown, Talbot D'Alemberte, C. Harris Dittmar, Charles C. Edwards, Timothy A. Johnson, Jr., David V. Kerns, and N. David Korones.

42. Special Committee to Study Supreme Court Jurisdiction, The Florida Bar, Statement of Principles (Sept. 12, 1979), app. D.

43. ABA Standards Relating to Appellate Courts § 3.00 (1977).

jurisdiction should be limited more severely than the court had proposed in SJR 714, but it disagreed with the bar committee's preferential guidelines for discretionary review. At the urging of commission member Tobias Simon, the commission opted for the alternative — constitutionally unlimited discretionary review — to be restricted by the court's adoption of rules setting guidelines for its own exercise of discretion.[44]

An important suggestion emerged from the commission's review of the proposed "bypass" mechanism. Rather than having circuit court chief judges certify causes in need of immediate resolution by the supreme court, the commission recommended that the district courts themselves certify those special cases after the filing of an appeal in their court. The commissioners perceived the advantage under this procedure of collecting like cases from the various circuits within the district for consolidated supreme court review.

On September 15, 1979, the bar committee formally presented its principles to the Board of Governors through the committee's chairman, attorney Benjamin Redding of Panama City. Tobias Simon argued for the alternative, commission-approved approach of constitutionally unlimited discretionary review. The members of the Board of Governors, at the request of Justice Sundberg, agreed to support a court proposal for constitutional change based either on the committee's principles or the alternative.[45]

As the court prepared to submit a proposed substitute for SJR 714 to the November special legislative session, the chairman of the American Bar Association's Committee to Implement Standards of Judicial Administration expressed an interest in Florida's court reform effort and chose Tallahassee as the site for the next scheduled ABA Committee meeting. The ABA Committee's national expertise with appellate courts focused, in accordance with the ABA standards, on constitutionally unlimited discretionary review for the supreme court. In discussions with legislative committee members, the court and the bar, the ABA Committee members recognized unusual features in the Florida system. Florida's judiciary is unique with the large number of appeals (35 per year) filed in death penalty cases, each requiring full record and sentence review, compared with only eight cases per year in the state with the next highest volume. The ABA Committee also noted the special concern for constitutional conflict resolution jurisdiction, due to the diversity in geographical regions of the state. These and other unique factors, the Committee concluded, adequately explained Florida's proposed deviation from the ABA's model standard of constitutionally unlimited discretionary review. A majority of the ABA Committee left Tallahassee satisfied with the consideration of ABA standards which had gone into Florida's court reform effort.[46]

Only two issues in the proposal were very controversial when the combined Senate-House Judiciary Committees met to consider the court's new constitutional amendment during the three day special session. The first was the court's suggestion to remove from the selection of supreme court justices the constitu-

44. *See* Letter from Tobias Simon to Justice Overton (Sept. 6, 1979), at app. E.

45. *See* Minutes of the Florida Bar Board of Governors meeting, Sept. 15, 1979 (available from The Florida Bar).

46. *Court Caseload Amazes Experts*, Today, Nov. 16, 1979, at 8B, col. 3.

tional restriction which required appellate district representation on the court. The Senate committee voted to retain the district selection requirement in that committee's draft resolution, Senate Joint Resolution 20-C (SJR 20-C) and the selection reform issue immediately died at that juncture.[47] The other publicly controversial issue concerned a proposal to transfer review from the supreme court to the district courts of appeal of most public utility decisions. The House and Senate committees determined, however, in accordance with an understanding between the court and major utilities, that only those Public Service Commission cases relating to rates and services of electric, gas, and telephone utilities were appropriate for initial review in the supreme court because these frequently affected segments of the population in service areas larger than the territory of any of the five appellate districts. Other Commission matters, such as those affecting transportation and water and sewer companies, were deemed suitable for initial review in one or more district courts of appeal in the manner that other agencies' actions were reviewable under Florida's Administrative Procedure Act.[48] The court's proposal, SJR 20-C, emerged from committees of both chambers of the legislature in essentially the form suggested by the court, as derived from the bar committee's statement of principles.[49]

At the request of the sheriffs' and clerks' associations, the Judiciary-Civil Committee chairman introduced an amendment on the floor of the Senate to retain discretionary review of district court decisions affecting a class of constitutional or state officers,[50] a provision which had been proposed for deletion by the court and the bar committee. The court and the associations' representatives had agreed that the amendment was acceptable, so long as district court decisions in this category, as in all others, "expressly" dealt with either of the classes. The Senate also amended SJR 20-C to delete any mention of the Public Service Commission, preferring to avoid naming any particular agency in the constitution and selecting the term "statewide agencies" based on an explanation for that term by the chairman of the sponsoring committee.[51]

SJR 20-C, as amended, was adopted by the Senate by a vote of 38 to 2 on November 28, together with a companion bill (SR 21-C) to accelerate submission to the voters by allowing the proposed amendment to be considered at the special presidential primary election scheduled for March 11, 1980.[52] Immedi-

47. *Proposed Amendment to Section 3, Article V of the State Constitution: Tapes of Hearings on S.J. Res. 20-C Before the Senate Judiciary-Civil Committee*, 6th Legis., Spec. C Sess., Nov. 26, 1979 [hereinafter cited as *Senate Committee Hearings on S.J. Res. 20-C*].

48. *Id.*

49. *See* app. D.

50. Journal of the Senate, 6th Legis., Spec. C Sess., Nov. 28, 1979, at 11; app. C.

51. *Id.* at 12-13.

52. *Id.* at 12. Art. XI, § 5(a) of the Florida Constitution requires a three-fourths vote of each house of the legislature in order to authorize voting on a constitutional amendment before the next regularly scheduled general election, which in this case would have been held in November 1980. On March 11, 1980, the special presidential election would be held and provided an opportunity to submit other matters for the voter's consideration. One other constitutional proposal previously scheduled concerned an increase of the homestead exemption of property-owners for school tax purposes. *See* Journal of the House of Representatives, 6th Legis., Spec. Sess., June 6, 1979, at 2-3. Like the court reform proposal, it also received overwhelming (69%) voter approval.

ately following the vote in the Senate, both measures were certified to the House, substituted for comparable House legislation, and adopted without further amendment by a vote of 110 to 2.[53]

IV. Adoption of the 1980 Amendment: November 1979-March 1980

During the period between November 28, 1979 and March 11, 1980, active public support for SJR 20-C was undertaken by six of the seven justices of the supreme court,[54] the governor, the attorney general of Florida, and the organized bar. Endorsements for the proposal were sought and received from the conferences of district court, circuit court, and county court judges, the League of Women Voters, the prosecuting attorneys' association, the sheriffs' association, and numerous newspaper and television editorial boards.[55]

Proponents such as The Florida Bar[56] and the justices[57] argued two dominant themes of persuasion. First, the amendment would eliminate delay in the supreme court, both by removing from the court's docket those district court decisions without written opinion, and by eliminating all direct appeals to the supreme court from trial courts (except in bond validation cases and cases in which a death penalty had been imposed). Second, the amendment would reduce the cost of litigation by reducing the number of successive appeals and by making the district courts truly final in the bulk of matters brought to Florida's appellate courts. Yet, as was continually pointed out, the amendment would still provide the opportunity for supreme court review of all cases having statewide importance.

Opposition to the amendment developed from a small group of Florida attorneys organized by Tobias Simon as "Floridians against Limited Access," from one current and one former member of the supreme court,[58] and from the public defenders' association. The opponents' main efforts were directed toward development of media appearances and editorial support against the amendment and to develop opposition in local bar associations.

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53. Journal of the House of Representatives, 6th Legis., Spec. C Sess., Nov. 28, 1979 at 23-24; app. B.

54. Chief Justice Arthur England, and Justices Joseph Boyd, Ben Overton, Alan Sundberg, James Alderman and Parker Lee McDonald.

55. See note 63 *infra*.

56. The Florida Bar and the Young Lawyers Section of The Florida Bar developed and disseminated promotional literature, and provided speakers for both civic clubs and media discussions and debates. Promotional literature, including targeted explanations of the amendment, was distributed widely throughout the state to employees of the state's electric and telephone companies, and to condominium association members.

57. Articles supporting passage of the amendment, most authored by justices of the court supporting the amendment, were published in trade publications such as the journals or monthly newsletters of the Florida Bankers Association, the cattlemen's association, the county commissioners' association, the League of Municipalities, and the like. Television appearances and radio spots were scheduled whenever possible for the justices supporting the amendment, and for others offering public support for its adoption.

58. Justice James Adkins and retired Justice B. K. Roberts, who was then chairman of the Judicial Council.

Five dominant themes were espoused. First, it was suggested to the media that the amendment would limit or cut off entirely their access to the supreme court for the resolution of first amendment cases.[59] Second, local bar associations and the public were told that general access to the court would be curtailed.[60] Third, it was suggested that district court judges would be given the power to prevent review of their decisions by the supreme court.[61] Fourth, it was urged that the Supreme Court of Florida should be like the United States Supreme Court and the ABA's model high tribunal, having constitutionally unlimited discretionary review of district court decisions.[62] Lastly, the opponents inferred that the amendment was unnecessary because the court's caseload was in fact diminishing and the justices travelled too much.

Immediately before the March 11 vote, the 1980 amendment was endorsed editorially by almost every major daily newspaper in the state.[63] The official vote for passage on March 11 was 940,420 to 460,266 – a 67 percent ratio of voter approval.[64] The significance of the public discussion concerning the amendment is that it provides a frame of reference by which to ascertain the intent of the voters.[65] In this case, the public debate and informational literature make abundantly clear that the voters were asked to approve an appellate court structure having these features:

1. a supreme court having constitutionally limited, as opposed to unlimited,[66] discretionary review of intermediate appellate court decisions;[67]

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59. *See* explanation by attorney Tobias Simon, available in the Supreme Court Library.

60. *Id.*

61. *Id.*

62. *Id.*

63. For example, editorial endorsements for the amendment were written by the Sarasota Herald Tribune, Feb. 22, 1980, at 6A, col. 1; St. Petersburg Times, Feb. 29, 1980, at 20A, col. 1; Pensacola News-Journal, March 2, 1980, at 20A, col. 1; (Orlando) Sentinel Star, March 2, 1980, at 8D, col. 1; Fort Myers News-Press, March 3, 1980, at 6A, col. 1; (Jacksonville) Florida Times-Union, March 7, 1980, at A8, col. 1; Tampa Tribune, March 8, 1980, at 12A, col. 1; (Cocoa) Today, March 9, 1980, at 22A, col. 1; Miami Herald, March 9, 1980, at 2M, col. 1; and the Tallahassee Democrat, March 10, 1980, at 4A, col. 1. Editorials against the amendment were written by the Ft. Lauderdale News and Sun-Sentinel, March 8, 1980, at 26A, col. 1; and by the (Lakeland) Ledger, March 7, 1980, at 14A, col. 1.

64. Certificate of Secretary of State (unofficial).

65. Myers v. Hawkins, 362 So. 2d 926 (Fla. 1978).

66. Proponents of the amendment urged that unlimited discretionary review would necessitate the creation of a pool of research assistants (a "hidden judicial bureaucracy") to screen the 5,000 to 6,000 cases which would likely come to the court. Opponents did not deny that a research pool would in all probability be required. The supporting justices expressed concern in terms of their unwillingness to abdicate judicial decision-making to a pool of recent law graduates. *Proposed Amendment to Section 3, Article V of the State Constitution: Tapes of Hearings on H.J. Res. 33-C Before the House Judiciary Committee*, 6th Legis., Spec. C Sess., Nov. 26, 1979, [hereinafter cited as *House Committee Hearings on H.J. Res. 33-C*] (remarks of Justice Sundberg). For a recent comment on this problem, *see* Abramson, *Should a Clerk Ever Reveal Confidential Information?*, 63 JUD. 361, 363 (1980); S. WASBY, T. MARVELL & A. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES, Nat'l Center for State Courts (Pub. No. R0048, 1979).

67. Adoption of the 1980 amendment was, of course, merely a reaffirmation of the decision to provide a structured review originally made in 1956 when the first district courts

2. finality of decisions in the district courts of appeal, with further review by the supreme court to be accepted, within the confines of its structural review, based on the statewide importance of legal issues and the relative availability of the court's time to resolve cases promptly; and

3. use of the district courts for the initial appellate review of all trial court orders and judgments, other than in death penalty and bond validation matters, in order to cull routine points of appeal (such as evidentiary rulings) from the important legal issues eventually brought to the court.[68]

V. Analysis of the 1980 Constitutional Change

A. *Mandatory Jurisdiction*

The mandatory jurisdiction of the supreme court is now limited to death penalty cases from circuit courts, district court decisions invalidating state statutes or provisions of the state constitution and, because provided by statute, bond validations and Public Service Commission cases relating to electric, gas and telephone utilities.

(1) Death penalties — section 3(b)(1)

The 1980 amendment provides that the supreme court

> [s]hall hear appeals from final judgments of trial courts imposing the death penalty ....[69]

This portion of section 3(b)(1) is identical to its predecessor. This aspect of the court's jurisdiction provoked very little controversy during the discussions leading to the 1980 amendment.[70] Indeed, it was thought that any attempt to relieve the supreme court of its responsibilities in death penalty cases might jeopardize the constitutionality of Florida's capital sentencing procedures.[71]

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were created. *House Committee Hearings on H.J. Res. 33-C*, Nov. 26, 1979, *supra* note 66 (remarks of Benjamin Redding and Justice Sundberg).

68. Proponents of the amendment described as "baggage" the routine points of appeal formerly brought along with the issue or issues which provided jurisdictional authority for filing in the supreme court. *Senate Committee Hearings on S.J. Res. 20-C*, Nov. 26, 1979, *supra* note 47 (remarks of Justice Sundberg); *House Committee Hearings on H.J. Res. 33-C*, Nov. 26, 1979, *supra* note 66 (remarks of Benjamin Redding).

69. Fla. Const. art. V, § 3(b)(1).

70. During the deliberations of the Appellate Structure Commission, a suggestion was made that review of death penalty cases be bifurcated, so that only sentences would first be reviewed by the supreme court. It was thought that a reduction of a death sentence to life would obviate the need for a full record review of the conviction in the supreme court. In view of the necessity of an initial full record review to determine the appropriateness of the sentence, however, a subsequent district court review of the conviction was rejected as being duplicative and unwieldy. *See* Appellate Structure Commission minutes, Feb. 22, 1979, *supra* note 31 (statement of Tobias Simon); Letter from Tobias Simon to Justice Overton (Feb. 14, 1979).

71. The constitutionality of these procedures, which are codified in § 921.141, Florida Statutes (1979), was upheld by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976). In that case, the Court recognized the vital role of the Supreme Court of Florida in reviewing "each death sentence to ensure that similar results are reached in

In recent years, the review of death penalty cases has consumed an estimated 25 percent of the court's available work time.[72] The time-consuming nature of this review stems in part from the exceptionally high number of death penalty cases before the court. The court has received an average of 30 to 35 cases in this category each year since the enabling statute was enacted,[73] and at the time of the adoption of the 1980 amendment approximately 110 such cases were pending in the court.[74] The difficulty of the task also constitutes an immense drain on judicial time because the supreme court must review the entire record to determine both the validity of the conviction and the appropriateness of the sentence of death.[75] This system of dual review mandated by statute[76] is probably essential to the constitutional imposition of any death penalty.[77] Since the 1980 amendment neither disturbs prior procedures nor affects current trends, it is certain that review of death penalty cases will continue to constitute a major part of the court's work.

(2) Life sentences — section 3(b)(2)

The 1980 amendment provides that the supreme court

> [w]hen provided by general law, shall hear appeals from ... ~~orders of trial courts imposing life imprisonment~~ ....[78]

Under current Florida law, conviction for a capital felony[79] may give rise to either a sentence of life imprisonment or a sentence of death.[80] The supreme court has direct appellate jurisdiction of death penalty cases under section 3(b)(1).[81] In contrast, life imprisonment cases traditionally have been reviewed

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similar cases," and concluded that the state tribunal performed this function "with a maximum of rationality and consistency." *Id.* at 258-59 (footnote omitted).

72. *Senate Committee Hearings on S.J. Res. 20-C*, Nov. 26, 1979, *supra* note 47 (remarks of Judge Albert Tate, United States Court of Appeals, Fifth Circuit); *see also House Committee Hearings on H.J. Res. 33-C*, Nov. 26, 1979, *supra* note 66 (remarks of Chief Justice England).

73. FLA. STAT. § 921.141(4) (1979). Statistics obtained from the Clerk of the Supreme Court of Florida.

74. *Id.*

75. *See* Proffitt v. Florida, 428 U.S. 242 (1976); LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Gibson v. State, 351 So. 2d 948 (Fla. 1977), *cert. denied*, 435 U.S. 1004 (1978); State v. Dixon, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). The court always examines both the conviction and the sentence, even though the defendant does not challenge his conviction. 351 So. 2d at 949 & n.2. See note 70 *supra*.

76. FLA. STAT. § 921.141(4) (1979); FLA. R. APP. P. 9.140(f).

77. See note 71 and accompanying text, *supra*.

78. FLA. CONST. art. V, § 3(b)(2).

79. There are only two capital felonies in Florida — first-degree murder, FLA. STAT. § 782.04(1) (1979), and sexual battery (when committed by an adult upon a minor 11 years of age or younger), FLA. STAT. § 794.011(2) (1979).

80. FLA. STAT. § 775.082(1) (1979).

81. See note 69 and accompanying text, *supra*.

initially by the district courts of appeal.[82] Under former section 3(b)(2), the legislature had the power to assign these cases to the supreme court, but it never chose to do so.

On recommendation of the supreme court, the 1980 amendment was fashioned to eliminate the legislature's authority to assign the review of life sentences to the supreme court. The purpose for the deletion was twofold. There was little likelihood the legislature would ever assign life imprisonment cases to the supreme court, as there was no expressed dissatisfaction with decisions in those cases emanating from the district courts of appeal.[83] More important, there was no certainty as to the actual number of life imprisonment cases which legislative assignment would send to the court.[84] Two justices expressed serious concern that any such assignment would overwhelm the court with capital cases.[85]

The deletion of the legislature's authority to assign life imprisonment cases to the supreme court will have no effect on existing practice or the validity of the statute which authorizes imposition of a death penalty.[86] Cases involving a life sentence will continue to be reviewed by the district courts of appeal.

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82. *See, e.g.*, Trotter v. State, 377 So. 2d 34 (Fla. 1st D.C.A. 1979); Bradley v. State, 374 So. 2d 1154 (Fla. 3d D.C.A. 1979); Cason v. State, 373 So. 2d 372 (Fla. 2d D.C.A. 1979).

83. It should be noted that several judicial and legislative attacks on the limited nature of the supreme court's jurisdiction have been unsuccessful. For example, Justice Ervin argued in dissent in State v. Dixon, 283 So. 2d 1, 18 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), that the court's inability to review life imprisonment cases prevented it from properly monitoring uneven sentencing in capital cases. *Id.* Similar fears were later expressed by Justice England. Alvord v. State, 322 So. 2d 533, 541-42 (Fla. 1975) (dissenting opinion), *cert. denied*, 428 U.S. 923 (1976). Nevertheless, the United States Supreme Court firmly rejected this argument in Proffitt v. Florida, 428 U.S. 242 (1976), concluding "[t]his problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty." 428 U.S. at 259 n.16.

The Court's conclusion in *Proffitt* did not end debate over the wisdom of mandating state supreme court review of life imprisonment cases. During the debates of the 1977 Florida Constitution Revision Commission, several commissioners renewed the argument that such review was necessary to ensure uniformity in the imposition of the death penalty. *See* Transcript of Fla. Const. Rev. Comm'n proceedings 214-27 (Jan. 26, 1978), 41-52 (Jan. 27, 1978). As a result of these debates, the Commission included in its package of revisions a proposal giving a defendant the option of appealing his conviction to the supreme court when a life sentence was imposed. This proposal, like all others in the Commission's package, was defeated by the voters at the November, 1978 general election. For a complete analysis of the background and possible effect of this proposal on the workload of the supreme court, *see* Note, *A Step Toward Uniformity: Review of Life Sentences in Capital Cases*, 6 FLA. ST. U.L. REV. 1015 (1978).

84. It is interesting to note that during the debates of the 1977 Florida Constitution Revision Commission, then Chief Justice Overton predicted that the Commission's proposal — giving defendants the option of appealing life imprisonment cases to the supreme court, see note 83 *supra* — would add at least 150-200 merit appeals to the court's workload each year. Transcript of Fla. Const. Rev. Comm'n proceedings 247-48 (Mar. 7, 1978).

85. *Senate Committee Hearings on S.J. Res. 714*, May 3, 1979, note *supra* 39 (remarks of Justice Sundberg); Address by Chief Justice Arthur J. England, Jr. to the Commission on the Florida Appellate Court Structure (Aug. 28, 1978).

86. FLA. STAT. § 921.141 (1979).

(3) Appeals from trial courts — formerly section 3(b)(1)

The 1980 amendment provides that the supreme court

> [s]hall hear appeals ... ~~from orders of trial courts ... initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.~~[87]

Under former section 3(b)(1), orders of circuit courts and county courts could be brought to the supreme court by direct appeal if they initially and directly passed on the validity of a state statute, a federal statute, or a federal treaty (either expressly or inherently), or if they expressly[88] construed a provision of the state or federal constitution. By far, the most important feature of the 1980 amendment is the abolition of all direct appeals to the supreme court from trial courts in these five generic categories.

Jurisdiction to review declarations of statutory and state constitutional invalidity under section 3(b)(1) is now expressly limited to "decisions of district courts of appeal . . . ."[89] The court's discretionary authority to review declarations of statutory validity and constitutional constructions under section 3(b)(3) is also limited to district court decisions. As a corollary of these changes, of course, the "initially and directly" requirement[90] became unnecessary and was deleted. The intended result of these related changes is that appeals from challenges to a state statute or to a constitutional provision will now be considered in the district courts of appeal, with presumptive finality of the appeals process in those courts as to all cases other than those in which a declaration of invalidity results.[91]

Reasons for the reassignment of jurisdiction were numerous. First, cases coming to the supreme court from the trial courts usually lacked a written explanation of the reasoning for the decision where a statute was declared valid. Moreover, many were at a preliminary stage of the trial proceeding. As a consequence of these factors, neither the reasoning of the trial judge nor a developed record was available for review of the constitutional question pre-

87. FLA. CONST. art. V, § 3(b)(1).

88. Although former § 3(b)(1), by its terms, did not require that constitutional constructions be "express," this requirement had been imposed on the provision by the case law. *See* Rojas v. State, 288 So. 2d 234 (Fla. 1973); Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973) (holding the inherency doctrine inapplicable to constitutional constructions).

89. FLA. CONST. art. V, § 3(b)(1). See note 98 and accompanying text, *infra*.

90. This requirement limited supreme court review in any particular case to the order or decision of the court which first passed on the validity of a statute or which first construed a constitutional provision. *See* Matthews v. State, 363 So. 2d 1066 (Fla. 1978); *In re* Kionka's Estate, 121 So. 2d 644 (Fla. 1960) (O'Connell, J., concurring specially).

91. The circuit court, rather than the district court, will hear appeals from county court orders. FLA. STAT. § 26.012(1) (1979). Conceivably, supreme court review of some county court orders invalidating a statute or constitutional provision could be precluded, depending on the action of reviewing tribunals. For an explanation and analysis of this problem, see notes 110-119 and accompanying text, *infra*.

sented.[92] The court thus faced abstract constitutional questions presenting the most difficult form of legal issue for it to review because the parties frequently viewed the issue in different perspectives. As a result of the absence of a factual context, the precedential value of the court's decisions in these areas was often, although inadvertently, either overnarrow or overbroad.[93]

Equally affecting the workload of the court was the fact that trial court decisions frequently carried a number of rulings on subsidiary issues, bringing before the supreme court a range of comparatively insignificant matters which did not warrant review by the state's highest tribunal. Nonetheless, the jurisprudence had developed that the supreme court would consider the entire case once any appealable issue had arisen.[94] The consequence of this doctrine was that subsidiary, nonconstitutional issues were brought to the court which could have been equally well handled by three district court judges.

In recent years the court criticized the apparent use of this constitutional provision as a means either of bypassing the district courts of appeal or coming to the supreme court for review of evidentiary and other "routine" matters on the basis of a technical or occasionally "frivolous" constitutional issue.[95] The most flagrant abuse of this jurisdictional tool was the practice of raising a constitutional issue by simple motion, perhaps as one ground of many, before a county or circuit court, with no intention to develop or argue the constitutional claim.[96]

After considering these problems, both the Appellate Structure Commission and the bar committee concluded that, with the obvious exception of death penalty and bond validation cases, all matters coming to the supreme court from trial courts should pass through the district courts of appeal. Generally, it was thought a more refined record and distillation of the issues would result

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92. *See, e.g.*, Johnson v. State, 351 So. 2d 10, 13 (Fla. 1977) (England, J., dissenting); Jordan v. State, 334 So. 2d 589, 593 (Fla. 1976) (England, J., dissenting).

93. *See, e.g.*, Spears v. State, 337 So. 2d 977 (Fla. 1976), *limited in* State v. Keaton, 371 So. 2d 86 (Fla. 1979).

94. *See* Coffin v. State, 374 So. 2d 504 (Fla. 1979); Anoll v. Pomerance, 363 So. 2d 329 (Fla. 1978); Griffis v. State, 356 So. 2d 297 (Fla. 1978); Allen v. State, 326 So. 2d 419 (Fla. 1975). The rationale traditionally offered in support of this doctrine is that it promotes "the efficient and speedy administration of justice . . .", P.C. Lisseden Co. v. Board of County Comm'rs, 116 So. 2d 632, 636 (Fla. 1959), for as the court noted in *Coffin*, "once a case has been accepted and the issues briefed and argued, transfer of the cause involves a repetitive waste of judicial time and energy." 374 So. 2d at 508.

In extreme cases — that is, where the constitutional issue is obviously "frivolous" or insubstantial and is employed solely to provide a basis for supreme court jurisdiction — the court will depart from this doctrine and transfer the entire case to the appropriate lower court. *See, e.g.*, MBF Theatres, Inc. v. State, 373 So. 2d 920 (Fla. 1979); Simmons v. State, 354 So. 2d 1211 (Fla. 1978); Evans v. Carroll, 104 So. 2d 375 (Fla. 1958).

95. *See* Coffin v. State, 374 So. 2d 504 (Fla. 1979); Evans v. Carroll, 104 So. 2d 375 (Fla. 1958). In *Coffin*, the court urged appellate practitioners to challenge "frivolous" constitutional issues by appropriate motions before argument. The court also cautioned that attempts to expand jurisdiction by focusing on these constitutional issues might "obscure lesser, but significant, trial errors." 374 So. 2d at 508 & n.6.

96. *See* Johnson v. State, 351 So. 2d 10 (Fla. 1977); Jordan v. State, 334 So. 2d 589 (Fla. 1976).

from this process. Additionally, the presence of a written opinion by the district court would facilitate the supreme court's consideration of all other cases.[97]

No estimate was made as to the number of new trial court orders which the 1980 amendment would add to the caseload of the district courts. The bar committee and the legislature felt, however, that the impact on each district court would be minimal because of the diffusion of these cases among the five appellate districts. In fact, there are no reported instances of the supreme court's having reviewed a trial court order which initially and directly passed on the validity of a federal statute or treaty. Therefore, this authority for review was removed by the 1980 amendment.

(4) Invalidity of state statute or constitutional provision — section 3(b)(1)

The 1980 amendment provides that the supreme court

> [s]hall hear appeals from ... decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution ....[98]

This provision drastically alters the court's former mandatory jurisdiction over questions of statutory validity and constitutional construction. Before the 1980 amendment, section 3(b)(1) required the supreme court to review both trial court orders and district court decisions which "initially and directly" passed on the validity of a state statute, federal statute or treaty, or which construed a provision of the state or federal constitution.[99] These five generic categories placed a very broad range of cases within the court's mandatory jurisdiction.

The 1980 amendment significantly narrows the scope of former section 3(b)(1). The supreme court's mandatory jurisdiction is now limited to district court decisions, and only to those which declare invalid either a state statute or a provision of the state constitution.[100] When a district court pronounces a statute or constitutional provision valid, review must be sought only under the court's discretionary authority.[101] Review of constitutional constructions is also shifted to the court's discretionary jurisdiction.[102] As previously noted, supreme court review of orders and decisions passing on the validity of federal statutes and treaties has been completely eliminated.

The rationale for these changes is best understood by reference to the development of the provision which was eventually enacted. The Appellate Structure Commission and the bar committee considered whether it was necessary for the supreme court to review every district court decision which declared

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97. *Senate Committee Hearings on S.J. Res. 714*, April 12, 1979, *supra* note 39 (comments of Justice Sundberg).

98. FLA. CONST. art. V, § 3(b)(1).

99. FLA. CONST. art. V, § 3(b)(1) (1968).

100. FLA. CONST. art. V, § 3(b)(1).

101. *Id.* § 3(b)(3).

102. *Id.*

valid a state statute or a provision of the state constitution.[103] Often these decisions lack statewide significance, or do not pose significant issues for supreme court consideration. For example, in *Hotoph v. State*,[104] the court was forced to examine the constitutionality of a special law prohibiting net or seine fishing in certain parts of St. Johns County.[105] Some cases do have statewide significance, of course, and those will come to the court for discretionary consideration with a presumption of both legislative correctness,[106] and judicial correctness.[107] These factors obviously tend to reduce the likelihood that supreme court review will alter the result in any particular case, and therefore mandatory review was not thought to be necessary.

Any district court decision invalidating a statute or provision of the state constitution would necessarily result in some disharmony in the law or confusion in the administration of justice throughout the state. Supreme court review is essential for uniformity in the application of the law in those cases. In contrast, the court's refusal to review a case validating a statute or a constitutional provision will have no adverse effect on the statewide operation of the law or constitution.

These considerations prompted the commission and the bar committee to recommend that the supreme court consider as a matter of right only those cases in which a statute or constitutional provision is declared invalid, and leave other cases involving questions of statutory validity or constitutional construction to its discretionary jurisdiction.[108] The Clerk of the supreme court has estimated that approximately 25 cases of constitutional or statutory invalidity will come to the court each year after the adoption of the 1980 amendment.[109]

Although new section 3(b)(1) is precisely worded, the provision has been so completely changed that a few unanswered questions necessarily remain.

(a) County court orders

One question is whether the limitation of the court's mandatory jurisdiction to "decisions of district courts of appeal"[110] prevents supreme court review of cases emanating from county court orders which invalidate statutes or constitutional provisions. Under the present statutory scheme, the circuit courts have

103. Appellate Structure Commission minutes, Oct. 12, 1978, *supra* note 31. *See also* app. E.

104. 367 So. 2d 1015 (Fla. 1979).

105. Similarly, in Graham v. State, 362 So. 2d 924 (Fla. 1978), the court upheld the constitutionality of a statute making it unlawful for any person to molest crab traps, lines, or buoys without the permission of the owner.

106. Statutes are presumptively constitutional, and all reasonable doubts are resolved in favor of their validity. A.B.A. Indus., Inc. v. City of Pinellas Park, 366 So. 2d 761 (Fla. 1979); Belk-James, Inc. v. Nuzum, 358 So. 2d 174 (Fla. 1978); Golden v. McCarty, 337 So. 2d 388 (Fla. 1976).

107. A trial court's findings and judgment come to an appellate court clothed with a presumption of correctness. Delgado v. Strong, 360 So. 2d 73 (Fla. 1978); Herzog v. Herzog, 346 So. 2d 56 (Fla. 1977). Similar deference would obtain for district court decisions coming to the supreme court.

108. FLA. CONST. art. V, § 3(b)(3). *See* notes 204-227 and accompanying text, *infra*.

109. Statistics obtained from the Clerk of the Supreme Court of Florida.

110. FLA. CONST. art. V, § 3(b)(1).

general appellate jurisdiction over the county courts,[111] and any further appellate review of a county court order generally lies within the district court's discretionary certiorari jurisdiction.[112] It is conceivable that a county court order invalidating a state statute or constitutional provision might never be received by the supreme court if, on review, the circuit court affirmed the order and a district court later denied certiorari review. Conceivably, then, a statute or constitutional provision could be valid in some counties or circuits of the state and invalid in others. This obviously would undermine the framers' intent to ensure uniformity in the law.[113]

Although this problem was not anticipated by the framers, there are at least two possible solutions. First, district courts could be encouraged to grant certiorari review in all cases where a circuit court order, on review of a county court order, has invalidated a statute or a constitutional provision.[114] District court review would then give at least three appellate judges[115] the opportunity to examine the case on the merits. More significantly, it would lay the predicate for a future review in the supreme court.

As a second possible solution, the legislature could enact a statutory "bypass" for the circuit courts, giving the district courts direct appellate jurisdiction over all county court orders passing on the validity of a state statute or constitutional provision.[116] This procedure would expedite district court review and ensure that the supreme court has the final word on all invalidation cases. It would also prevent four levels of review, and attendant delay, for this class of cases. At the start of the 1980 legislature's regular session, the supreme court requested that the legislature adopt this second alternative.[117]

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111. FLA. STAT. § 26.012(1) (1979).

112. FLA. CONST. art. V, § 4(b)(3).

113. See note 108 and accompanying text, *supra*.

114. This problem was discussed at a meeting of the state's appellate judges and justices, which was convened by the chief justice on March 22, 1980. Of the 33 district court judges present, all agreed that review should be granted in all such cases even though certiorari was the basis of the request.

115. More than three judges will have the opportunity to review the case if the district court decides to sit en banc. *See* FLA. R. APP. P. 9.331 (1977).

116. Both the circuit courts and the district courts benefited from a similar sort of "constitutional double bypass" under old § 3(b)(1) since all county court orders involving constitutional constructions or questions of statutory validity were appealable directly to the supreme court. *See* FLA. STAT. § 26.012(1) (1979).

117. At the request of the supreme court, bills were introduced at the 1980 regular session of the legislature to revise § 26.012(1), Florida Statutes (1979), as follows:

26.012 Jurisdiction of circuit court.—

(1) Circuit courts shall have jurisdiction of appeals from county courts except ~~those--appeals which-may-be-taken-directly-to-the-Supreme-Court~~ appeals of county court orders and judgments declaring invalid a state statute or a provision of the state constitution.

Fla. S. 702 (Reg. Sess. 1980); Fla. P.C.B. 38 (Reg. Sess. 1980). In effect, this proposal would enable a bypass of the circuit courts whenever a county court order declared invalid a state

It should be noted that section 3(b)(5) enables a district court to certify a trial court order directly to the supreme court if it requires immediate resolution and is either of great public importance or will have a great effect on the administration of justice.[118] Some county court invalidations, whether initially brought to a district court or brought through a circuit court affirmance, could fall within this provision if its requirements were met.[119]

(b) Inherency doctrine

A second question is whether the new provision, which mandates review of district court decisions "declaring invalid" either a state statute or constitutional provision, carries forward the inherency doctrine of *Harrell's Candy Kitchen*.[120] Under this doctrine, it was not necessary that a written opinion or order expressly rule on the validity of a state statute[121] in order to predicate review in the supreme court. A ruling of validity that was implied or inherent in the lower court's decision was considered sufficient.[122]

If the new provision were interpreted to obviate the old inherency doctrine and require an express declaration of invalidity, the possibility would exist that some district court decisions "declaring invalid" a state statute or constitutional provision would not be eligible for supreme court review. For example, a trial court could declare a state statute invalid and a district court could affirm the trial court without an explanation of its action.[123] Thus, the decision might not be reviewable in the supreme court.[124] Such a result would clearly be at odds with the intent of the framers in adopting the provision.[125] Moreover, the contrast between the "expressly" requirements in section 3(b)(3) and the omission of any like directive in this section suggests that inherency is preserved. Thus, the term "declaring invalid" should carry forward the inherency doctrine to the extent that the district court's action can be shown to be predicated on a trial court order which declares a statute or constitutional provision invalid.

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statute or constitutional provision. If enacted, the district courts would be required to determine whether this provision applies to "as applied" invalidations as well as facial invalidations. This had been an issue for the supreme court before the 1980 amendment. *See* notes 126-132 and accompanying text, *infra*. The district courts could treat the issue differently, perhaps leading to a direct conflict of decisions which the supreme court would want to resolve.

118. FLA. CONST. art. V, § 3(b)(5).

119. *See, e.g.*, State v. Champe, 373 So. 2d 874 (Fla. 1978), discussed at notes 271-272 and accompanying text, *infra*.

120. *See* Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So. 2d 439 (Fla. 1959), discussed at notes 12-13 and accompanying text, *supra*.

121. Under the case law which had developed prior to the 1980 amendment, application of the inherency doctrine was limited to cases involving questions of statutory validity; it did not apply to those cases construing a provision of the state or federal constitution. *See, e.g.*, Craft v. Craft, 276 So. 2d 4 (Fla. 1973); Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973).

122. *See, e.g.*, Gissendanner v. State, 373 So. 2d 898 (Fla. 1979); Levitz v. State, 339 So. 2d 655 (Fla. 1976).

123. The district court's decision without an explanation could be a per curiam affirmance or a written opinion which says simply that all points have been considered and are without merit.

124. See notes 171-192 and accompanying text, *infra*.

125. See notes 103-108 and accompanying text, *supra*.

The inherency problem should rarely arise. District court judges, it would seem, have an obligation to express their reasoning for so solemn a responsibility as declaring invalid either a state statute or a provision of the state constitution. A district court might well reduce its writing role, however, by adopting a trial court's order which adequately articulates reasoning for the action taken and reproducing that order as its opinion. In those cases, no problem of inherency will arise because the district court's decision will be adequately expressed for subsequent review.

(c) "As applied" decisions

A third question under new section 3(b)(1) arises from the distinction between an attack on the validity of a statute "on its face" as opposed to "as applied." A facial attack on the validity of a statute challenges its constitutionality for all situations.[126] In contrast, an as applied attack merely challenges the statute's constitutionality as it pertains to the facts of a particular case.[127] It is thus possible for a statute to be constitutionally valid on its face, but invalid as applied to a certain fact pattern.[128]

In *Snedeker v. Vernmar, Ltd.*,[129] a narrowly-divided court[130] held that jurisdiction would lie under old section 3(b)(1) when a lower court passed on the validity of a statute as applied.[131] Since *Snedeker*, the court has regularly entertained both facial and as applied challenges to the validity of statutes, although one justice recently questioned the wisdom of that decision.[132] It remains to be seen whether the new section 3(b)(1) will carry forward *Snedeker* and its progeny, so as to encompass declarations of both facial and as applied invalidity.[133]

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126. *See, e.g.*, Vernold v. State, 376 So. 2d 1166 (Fla. 1979); Scott v. State, 369 So. 2d 330 (Fla. 1979); State v. Belgrave, 364 So. 2d 1225 (Fla. 1978).

127. *See, e.g.*, Cross v. State, 374 So. 2d 519 (Fla. 1979); Matthews v. State, 363 So. 2d 1066 (Fla. 1978); Reams v. State, 279 So. 2d 839 (Fla. 1973).

128. *See, e.g.*, Fiske v. State, 366 So. 2d 423 (Fla. 1978); *In re* Fuller, 255 So. 2d 1 (Fla. 1971).

129. 151 So. 2d 439 (Fla. 1963).

130. The vote in *Snedeker* was four-to-three.

131. *Snedeker* overruled the court's contrary decision on this point in Stein v. Darby, 134 So. 2d 232 (Fla. 1961).

132. In Cross v. State, 374 So. 2d 519 (Fla. 1979), Chief Justice England urged that *Snedeker* be reevaluated. The majority in *Cross* accepted jurisdiction without comment, and then proceeded to uphold the validity of Florida's disorderly intoxication statute against a claim that, as applied to the defendant, it impinged on protected first amendment rights. In response, Chief Justice England stated:

> After reading the majority's opinion, I cannot help asking myself why this case should be in our Court to resolve. The majority, I believe, has merely performed an exercise of the most fundamental form of evidential review, of the type properly performable by the district courts of appeal rather than this tribunal.
>
> Having asked myself why, under Florida's present appellate structure, we have provided this form of appellate review without articulating any legal principle of value to the jurisprudence of this state, I found the answer in the Court's decision in *Snedeker v. Vernmar, Ltd.*, 151 So. 2d 439 (Fla. 1963), upon which the majority has implicitly relied as the basis for our jurisdiction.

There was virtually no discussion of this problem during the development of the 1980 amendment. Arguably, one interpretation of section 3(b)(1) which is consistent with the amendment's objectives,[134] is that it would not require as applied determinations of the district courts to fall within the supreme court's mandatory review jurisdiction. This argument is premised on the notion that a successful as applied attack results only in a declaration that an individual application of a statute is without the bounds of constitutional permissibility. The challenged statute remains unaffected, posing none of the implications for further review which led to this aspect of the court's mandatory jurisdiction. Consequently, it can be argued that district court determinations of as applied invalidity usually will not have statewide significance, and therefore supreme court review is not essential.[135]

Conversely, a failure to accept as applied invalidations would create a crack through which some important cases might fall, resulting in a lack of jurisdiction for necessary supreme court review. The point can be illustrated by the recent supreme court decision of *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*[136] In that case the court reviewed a district court decision which had determined that a certain agent hired by a public body was subject to the public records law.[137] Hypothetically, the district court could have ruled that the public records law was invalid as applied to that particular agent of a public body. If as applied determinations were not appealable under section 3(b)(1), there would be no basis for the parties to seek supreme court review under the court's mandatory jurisdiction. Of course, the district court could certify the issue for discretionary consideration,[138] but it might not. This scenario raises the question upon which the authors decline to speculate, whether that case or any other which seemingly presents important public principles needs supreme court review after the district court has fully considered the issue and ruled on the merits.[139] The ultimate issue in this debate

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. . . .

Rather than restate the jurisdictional arguments set forth in the majority and dissenting opinions in *Snedeker* to indicate my concerns, I need only say here that the dissenting opinion of Justice Thomas in *Snedeker* is by far more compelling to me than the majority's opinion, that we should reevaluate *Snedeker* in light of what we now know about the appellate processes that have evolved in the past fifteen years, and that a realistic appraisal of contemporaneous jurisprudence in Florida will reveal that Justice Thomas' hypothesized concerns with our taking "as applied" statutory challenges were amazingly farsighted.

Id. at 521.

133. This analysis is equally applicable but less important under the court's authority in section 3(b)(3) to review any decision of a district court which declares a state statute valid. Under that provision, the court's jurisdiction is discretionary.

134. See notes 66-68 and accompanying text, *supra*.

135. There are other possible avenues within the court's discretionary jurisdiction for review of district court decisions holding a statute invalid as applied. *See, e.g.*, FLA. CONST. art. V, §§ 3(b)(3) (constitutional construction), 3(b)(4) (certification).

136. 379 So. 2d 633 (Fla. 1980).

137. FLA. STAT. ch. 119 (1975).

138. FLA. CONST. art. V, § 3(b)(4).

139. Notably, the district courts also will have to resolve the question of whether to re-

would be whether the 1980 amendment was framed to permit district court finality in cases such as these, or whether the as applied invalidity problem simply was not foreseen. The debates of the framers and the information provided the public offer no answer.

(5) Bond validations – section 3(b)(2)

The 1980 amendment provides that the supreme court

> [w]hen provided by general law, shall hear appeals from final judgments ... entered in proceedings for the validation of bonds or certificates of indebtedness ....[140]

Before and after the 1980 amendment, section 3(b)(2) authorized the legislature to provide by general law for supreme court review of final judgments in bond validation proceedings. The legislature has provided for such review in section 75.08, Florida Statutes (1979).[141] This category of jurisdiction, which brings approximately five to ten cases to the court each year,[142] remained unchanged in the constitution.

The rationale for retaining authority over bond validation cases in the supreme court appears to have been pragmatic. It was believed that the finality of bond judgments, for marketability purposes, would be enhanced and speeded by decisions of the supreme court rather than a district court of appeal.[143] Moreover, aside from being few in number, bond finance cases in the supreme court do not entail the elaborate record review which encumbers the court in other matters, such as death penalty cases.[144] The court's function in reviewing bond validation final judgments is simply to determine whether the governmental agency issuing the bonds had the power to act and whether it exercised that power in accordance with the law.[145] Review of bond validation cases therefore does not consume an inordinate amount of the court's time.

(6) Review of administrative action – section 3(b)(2); formerly sections 3(b)(3) and 3(b)(7)

The 1980 amendment provides that the supreme court

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view as applied invalidations from the trial courts. While it is possible that the five district courts might take different stands on this issue, the supreme court ultimately could resolve any such conflict of decisions.

140. FLA. CONST. art. V, § 3(b)(2).

141. This section provides that "[a]ny party to the action whether plaintiff, defendant, intervenor or otherwise, dissatisfied with the final judgment, may appeal to the Supreme Court within the time and in the manner prescribed by the Florida Appellate Rules." FLA. STAT. § 75.08 (1979).

142. Statistics obtained from the Clerk of the Supreme Court of Florida.

143. *House Committee Hearings on H.J. Res. 33-C*, Nov. 26, 1979, *supra* note 66 (remarks of Benjamin Redding).

144. See note 75 and accompanying text, *supra*.

145. Doane v. Lee County, 376 So. 2d 852 (Fla. 1979); Speer v. Olsen, 367 So. 2d 207 (Fla. 1978).

(2) [w]hen provided by general law, ... shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.[146]

~~(3) may issue writs of certiorari to commissions established by general law having statewide jurisdiction.~~

~~(7) [s]hall have the power of direct review of administrative action prescribed by general law.~~

Before the 1980 amendment, two provisions of article V — sections 3(b)(3) and 3(b)(7) — directed or authorized review of administrative action which might be assigned to the supreme court by the Florida Legislature. Over the years, only two classes of administrative cases remained with the supreme court — Industrial Relations Commission (IRC) decisions in workmen's compensation cases,[147] and decisions of the Public Service Commission (PSC).[148]

The supreme court never expressly declared whether its review of PSC matters was premised on section 3(b)(7), which assigned the power of direct review of administrative action as prescribed by general law, or section 3(b)(3), which allowed review by certiorari of commissions established by general law having statewide jurisdiction.[149] It is clear, however, that the court generally considered cases from the PSC "by certiorari," frequently denying review with-

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146. FLA. CONST. art. V, § 3(b)(2).

147. *See, e.g.*, Exxon Co. v. Alexis, 370 So. 2d 1128 (Fla. 1978); Farrell v. Amica Mut. Ins. Co., 361 So. 2d 408 (Fla. 1978).

IRC decisions were assigned to the court by 1971 Fla. Laws ch. 71-355, § 120 (former FLA STAT. § 440.27(1)), which provided, in relevant part, that "[o]rders of the [Industrial Relations Commission] entered pursuant to s. 440.25 shall be subject to review only by petition for writ of certiorari to the supreme court." On October 1, 1979, review of IRC decisions was transferred to the First District Court of Appeal. See note 154 and accompanying text, *infra*.

148. *See, e.g.*, Aloha Utils., Inc. v. Florida Pub. Serv. Comm'n, 376 So. 2d 850 (Fla. 1979); Gulf Coast Motor Line, Inc. v. Hawkins, 376 So. 2d 391 (Fla. 1979).

Supreme court review of PSC decisions is directed by various statutes relating to specific regulated industries, *see* authorities cited in notes 158 & 162 *infra*, and by one "blanket" provision, FLA. STAT. § 350.641(1) (1979) ("All petitions to the Supreme Court to review orders of the Florida Public Service Commission by writ of certiorari shall be filed in the Supreme Court within the time and in the manner provided by the Florida Appellate Rules."). The 1980 amendment will necessitate the repeal or revision of many of these statutes. See note 162 *infra*. Bills for this purpose were introduced at the commencement of the 1980 regular session of the legislature.

149. *Compare* City of St. Petersburg v. Hawkins, 366 So. 2d 429, 430 (Fla. 1978) ("This cause is before us on a petition for writ of certiorari to review an order of the Florida Public Service Commission. . . . We have jurisdiction pursuant to Article V, Section 3(b)(7), Florida Constitution.") *with* H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913, 913 (Fla. 1979) ("This cause is before us on petition for writ of certiorari to the Public Service Commission. Art. V, § 3(b)(3), Fla. Const.").

out a written opinion.[150] In contrast, the court specifically stated in *Scholastic Systems, Inc. v. LeLoup*,[151] that its review of IRC decisions was by certiorari under section 3(b)(3).

During the debates of the Appellate Structure Commission[152] and in the statement of principles developed by the bar committee,[153] it was generally agreed that all administrative decisions could be properly reviewed by the district courts of appeal instead of the supreme court. In the meantime, the 1979 legislature withdrew workmen's compensation cases from supreme court review by its dual action of abolishing the Industrial Relations Commission and assigning the review of workers' compensation decisions to the First District Court of Appeal.[154] With that action, the supreme court's administrative review jurisdiction was limited to matters arising from the Public Service Commission. Considerable debate ensued as to whether even that jurisdiction of the court should be retained.[155] However, it was decided that the statewide significance of PSC decisions in electric, telephone and gas cases, and their financial impact on the citizens of the State of Florida, warranted leaving the review of those Commission decisions with the court.[156]

Section 3(b)(2) commences with the phrase "when provided by general law,"[157] thus enabling the legislature to withdraw the court's limited jurisdiction. This continues former section 3(b)(7), which indicated that reviewable administrative actions would be those "prescribed by general law." Of course, implementing legislation to confer jurisdiction on the supreme court already appears in the statutes which govern the three classes of regulated utilities.[158]

150. *See, e.g.*, Flamingo Transp., Inc. v. Hawkins, 368 So. 2d 1366 (Fla. 1979); Florida Power Corp. v. Hawkins, 366 So. 2d 881 (Fla. 1978).

151. 307 So. 2d 166 (Fla. 1974).

152. Appellate Structure Commission minutes, Oct. 12, 1978, *supra* note 31. *See* app. E.

153. *See* app. D.

154. *See* 1979 Fla. Laws, ch. 79-312, § 1. For a complete analysis of the 1979 reform of Florida's Workers' Compensation Law, see Sadowski, Herzog, Butler & Gokel, *The 1979 Florida Workers' Compensation Reform: Back to Basics*, 7 FLA. ST. U. L. REV. 641 (1979).

155. *See Senate Committee Hearings on S.J. Res. 20-C*, Nov. 26, 1979, *supra* note 47; *House Committee Hearings on H. J. Res. 33-C* (later replaced by S.J. Res. 20-C), Nov. 26, 1979, *supra* note 66.

156. See notes 162-166 and accompanying text, *infra*.

157. FLA. CONST. art. V, § 3(b)(2).

158. FLA. STAT. § 366.10 (1979) enables the supreme court to review PSC orders affecting gas and electric utilities. There is no comparable provision in chapter 364, which governs the regulation of telephone companies, so supreme court review of PSC orders affecting telephone companies is based on FLA. STAT. § 350.641(1) (1979), the "blanket" provision. *See, e.g.*, Florida Tel. Corp. v. Mayo, 350 So. 2d 775 (Fla. 1977).

In response to the passage of the 1980 amendment, a bill was introduced at the 1980 regular session of the legislature which would amend both of the above statutes to conform with the language of new section 3(b)(2). S.B. 458 (Reg. Sess. 1980). Section 366.10, under the bill, would provide specifically for supreme court review of "any action of the commission relating to rates or service of utilities providing electric or gas service." Section 350.641(1), the "blanket" provision, would be amended similarly so as to enable supreme court review of PSC orders involving telephone, gas, and electric utilities, and a new provision in chapter 364 would provide specifically for supreme court review of PSC orders involving telephone companies. The proposed revision of § 350.641(1) also assigns review of all other PSC action to the First District Court of Appeal.

This new provision has several significant features which should be noted. First, the legislature is only free to prescribe review of the action of "statewide agencies."[159] This term first appeared in SJR 20-C when it reached the floor of the Senate, and is best explained by reference to the journal of the Senate on the day this provision was adopted.[160] The term "statewide agencies" was designed both to eliminate a direct reference to the Public Service Commission,[161] and to ensure that decisions of local agencies, such as municipal utilities, would not be initially reviewable in the supreme court.

Second, the only classes of utilities for which supreme court review may be prescribed are those providing electric, gas and telephone services. Eliminated from direct supreme court review are all decisions of the Public Service Commission, or any other statewide agency, affecting other regulated industries.[162] The framers of this provision limited supreme court review to only three classes of utilities on the basic premise that PSC decisions with respect to any of them would have significant, statewide, financial implications, whereas PSC decisions involving other regulatory functions would not. For example, the supreme court had reviewed for a number of years transportation decisions of very minor statewide impact, such as those determining the size of passenger busses between municipalities and their outlying airports,[163] regulating sightseeing services,[164] and one involving the state's only regulated bridge company.[165] The framers intended to cut down substantially the number of cases that would come to the court from the PSC, and it is estimated the court will now receive approximately five to ten such cases each year.[166]

The plan to limit supreme court review to three major classes of utility cases was conceived through an alliance between the supreme court and representatives of the electric, gas and telephone utilities in the state. This alliance arose as a reaction to earlier drafts of the proposed constitutional amendment, including SJR 714, which would have eliminated all supreme court review of Public Service Commission cases.

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159. FLA. CONST. art. V, § 3(b)(2).

160. *See* app. C.

161. An earlier draft of § 3(b)(2) expressly mentioned the Public Service Commission. This was later considered unwise in light of the possible change in the commission's name or function, and the inappropriateness of naming any particular administrative agency in the Florida Constitution. *See* app. C.

162. Ground transportation cases (e.g., bus and trucking) and water and sewer cases are the main categories of PSC decisions which had been, but are no longer, eligible for direct supreme court review. Some of the statutes which authorize direct supreme court review of cases now outside the court's jurisdiction, and which therefore should be repealed, include FLA. STAT. § 367.131 (1979) (water and sewer cases), *id.* § 365.12 (private wire companies), and *id.* § 323.09(1) (ground transportation cases). A bill was introduced in the 1980 regular session of the legislature to repeal these and other inoperative statutes. S.B. 458 (Reg. Sess. 1980).

163. *See, e.g.*, Daytona Beach Limousine Serv., Inc. v. Yarborough, 267 So. 2d 11 (Fla. 1972).

164. *See, e.g.*, Tamiami Trail Tours, Inc. v. Mayo, 333 So. 2d 15 (Fla. 1976); A-1 Bus Lines, Inc. v. Bevis, 330 So. 2d 1 (Fla. 1976); American Sightseeing Tours, Inc. v. Bevis, 326 So. 2d 437 (Fla. 1976).

165. *See* Florida Bridge Co. v. Bevis, 363 So. 2d 799 (Fla. 1978).

166. Statistics obtained from the Clerk of the Supreme Court of Florida.

Some members of the Public Service Commission opposed placing review of any PSC decisions in the district courts of appeal for fear of a dispersal of review among the five district courts.[167] The 1980 amendment did not resolve the place for review of PSC cases removed from the supreme court. Shortly after the amendment was adopted a bill was filed to assign review of these cases to the First District Court of Appeal.[168]

Third, the 1980 amendment allows the legislature to prescribe review of the "action" of statewide agencies relating to the three subject classes of utilities. The obvious intent of the framers was to parallel former section 3(b)(7) and the terminology of the Administrative Procedure Act, which describes virtually all things which an administrative agency can do, either by order or rule, as "agency action."[169]

Fourth, the provision allows review of statewide agency (PSC) actions which relate to "rates or service."[170] This phraseology was selected with the broad intent of covering all subjects of regulation relative to electric, gas and telephone utilities. The framers of the constitutional proposal did not envision that PSC decisions affecting these three classes of utilities would be channeled to any district court of appeal. For practical purposes the terms "rates" and "services" should be viewed as all-encompassing as to these utilities.

B. *Discretionary Jurisdiction*

Before analyzing the categories of cases within the court's discretionary jurisdiction, discussion of two specific changes in terminology intended to clarify the constitutional standards is essential.

(1) Inserting "expressly"

The 1980 amendment provides in section 3(b)(3) that the supreme court

> [m]ay review ~~by certiorari~~ any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers ... or that expressly and directly conflicts ... with a decision of another ~~any~~ district court of appeal or of the supreme court on the same question of law ....[171]

The 1980 amendment places the term "expressly" before each distinctive

167. *House Committee Hearings on H.J. Res. 33-C*, Nov. 26, 1979, *supra* note 66 (remarks of Benjamin Redding).

168. See note 158 *supra*.

169. FLA. STAT. § 120.52(2) (1979); City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976); City of Titusville v. Florida Pub. Employees Relations Comm'n, 330 So. 2d 733 (Fla. 1st D.C.A. 1976).

170. FLA. CONST. art. V, § 3(b)(2).

171. FLA. CONST. art. V, § 3(b)(3).

jurisdictional base of the supreme court's discretionary jurisdiction which appears in section 3(b)(3). This change is equal in importance to the reordering of direct appeals.[172] The profound effect of the change is that all of the court's discretionary jurisdiction is now predicated on written opinions of the district courts on points of law brought for review, rather than on obscure legal issues which were never discussed at the appellate level.[173] The impact of this change becomes apparent when one considers the practice of the court under former section 3(b)(3).

As was mentioned earlier,[174] the major purpose of the 1956 revision of article V was to relieve the supreme court's overburdened docket by creating the district courts and making them courts of final appellate jurisdiction in most cases. This purpose was severely undermined by *Foley*, where a bare majority (4-3) of the justices held that the court would accept jurisdiction of cases where conflict certiorari was based solely upon a district court per curiam affirmance of lower court action without opinion (hereafter called "PCA").[175] The rather dubious rationale offered in support of this holding was that a district court affirmance without opinion became an effective precedent in the trial court being affirmed, so as to provide the potential for a "conflict" of decisions within the circuit.[176] Because there was no articulation of conflicting precedent in the

172. See notes 87-97 and accompanying text, *supra*.

173. Possibly, a legal issue could be discussed at length in a trial court's order but avoid supreme court review by omission from a district court's decision. The seemingly anomalous result becomes highly rational when it is remembered that the district court may have resolved the case on a legal or factual ground (such as standing) which made it unnecessary or inappropriate to reach the legal issue discussed below.

174. See note 5 and accompanying text, *supra*.

175. *Foley* overruled Lake v. Lake, 103 So. 2d 639 (Fla. 1958), which held that, with some exceptions, district court decisions are not reviewable under conflict certiorari unless there is direct conflict on the face of the opinion.

176. In Florida Greyhound Owners & Breeders Ass'n, Inc. v. West Flagler Assocs., 347 So. 2d 408 (Fla. 1977), Justice England severely criticized this basic rationale underlying *Foley*:

> In my view, the [rationale] articulated by the *Foley* majority is in all events manifestly unsound. It is based on the indefensible assumption that trial judges assume that district courts issue per curiam affirmances only when they agree with the trial judge's reasons for ruling a certain way. That assumption is not only fallacious as a matter of simple logic, but it has, since *Foley*, been expressly rejected by the district courts themselves. . . . To my mind, there is no possible way that a district court's affirmance without opinion can create decisional disharmony in the jurisprudence of this state sufficient to warrant our attention. The foul assumption which underlies any review is that the district court perpetrated an injustice which it could not explain away in an opinion. I refuse to indulge that assumption.
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> • • • •
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> Even if I am wrong in my premise that an affirmance without opinion doesn't constitute a "precedent," I would still contend that the need to "harmonize" such a precedent with other decisions is too miniscule to require our intercession. A precedent so limited simply does not create disharmony in the general law of the state. Similar situations occur whenever a losing litigant fails to take an erroneous trial court decision to the district court or an erroneous district court decision to us. In those cases future litigants are affected by any propensity of the trial judge or the appellate court to follow its erroneous

district court's decision, it was necessary to create the concept of "record proper" – the written record of the proceedings in the trial court except the transcript of testimony[177] – from which to determine whether the district court affirmance created the necessary conflict.[178] Justice Thornal, in dissent, strongly criticized the majority's holding in *Foley*:

> [A]ll of this simply means that the District Court decisions are *no longer final* under any circumstances. It appears to me that the majority view is an open invitation to every litigant who loses in the District Court, to come up to the Supreme Court and be granted a second appeal – the very thing which we assured the people of this state would *not* happen when the judiciary article was amended in 1956.[179]

Justice Thornal's warning was accurate and prophetic, as the *Foley* doctrine created a number of unfortunate consequences for supreme court practice. Increasing numbers of certiorari petitions were filed alleging decisional conflict on the basis of district court PCAs, and the court found that it was no small task either to define or to dig into the "record proper" to find decisional conflict.[180] By providing both a new and virtually boundless level of review, the *Foley* doctrine exacted a high price in time and money for individual litigants and became a means of delaying lost causes.[181] It also commanded significant time and energy from the supreme court's justices.[182]

"precedent," yet the system survives. That is because those cases have no lasting effect on our general jurisprudence. For the same reason, unexplained district court decisions have only a limited potential effect throughout the system.

Id. at 410-12 (footnote omitted) (concurring opinion).

177. Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 225 (Fla. 1965).

178. The concept of "record proper," which was derived from the English common law, created great confusion in the court's jurisdictional jurisprudence. *See* Note, *Conflict Certiorari Jurisdiction of the Supreme Court of Florida: The "Record Proper,"* 3 FLA. ST. U.L. REV. 409 (1975) and authorities cited therein. The court's expansive, yet unpredictable, treatment of this concept led one student commentator to state that "[t]he post-*Foley* cases lead to one conclusion: where the supreme court is interested in the merits of the controversy before it, it will examine the *entire* record, not merely the record proper, in determining whether it has conflict certiorari jurisdiction." *Id.* at 424 (emphasis in original). *See also* Gibson v. Maloney, 231 So. 2d 823, 832 (Fla.), *cert. denied*, 398 U.S. 951 (1970) (Thornal, J., dissenting) ("The majority is out-Foleying *Foley*. Just once, it would be helpful if my colleagues who follow the *Foley* majority would actually define what is meant by 'record proper' and 'transcript of testimony.' There is no clear-cut definition in the books and I think our cases on the subject are extremely confusing.").

179. Foley v. Weaver Drugs, Inc., 177 So. 2d at 234.

180. *See, e.g.*, AB CTC v. Morejon, 324 So. 2d 625 (Fla. 1975); Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975); Gibson v. Maloney, 231 So. 2d 823 (Fla.), *cert. denied*, 398 U.S. 951 (1970).

181. *Compare* FLA. R. APP. P. 4.5(c)(6) (1962) *with* FLA. R. APP. P. 9.120 (1977). The 1977 appellate rules removed the automatic stay which was permitted under previous rules.

182. The supreme court attempted to deal with the burden in various ways. A "pool" of research aides was created to screen petitions and write memoranda. When this procedure failed to keep pace with the volume, additional research aides were hired for the individual justices. Later, new internal procedures were devised to circulate certiorari petitions, and

By the mid-1970s, a minority of new justices on the court began challenging the *Foley* doctrine.[183] Their protests helped shape the 1980 amendment, and the legislative debates indicate clearly that the purpose for including the term "expressly" in section 3(b)(3) was to overrule *Foley*[184] and thereby eliminate supreme court review of PCAs.[185] A written opinion of the district court on the point of law sought to be reviewed is now an essential predicate for supreme court review.[186]

Under section 3(b)(3), the court clearly will refuse to review PCAs. For similar reasons, the court should decline to review several other types of district court decisions. Per curiam affirmances containing only a citation of authority ("citation PCAs"), for example, stand on no better precedential footing than pure PCAs,[187] and should likewise be insufficient as a basis for supreme court

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litigants were required to assume the additional burden of filing multiple briefs simultaneously.

183. *See, e.g.*, Florida Greyhound Owners & Breeders Ass'n v. West Flagler Assocs., 347 So. 2d 408 (Fla. 1977) (England, J., concurring; Overton, C.J., concurring specially); Williams v. State, 340 So. 2d 113 (Fla. 1976) (England, J., dissenting, joined by Overton, C.J. and Hatchett, J.); Golden Loaf Bakery, Inc. v. Charles W. Rex Constr. Co., 334 So. 2d 585 (Fla. 1976) (England, J., concurring, joined by Overton, C.J.); AB CTC v. Morejon, 324 So. 2d 625 (Fla. 1975) (England, J., dissenting, joined by Overton, C.J.); Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975) (Overton, J., dissenting).

One student commentator described the situation as follows:

> In the past several years, this resistance to the review of PCA's without opinion and to the erosion of the finality of the district courts' jurisdiction has suddenly become highly visible. Since his election to the court, Chief Justice England has written a number of opinions recognizing the jurisdictional principles early established by the court, pointing out the court's deviation from these established constitutional principles and vociferously calling for the dethronement of the *Foley* decision. While most of the other members of the court have concurred in England's opinions at one time or another, in no decision has a majority of the court concurred in any opinion explicitly calling for the overruling of *Foley*.

Note, *Per Curiam Affirmances Without Opinion: A Proper Basis For Conflict Jurisdiction?*, 7 FLA. ST. U.L. REV. 295, 305-06 (1979) (footnote omitted).

As might be expected, *Foley* and its progeny were subjected to intense discussion in academic circles. Most commentators were highly critical of the decision. *See generally id.*; Note, *supra* note 178; Note, *Establishing New Criteria for Conflict Certiorari in Per Curiam District Court Decisions: A First Step Toward a Definition of Power*, 29 U. FLA. L. REV. 335 (1977); Note, *Conflict Certiorari: Scope and Purpose Examination*, 6 STETSON INTRA. L. REV. 15 (1976); Comment, *Certiorari Review of District Court of Appeal Decisions by the Supreme Court of Florida*, 28 U. MIAMI L. REV. 952 (1974).

184. See notes 28-68 and accompanying text, *supra*.

185. While requests for the review of PCAs could have been grounded on jurisdictional bases other than conflict certiorari under former § 3(b)(3), conflict assertions were most prevalent.

186. FLA. CONST. art. V, § 3(b)(3) (1980). Of course, a written opinion does not guarantee that the supreme court will accept jurisdiction of the matter. Section 3(b)(3) is within the court's *discretionary* jurisdiction.

187. The citation of authorities in a citation PCA is for the benefit of the parties, not the public at large. Thus, a citation PCA is normally of no precedential value. P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 33, 39-40 (1976).

review.[188] So-called "no merit opinions," which merely state that the court has reviewed the record and found no merit in the points presented and no reversible error in the record, should be similarly treated.[189] Being of no real precedential value, and failing to treat "expressly" any point of law, these classes of opinions should form no basis for supreme court review.

Similarly, the "inherency" doctrine developed in *Harrell's Candy Kitchen*[190] will no longer be applicable under section 3(b)(3). The "expressly" requirement, obviously, cannot be met by an inherent declaration of a statute's validity in a written opinion which does not discuss the statute.

The history of the 1980 amendment indicates, however, that while a district court written opinion must treat the area of law sought to be reviewed, it is not essential that a conflict of decisions be recognized or acknowledged in the opinion. Any discussion of a point of law which in fact "directly conflicts" with another appellate precedent is grounds for a request for review. This construction of section 3(b)(3) accomodates the bar's insistence that attorneys retain the right to argue an alleged conflict, and that they need not be required to rely on the district courts to preserve their review right by mentioning the cases with which the court disagrees. This position is bolstered by the amendment's

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188. There is one circumstance which could argue for an exception to this rule. If a case cited as authority in a citation PCA is overruled on the legal issue asserted for conflict within the 30-day time period for filing for review, *see* FLA. R. APP. P. 9.120(b), then it is arguable that the district court's decision is in "conflict" with the overruling case so that the supreme court should have jurisdiction. The court itself is generally aware of the recent overruling case, and has generally accepted jurisdiction of such cases in the past to avoid an unjust result to a litigant whose case is not truly concluded. *Cf., e.g.*, Robbins v. State, 364 So. 2d 871 (Fla. 3d D.C.A. 1978), *remanded*, No. 55,857 (Fla. Mar. 27, 1980) (the supreme court accepted jurisdiction of, and then remanded, a district court no merit opinion which cited as its sole authority a case which had been reversed recently by the court). In these instances the court may simply remand to the district court for reconsideration in light of the overruling decision. This possible exception to a rule calling for the total rejection of citation PCAs by the court is distinguishable from cases in which the time for review has expired when the precedent is overruled, even if it is one day later. In those situations, the doctrine of finality of decisions operates to override all other considerations.

189. The following is a typical "no merit opinion," or more precisely, a "citation no merit opinion":

> This is an appeal from a final judgment in a suit to quiet title instituted by the Board of Trustees of the Internal Improvement Trust Fund, an agency of the State of Florida Department of Natural Resources, in the Circuit Court for the Eleventh Judicial Circuit of Florida. We have carefully examined the thorough and detailed final judgment entered by the trial court in this cause together with the record on appeal and the briefs of the parties. In our view, no reversible error has been shown. Accordingly, the final judgment appealed from is affirmed. Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976); Jefferson National Bank at Sunny Isles v. Metropolitan Dade County, 271 So. 2d 207, 214 (Fla. 3d DCA 1972); Gars v. Woodard, 214 So. 2d 385, 386 (Fla. 3d DCA 1968).
>
> Affirmed.

Brown v. Board of Trustees of the Internal Improvement Trust Fund, 369 So. 2d 640 (Fla. 3d D.C.A. 1979).

190. See notes 12-13 and accompanying text, *supra*.

creation of certified conflict, which accommodates instances of recognized conflict and allows the district courts to certify the conflict.[191]

The addition of the term "expressly" should vastly improve supreme court practice under section 3(b)(3). The much-maligned and confusing doctrine of "record proper" will have been interred, saving the justices immeasurable time and effort in locating alleged decisional conflict. The clerk's office will be able to screen petitions to ascertain if they are supported by a written opinion of a district court, and those without such support will simply be returned to the filing attorney. The court's review process for exercising its discretion will be expedited considerably by the district court's discussion of the point of law brought for review, enabling significantly shorter jurisdictional briefs.[192] Moreover, where jurisdiction is accepted, the court will have a better basis for making an informed decision since the written opinions of the appellate courts will most likely analyze both sides of the same issue.

Section 3(b)(3) now places an increased obligation on district court judges who again have some ability to control a party's right to supreme court review. Now, as was originally intended, these judges must keep a wary eye on the broad import of their decisions before issuing an affirmance without opinion. It goes without saying that the press and the public will keep a wary eye on them.

(2) Deleting "by certiorari"

The deletion of the words "by certiorari" from section 3(b)(3) may prove to be another very significant aspect of the 1980 amendment. Under the former provision, the supreme court's discretionary jurisdiction in section 3(b)(3) was exercised "by certiorari," based on common law notions of that term. Certiorari is essentially a common law writ issued by a superior court to an inferior court for the purpose of bringing up the record to determine whether the inferior court exceeded its jurisdiction or failed to proceed according to the essential requirements of law.[193] Generally, certiorari is not available to review final judgments and decrees where another remedy exists,[194] and the issuance of a writ of certiorari will always lay in the sound discretion of the superior court.[195] In *DeGroot v. Sheffield*,[196] Justice Thornal emphasized the limited nature of

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191. FLA. CONST. art. V, § 3(b)(4).

192. Currently, jurisdictional briefs are limited to 20 pages. FLA. R. APP. P. 9.210(a)(5).

193. Dade County v. Marca, S.A., 326 So. 2d 183 (Fla. 1976); Ellison v. City of Ft. Lauderdale, 183 So. 2d 193 (Fla. 1966); Kilgore v. Bird, 149 Fla. 570, 6 So. 2d 541 (1942); G-W Dev. Corp. v. Village of N. Palm Beach Zoning Bd. of Adjustment, 317 So. 2d 828 (Fla. 4th D.C.A. 1975).

194. DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957); Roper v. Roper, 336 So. 2d 654 (Fla. 4th D.C.A. 1976); G-W Dev. Corp. v. Village of N. Palm Beach Zoning Bd. of Adjustment, 317 So. 2d 828 (Fla. 4th D.C.A. 1975); Biscayne Kennel Club, Inc. v. Board of Bus. Reg., 239 So. 2d 53 (Fla. 1st D.C.A. 1970).

195. Burdine's, Inc. v. Drennon, 97 So. 2d 259 (Fla. 1957); G-W Dev. Corp. v. Village of N. Palm Beach Zoning Bd. of Adjustment, 317 So. 2d 828 (Fla. 4th D.C.A. 1975); Arvida Corp. v. City of Sarasota, 213 So. 2d 756 (Fla. 2d D.C.A. 1968).

196. 95 So. 2d 912 (Fla. 1957).

certiorari review, noting that the reviewing court will not undertake to reweigh or reevaluate the evidence presented to the lower tribunal.

The implicit incorporation of common law principles in former section 3(b)(3) led to a number of unfortunate consequences. For one, bringing up the lower court's entire record allowed the supreme court to review the full record and address the merits of all points in cases it had accepted for review.[197] For another, a notion developed over the years that finding a decisional conflict required, rather than permitted, acceptance of the case for review.[198] This practice led members of the Appellate Structure Commission to conclude that the court had all but written the word "may" out of section 3(b)(3).[199] Moreover, the certiorari issue contributed to the court's frequent, and often lengthy discussions regarding the acceptance or rejection of jurisdiction.[200]

The combined effect of these developments was to waste vast amounts of judicial time and labor. The justices often reached issues which had already received full consideration by a district court, and considered the non-substantive subject of jurisdiction. These practices encouraged attorneys to seek a third, plenary review, and created a climate whereby attorneys could never advise their clients that a case was indeed final after district court review. Full review by certiorari, coupled with the *Foley* doctrine, in effect evolved into a practice by judicial fiat, giving the court the role rejected by the framers of the 1956 constitution – that of third level, unlimited, discretionary review of the full record of every case which passed through the district courts.

The debates which led to the 1980 constitutional reform quite clearly indicate that the term "may" has been resurrected to its original stature.[201] The deletion of "by certiorari" from section 3(b)(3) was intended to eliminate the common law jurisdictional predicate of bringing up the whole record for scrutiny and therefore signifies the end of full record review of a discretionary case.[202] The supreme court should now decline to review any district court decision which the court deems to lack importance to the jurisprudence of the state, even though a conflict of decisions or one of the other enumerated criteria for review exists. Opinions should embrace only the legal issue which was important enough to persuade the justices to accept the case for review. The need for protracted written debates on the existence or nonexistence of a jurisdictional predicate will be obviated, since the supreme court's decisions will themselves deal with the legal issue or issues on which jurisdiction was predicated.[203]

197. Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); D'Agostino v. State, 310 So. 2d 12 (Fla. 1975); Kennedy v. Kennedy, 303 So. 2d 629 (Fla. 1974).

198. Numerous cases invoking the court's conflict jurisdiction speak in terms of the court's "duty" to consider the case on the merits. *E.g.*, Tyus v. Apalachicola N. R. R., 130 So. 2d 580 (Fla. 1961); Adjmi v. State, 154 So. 2d 812, 817 (Fla. 1963).

199. *Appellate Structure Commission Report*, 53 FLA. B.J. 274, 285 (1979).

200. *E.g.*, PERC v. School Bd. of Palm Beach County, 380 So. 2d 427 (Fla. 1980) (England, C.J., dissenting); Kendry v. Division of Admin., State Dept. of Transp., 366 So. 2d 391, 395 (Fla. 1978) (Overton, J., dissenting); Winn-Dixie Stores, Inc. v. Goodman, 276 So. 2d 465 (Fla. 1972).

201. *Senate Hearings on S.J. Res. 20-C*, Nov. 26, 1979, *supra* note 47 (remarks of Chief Justice England).

202. *Id.*

203. There is one minor exception to this point. The initial decisions defining the

As for that aspect of the common law concept of certiorari which allows the superior court to refuse review when another remedy is available, that principle should remain intact as a matter of conscience for the seven justices. One ramification of these changes in the court's constitutional jurisdiction is to give the court greater control of its discretionary jurisdiction, another goal so often mentioned in the history of the 1980 amendment.

(3) Validity of state statutes — section 3(b)(3)

The 1980 amendment provides that the supreme court

> [m]ay review ~~by certiorari~~ any decision of a district court of appeal that expressly declares valid a state statute ....[204]

The district court's declaration of validity must be expressed in a written opinion of a district court dealing in some form with the legal issue of validity. Presumably, there need be no more identification of the issue than the announcement in the court's opinion, as had been common in the orders of trial courts, that "Section ———, Florida Statutes, is valid." But the inherency doctrine announced in *Harrell's Candy Kitchen* is clearly no longer viable.[205]

As was mentioned above,[206] section 3(b)(3) was added to the supreme court's discretionary review jurisdiction as a corollary to the court's mandatory review of district court decisions which declare statutes invalid. Discussions preceding the adoption of the 1980 amendment[207] emphasized the discretionary aspect of review in validity cases, for it was recognized that not all statutes are of statewide importance,[208] that not all general laws declared valid require supreme court consideration,[209] and that the court should have the freedom to restrict its writing responsibilities by declining to review cases when it was thought necessary.[210]

Under the new provision, of course, the supreme court's denial of review where a statute is upheld does not foreclose other challenges to the same statute in the same[211] or in other appellate districts. Declining to review a validity case,

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contours of the court's jurisdiction under the 1980 amendments will undoubtedly include extensive discussions of jurisdiction so as to provide some guidance for attorneys and judges.

204. FLA. CONST. art. V, § 3(b)(3).

205. See text accompanying notes 12-13, 121-122, *supra*.

206. See notes 100-101 and accompanying text, *supra*.

207. See text accompanying notes 103-108, *supra*.

208. *See, e.g.*, Barndollar v. Sunset Realty Corp., 379 So. 2d 1278 (Fla. 1979); North Ridge General Hosp., Inc. v. City of Oakland Park, 374 So. 2d 461 (Fla. 1979).

209. *See, e.g.*, Gaer v. State, 372 So. 2d 80 (Fla. 1979); Grant v. State, 363 So. 2d 1063 (Fla. 1978).

210. If the district court of appeal gives adequate treatment to the issues raised in a proceeding, the supreme court should have the discretion to leave the district court's opinion untouched. Indeed, it is not unusual for the court to adopt the district court's opinion as its own. *See, e.g.*, Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); Leatherby Ins. Co. v. American Bankers Ins. Co., 371 So. 2d 488 (Fla. 1979); Ringel v. State, 366 So. 2d 758 (Fla. 1978).

211. A subsequent panel of the same district court could declare the statute invalid, or

therefore, does not preclude a subsequent declaration of invalidity which the court would be required to take,[212] another declaration of validity which might persuade the court to grant a request for review, or a later certification of the issue.[213] In other words, by exercising its discretionary review with care, the supreme court can avoid using its limited resources to analyze and write concerning a state statute which does not immediately appear to be controversial or of current importance, safe in the knowledge that a decision not to review will not forever insulate the legal issue from supreme court consideration.

One district court could declare a statute invalid "as applied" to one set of circumstances, and another district court could declare the same statute valid as applied to a similar set of circumstances. As suggested earlier,[214] an as applied declaration of invalidity might not trigger mandatory review of the first decision. Of course, a declaration of validity, whether as applied or facially, does not trigger mandatory review. The question arises whether two similarly situated persons might not have different results in their litigation, without supreme court harmonization. The answer is "yes," of course. In these situations, however, the presence of close factual circumstances with conflicting judicial interpretations might well persuade a district court to certify a case,[215] or the supreme court to accept discretionary review of either or both cases, in order to reconcile the difference.

The Clerk of the supreme court has estimated that approximately 150 requests will be filed each year seeking to have reviewed district court declarations of statutory validity.[216]

(4) Construction of the constitution – section 3(b)(3)

The 1980 amendment provides that the supreme court

> [m]ay review ~~by certiorari~~ any decision of a district court of appeal ... that expressly construes a provision of the state or federal constitution ....[217]

The "expressly" requirement continues by constitutional directive a judicial doctrine which had grown up as a gloss on the earlier constitutional construction provision.[218]

Prior to the adoption of this provision, review of district court decisions construing a provision of the constitution was available only if that court was the first court in the proceeding to make such a construction, such as might occur when the constitutional issue arose during the pendency of appeal and

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the full district court could consider a subsequent challenge to the same statute. *See* FLA. R. APP. P. 9.133.

212. A conflict of decisions would also then exist, but the mandatory jurisdiction of the court would make invocation of discretionary conflict certiorari unnecessary.

213. See notes 257-264 and accompanying text, *infra*.

214. See note 133 and accompanying text, *supra*.

215. See notes 265-267 and accompanying text, *infra*.

216. Statistics obtained from the Clerk of the Supreme Court of Florida.

217. FLA. CONST. art. V, § 3(b)(3).

218. Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973).

had not been passed upon or dealt with by the parties in the trial court.[219] As noted earlier, of course, the "initially and directly" requirements of the former provision became unnecessary when trial court appeals were removed and the "expressly" requirement was added.[220]

Choice of the word "construes" in the new provision is advertent, carrying forward the term as it appeared in section 3(b)(1) of the constitution before the amendment was adopted. The shift of this provision from the court's mandatory to its discretionary jurisdiction provides no reason to suggest that prior judicial interpretations of the term "construe" will not remain applicable. Decisions such as *Armstrong v. City of Tampa*,[221] which differentiate the "construction" of a constitutional provision from the "application" of a provision,[222] would seem to be incorporated into the new provision of the constitution to the same extent that they were embedded in the earlier version.

When constitutional constructions were brought to the supreme court by way of mandatory appeal under former section 3(b)(1), the court sometimes concerned itself with the substantiality of the constitutional claim as a predicate for its jurisdiction.[223] By reclassifying review of constitutional constructions as discretionary, the need for any discussion of substantiality has been wholly eliminated. The court, however, can certainly consider the insubstantiality of the issue as a basis to exercise its discretion to deny a request to review a constitutional construction.

Also made inconsequential by this constitutional shift is the court's recent suggestion in *State v. Coffin*[224] that insubstantial constitutional questions should be challenged by a motion to dismiss. Such motions will no longer be necessary since the respondent, addressing the court's exercise of discretionary review, may suggest the insubstantiality of the question in his jurisdictional brief.[225]

After the 1980 amendment, one district court could adopt a construction of the federal or state constitution which differs from that of another district court, and conceivably those differences would remain outstanding in the respective appellate districts if the supreme court simply denied discretionary review in both cases. This appears unlikely, however, if either of the differing constructions were brought to the court's attention by a petition for review.[226] Differing

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219. *See, e.g.*, Foerster v. Foerster, 300 So. 2d 33 (Fla. 1st D.C.A. 1974), *aff'd in part, rev'd in part sub nom.*, Williams v. Foerster, 335 So. 2d 810 (Fla. 1976). *See also In re* Kionka's Estate, 121 So. 2d 644, 646-47 (Fla. 1960) (O'Connell, J., concurring specially), which describes three circumstances in which a district court may "initially" rule on the validity of a statute or "initially" construe a constitutional provision. A fourth instance could occur during a district court's review of administrative action. *E.g.*, Wasserman v. Florida State Bd. of Architecture, 361 So. 2d 792 (Fla. 1st D.C.A. 1978), *rev'd*, 377 So. 2d 653 (Fla. 1979).

220. See note 90 and accompanying text, *supra*.

221. 106 So. 2d 407 (Fla. 1958).

222. *E.g.*, Dykman v. State, 294 So. 2d 633 (Fla. 1973); Rojas v. State, 288 So. 2d 234 (Fla. 1973); Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973).

223. *See* Evans v. Carroll, 104 So. 2d 375 (Fla. 1958).

224. 374 So. 2d 504 (Fla. 1979).

225. *See* Commentary to FLA. R. APP. P. 9.120.

226. The petitioner in this instance could, of course, assert conflict of decisions as an

constructions of the state or federal constitution pose problems for the jurisprudence of the entire state, comparable to those which would exist if a statute were declared valid in one portion of the state and invalid in another. Consequently, these situations would seem to provide a most logical basis for the court to exercise its jurisdiction in favor of review.

A more likely possibility, consistent with the constitutional reforms adopted, is that a construction of the constitution in one district court in the first instance might not be reviewed by the supreme court for reasons of untimeliness, workload, insubstantiality of issue, general agreement with the district court's construction, or any other relevant consideration. In that event, the district court's construction might well prove persuasive, although not technically precedential, throughout the state, so that plenary supreme court review will either be deferred or become wholly unnecessary.

The Clerk of the supreme court has estimated that approximately 80 requests will be filed each year seeking to have reviewed constructions of the state or federal constitution.[227]

(5) Class of constitutional or state officers — section 3(b)(3)

The 1980 amendment provides that the supreme court

> [m]ay review ~~by certiorari~~ any decision of a district court of appeal ... that expressly affects a class of constitutional or state officers ....[228]

Before the 1980 amendment, the supreme court could review on a discretionary basis those district court decisions which affected a class of constitutional or state officers. The nature and extent of this review had been limited in scope by *Richardson v. State*,[229] and *Spradley v. State*.[230] In *Spradley*, the court stated that:

> [a] decision which "affects a class of constitutional or state officers" must be one which does more than simply modify or construe or add to the caselaw which comprises much of the substantive and procedural law of this state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. To vest this Court with certiorari jurisdiction, a decision must *directly* and, in some way, *exclusively* affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers.[231]

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additional, independent ground for the exercise of certiorari jurisdiction. See notes 235-251 and accompanying text, *infra*.

227. Statistics obtained from the Clerk of the Supreme Court of Florida.

228. FLA. CONST. art. V, § 3(b)(3).

229. 246 So. 2d 771 (Fla. 1971).

230. 293 So. 2d 697 (Fla. 1974).

231. *Id.* at 701. This restrictive test announced in *Spradley* had an immediate and decisive effect on the court's jurisdiction. As one justice observed in 1976: "My research indicates that, dating from [*Spradley*'s] adoption in May 1974 to the present, only two cases have been accepted by this Court on the jurisdictional ground that a requisite class of officers was

The 1980 amendment made no change in this jurisprudence. The operative language of the provision remained unchanged, so that existing case law interpreting this provision would seem to have continuing vitality.

The 1980 amendment did, however, insert the word "expressly" before the description of this portion of the court's discretionary jurisdiction. The requirement of an express written decision of the district court which affects either a class of constitutional or state officers would seem to have little practical impact, since virtually all of the cases which have come to the court in recent years arose from written opinions of district courts articulating their effect on the class.[232]

Nonetheless, the preface "expressly" makes clear that the court is not free to entertain review of a district court decision which counsel alleges affects a class of state or constitutional officers, if the district court has written no opinion on that legal point. In fact, the principal reason for the requirement of "expressly" as regards this aspect of the court's jurisdiction was to prevent a loophole in the court's discretionary review authority by which PCAs could be brought to the court for review.[233] Members of the court following the legislative evolution of SJR 20-C were well aware that judicial decisions can expand or contract the court's jurisdiction, and they perceived that the *Spradley* doctrine might someday be overruled or broadened to provide an open door through which PCAs might once again be brought for review. The addition of the word "expressly" to this aspect of the court's jurisdiction not only constitutionally foreclosed that possibility, but it further emphasized the court's inability to entertain through any device a district court PCA or its nonprecedential equivalent.

The Clerk of the supreme court has estimated that approximately 10 requests will be filed each year seeking review of decisions affecting a class of constitutional or state officers.[234]

(6) Conflict of decisions — section 3(b)(3)

The 1980 amendment provides that the supreme court

> [m]ay review ~~by certiorari~~ any decision of a district court of appeal ... that expressly and directly conflicts ... with a decision of another ~~any~~ district court of appeal or of the supreme court on the same question of law ....[235]

affected by a district court's decision. Many assertions to that effect have been made, of course, but only two have prevailed." Shevin v. Cenville Communities, Inc., 338 So. 2d 1281, 1282-83 (Fla. 1976) (England, J., concurring) (footnote omitted).

232. *E.g.*, Nelson v. Pinellas County, 343 So. 2d 65 (Fla. 2d D.C.A. 1977), *aff'd in part, rev'd in part*, 362 So. 2d 279 (Fla. 1978); Taylor v. Tampa Elec. Co., 335 So. 2d 349 (Fla. 2d D.C.A. 1976), *rev'd*, 356 So. 2d 260 (Fla. 1978). *But see* Satz v. Perlmutter, 362 So. 2d 160 (Fla. 4th D.C.A. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980).

233. For a discussion of the use of the term "expressly" to prevent petitions for review of PCAs, see notes 171-192 and accompanying text, *supra*.

234. Statistics obtained from the Clerk of the Supreme Court of Florida.

235. FLA. CONST. art. V, § 3(b)(3).

Prior to the 1980 amendment, the supreme court had discretionary authority to review district court decisions which were in "direct conflict" either with any other district court decisions or with decisions of the supreme court on the same question of law.[236] The concept of "direct conflict" was carried forward in the 1980 amendment, with minor but important changes.

First, the amendment eliminated the notion of intra-district conflict – that is, a direct conflict within any appellate district by reason of conflicting decisions of the same district court. This change restores the constitutional provision to its stature before 1972, when the constitution first authorized the review of intra-district conflicts.[237]

In conjunction with the development of the 1980 amendment, there was a question as to whether the notion of intra-district conflict was in fact possible, since a decision of a three judge panel in one district which differs in result from an earlier decision of another panel in the same district court would seem to overrule the latter as precedent. Whatever the merits of that view, the fact remains that the 1980 amendment eliminated any possibility that the supreme court would review decisions alleging intra-district conflict.

The supreme court was cognizant, of course, of the possibility that multiple panels of the same district court could achieve different legal results, possibly inadvertently, on the same question of law.[238] For that reason, and based on a recommendation of the Appellate Structure Commission,[239] the court adopted, effective January 1, 1980, a rule for an en banc review within the district courts of any conflicting three judge panel decision.[240] Elimination of the court's review of intra-district conflicts, combined with the creation of an en banc rehearing proceeding for intra-district conflict, results in potential supreme court "conflict" review of (i) panel or en banc decisions of a district court which conflict with a decision of another district court, and (ii) panel or en banc decisions which conflict with a supreme court decision.[241]

The second significant change in the conflict jurisdiction of the supreme court is the requirement that the district court decision must "expressly" be in conflict. As discussed above, this new requirement means that the court will no longer entertain alleged conflicts of appellate decisions which do not arise from

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236. FLA. CONST. art. V, § 3(b)(3) (1972).

237. *Compare* FLA. CONST. art. V, § 3(b)(3) (1972) *and* David v. State, 369 So. 2d 943 (Fla. 1979), *with* FLA. CONST. art. V, § 4(2) (1956) *and* Grisillo v. Franklyn S., Inc., 173 So. 2d 682 (Fla. 1965).

238. *E.g.*, Cumbie v. State, 378 So. 2d 1 (Fla. 1st D.C.A. 1978) and Nevels v. State, 364 So. 2d 517 (Fla. 1st D.C.A. 1978), *cert. denied*, 372 So. 2d 470 (Fla. 1979), *resolved in* State v. Cumbie, 380 So. 2d 1031 (Fla. 1980); David v. State, 348 So. 2d 420 (Fla. 4th D.C.A. 1977) and Childers v. State, 277 So. 2d 594 (Fla. 4th D.C.A. 1973), *resolved in* David v. State, 369 So. 2d 943 (Fla. 1979).

239. *Appellate Structure Commission Report*, 53 FLA. B.J. 274, 279 (1979).

240. *In re* Rule 9.331, Determination of Causes by a District Court of Appeals En Banc, 377 So. 2d 700 (Fla. 1979).

241. Although the supreme court prohibits the district courts from deciding cases in contradiction of a supreme court decision, a conflict can arise with a supreme court decision rendered after the district court's decision and before the grant or denial of review by the supreme court. See note 251 and accompanying text, *infra*.

a written opinion of a district court.[242] With respect to this issue, there was very little discussion among the framers of this provision, the bar committee, the Appellate Structure Commission or the legislature, whether the term "expressly" would require that the conflict of law be identified and discussed in the district court's opinion, or alternately whether a general statement of the legal issue might be adequate to permit a petition for review based on an asserted conflict of decisions. Given the strong desire of the bar for the retention of pre-existing conflict review,[243] which did not require district court recognition of conflicting precedents, the latter view seems the more consistent with the development of the amendment.

In light of the two limited intended effects of the 1980 amendment on the court's conflict jurisdiction — that is, the elimination of intra-district conflict and the requirement of a written opinion as a predicate for further review — it is also clear that doctrines which had developed by case law under the prior provision and which were not antithetical to the two changes would carry forward after April 1, 1980. For example, the two basic types of "direct conflict" articulated in *Nielsen v. City of Sarasota*,[244] would seem to be continued.[245] On the other hand, the "expressly" requirement would seem to have eliminated the review of those district court decisions without opinion which contain a written dissent or a special written concurrence, where formerly counsel was allowed to argue for so-called "dissent conflict"[246] or "concurrence conflict."[247] Plainly, the "expressly" requirement for district courts' majority decisions cannot be satisfied by a dissenting or concurring characterization of what the majority has done. To this extent, numerous jurisdictional precedents appear to have been overruled by the 1980 amendment.

"Uncertain" best characterizes the effect of the expressly requirement on so-called "dicta conflict," where a written opinion of the district court discusses legal points which are not germane to the decision (and therefore properly classifiable as dicta) but which are nonetheless apparent on the face of the opinion. Before the 1980 amendment, the court considered itself free to review these cases, depending on their perceived importance for consideration and resolution.[248] No view is expressed as to the continuation of that practice.

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242. See notes 184-186 and accompanying text, *supra*.

243. See notes 41-43 and accompanying text, *supra*.

244. 117 So. 2d 731 (Fla. 1960).

245. *See* Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960), discussing two types of decisions properly reviewable as in direct conflict:

(1) decisions announcing a rule of law different from that announced in a previous district court or supreme court decision; and

(2) decisions applying a rule of law to a set of facts substantially similar to that considered in a previous district court or supreme court decision, but arriving at a disparate result.

246. *E.g.*, David v. State, 369 So. 2d 943 (Fla. 1979); Keller v. Keller, 308 So. 2d 106 (Fla. 1974). *See* Golden Loaf Bakery v. Charles W. Rex Constr. Co., 334 So. 2d 585, 586 (Fla. 1976) (England, J., concurring, suggesting infirmities in dissent conflict even before adoption of the constitutional amendment); Williams v. State, 340 So. 2d 113, 116 (Fla. 1976) (England, J., dissenting, joined by Overton, C.J., and Hatchett, J.).

247. Rosenthal v. Scott, 131 So. 2d 480 (Fla. 1961); State v. Greene, — So. 2d — (Fla. 4th D.C.A.), *petition for cert. docketed*, No. 57,980 (Fla. Oct. 29, 1979).

248. *E.g.*, Twomey v. Clausohm, 234 So. 2d 338 (Fla. 1970); Sunad, Inc. v. City of

The constitution retains a minor anomaly which preexisted the 1980 amendment, concerning which there was little discussion as the amendment evolved. Previously, the constitution had allowed review of a district court decision which directly conflicted with a decision of the supreme court on the same question of law. After *Hoffman v. Jones*,[249] it became impermissible for a district court to announce a decision in direct conflict with a previous decision of the supreme court. Rather, the court was obliged to follow the directive of the supreme court even if it chose to articulate reasons why the policy or justification for the supreme court's earlier decision should no longer be followed. The district court could, however, certify the legal question to the court as one suitable for reconsideration.[250]

As the sole intent of the "expressly" requirement of the 1980 amendment was to require a written decision for review, and the sole intent for the language change from "any" to "another" was to eliminate intra-district conflict, the amended provision contains the same anomaly which previously existed. There is, however, a small area where decisional conflicts between the district courts and the supreme court may operate. Although a district court cannot decide a legal issue in direct conflict with a supreme court pronouncement on the subject, any district court's decision could *become* in direct conflict with a supreme court decision rendered after the district court has ruled.[251] If a conflict of that type were to develop, either during the time available to seek supreme court review (where the sole basis for review is that particular conflict) or before the supreme court acts on a petition for review otherwise properly filed (so that a notice of additional authority could be filed), then a direct conflict with the supreme court could properly be brought to the court's attention or provide a basis for granting review.

Sarasota, 122 So. 2d 611 (Fla. 1960). The legitimate differences of opinion between attorneys and among the justices as to what is dicta and what is not suggests that dicta conflict may still be available as a basis to request supreme court review. *See* State v. Embry, 322 So. 2d 515, 519 (Fla. 1975) (England, J., dissenting). *See also* Florida Greyhound Owners & Breeders Ass'n, Inc. v. West Flagler Assocs., Ltd., 347 So. 2d 408, 410 n.6 (Fla. 1977) (England, J., concurring).

249. 280 So. 2d 431 (Fla. 1973).

250. This was done in Johnson v. Bathey, 350 So. 2d 545 (Fla. 2d D.C.A. 1977), *aff'd*, 376 So. 2d 848 (Fla. 1979), wherein the district court expressly questioned the wisdom of Florida's attractive nuisance doctrine yet, in accord with *Hoffman*, applied the existing rule. *See also* Raisen v. Raisen, 370 So. 2d 1148 (Fla. 4th D.C.A. 1978), *aff'd*, 379 So. 2d 352 (Fla. 1979).

251. *E.g.*, Rose v. D'Alessandro, 364 So. 2d 763 (Fla. 2d D.C.A. 1978), *rev'd in part, aff'd in part*, 380 So. 2d 419 (Fla. 1980) (conflicting with Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979)); Brunson v. State, 355 So. 2d 812 (Fla. 3d D.C.A. 1978), *rev'd*, 369 So. 2d 945 (Fla. 1979) (conflicting with Hargrave v. State, 366 So. 2d 1 (Fla. 1978)). The opposite effect is also possible, that is, a direct conflict of district court decisions can be dispelled between the filing of the district court decision and its review by the supreme court. *See, e.g.*, St. Johns Assocs. v. Mallard, 373 So. 2d 912 (Fla. 1979) (where a later supreme court decision dispelled preexisting conflict); Aiken v. State, — So. 2d — (Fla. 4th D.C.A.), *petition for cert. docketed*, No. 56,671 (Fla. April 19, 1979) (pending after oral argument; respondent has argued that decisional conflict between the Third and Fourth District Courts of Appeal was dispelled by a later decision of the former court, adopted after certiorari had been filed in the supreme court, receding from the conflicting decision in favor of the latter court's view).

During discussions which led to the adoption of the 1980 provision, it was estimated that 25 to 35 percent of the preamendment discretionary petitions for conflict review arose from cases in which the district courts had written no decision.[252] The elimination of these cases from the supreme court docket will save judicial and administrative labor in the court in the processing and review of those matters. It may be expected that the court will amend the appellate rules to alter the format and size of jurisdictional briefs in conflict cases, and amend its manual of internal procedures to state that attempts to file based on alleged conflict found in district court decisions without opinions will be returned to the petitioning attorney by the clerk's office, without being seen by any justice or his staff.

The Clerk of the supreme court estimates that conflict review petitions will continue to provide the bulk of the court's discretionary cases, or approximately 1,200 cases per year.[253]

(7) Interlocutory trial court orders — formerly section 3(b)(3)

The 1980 amendment provides that the supreme court

> [m]ay review ~~by certiorari ... any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court ....~~[254]

This provision removed all supreme court review of interlocutory orders of the trial courts. The reasons for routing all cases through the district courts have been previously explored.[255] By eliminating the review of interlocutory orders of trial courts, the 1980 amendment also made moot the doctrine of *Burnsed v. Seaboard Coastline RR*,[256] which construed former sections 3(b)(1) and 3(b)(3) as they related to such interlocutory orders. The gist of that decision was that the court would review only final, as opposed to interlocutory, orders of trial courts, under section 3(b)(1).

(8) Certified questions of great public importance — section 3(b)(4); formerly section 3(b)(3)

The 1980 amendment provides in section 3(b)(4) that the supreme court

> [m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance ....[257]

The 1980 amendment moved the supreme court's discretionary review of district court decisions that pass upon a question certified by the district court

252. Statistics obtained from the Clerk of the Supreme Court of Florida.
253. Statistics obtained from the Clerk of the Supreme Court of Florida.
254. FLA. CONST. art. V, § 3(b)(3).
255. See notes 87-97 and accompanying text, *supra*.
256. 290 So. 2d 13 (Fla. 1974).
257. FLA. CONST. art. V, § 3(b)(4).

from old section 3(b)(3) to new section 3(b)(4). The sole change is that the word "interest" has now become "importance."

The development of this provision suggests that this terminology change has limited significance. As various proposals for constitutional change wound their way through the Appellate Structure Commission, The Florida Bar, the House Judiciary Committee and the Senate Judiciary Committee, the provision in section 3(b)(3) granting the supreme court jurisdiction over district court decisions affecting a class of constitutional or state officers was deleted as unnecessary in light of the narrow construction given it in *Spradley*.[258] It was generally believed this subject area could safely be left to certified questions if the operative phrase were expanded to encompass questions of great public "importance." The day before the amendment was actually adopted, however, the sheriffs' and clerks' associations urged that the "class" category be restored.[259] There being no serious reason to reject the associations' suggestion, the restoration was effected on the floor of the Senate.[260] Although the change in terminology from great public "interest" to great public "importance" became unnecessary, there was no time before final Senate passage to restore the original wording, or even to explain the justification for so doing.

The term "great public importance" in section 3(b)(4), consequently, should be given content similar to that which "great public interest" had in former section 3(b)(3).[261] This content would include, for example, the review of a district court decision even if the question were not precisely framed in that decision, although the failure to frame a clear question has always been strongly discouraged.[262]

Finally, of course, there is no doubt that under the new provision, as under the predecessor provision, the supreme court may decline for any reason to review any legal question which has been certified.[263] The Clerk of the supreme court estimates that approximately 35 decisions will be certified to the court under this provision each year.[264]

(9) Certified conflict — section 3(b)(4)

The 1980 amendment provides that the supreme court

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258. See note 231 and accompanying text, *supra*.

259. *House Committee Hearings on H.J. Res. 33-C*, Nov. 27, 1979, *supra* note 66 (remarks of Jack M. Skelding, Jr.).

260. See app. C.

261. This change of language may broaden slightly the scope of the provision. Indeed, the commentary to the 1980 amendments to the Florida Rules of Appellate Procedure states that "[t]he change was to recognize the fact that some legal issues may have 'great public importance,' but may not be sufficiently known by the public to have 'great public interest.' *In re* Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370 (Fla. 1980). The actual effect of the change, of course, must await future developments in the case law.

262. Rupp v. Jackson, 238 So. 2d 86 (Fla. 1970). *But see* Lake Region Packing Assoc. v. Furze, 327 So. 2d 212, 217 (Fla. 1976) (England, J., concurring in part and dissenting in part).

263. *See* Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961).

264. Statistics obtained from the Clerk of the Supreme Court of Florida.

> [m]ay review any decision of a district court of appeal ... that is certified by it to be in direct conflict with a decision of another district court of appeal.[265]

This provision is entirely new, and expands the instances for district court certification to situations in which a direct conflict of decisions among the districts is perceived by the district court. In the years 1978 and 1979, the district courts actually commented on conflicting appellate court decisions in 25 percent of their decisions brought by attorneys and accepted by the supreme court on the basis of conflict certiorari.[266] This provision adds to the district court's arsenal the authority to certify the more important decisional conflicts for supreme court reconciliation.

The Clerk of the supreme court estimates that approximately 20 decisions will be certified to the court under this provision each year.[267]

(10) Certified trial court orders — section 3(b)(5)

The 1980 amendment provides that the supreme court

> [m]ay review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.[268]

The 1980 amendment authorizes the supreme court to review, in its discretion, orders or judgments of trial courts which have been certified by a district court either as being of great public importance or as having a great effect on the proper administration of justice throughout the state. A requisite to review, however, and therefore a necessary part of the district court's certification, is also a determination by the district court that the matter certified requires an immediate resolution by the supreme court. This provision can only be understood in the context of its development.

Under the constitution as it existed before the 1980 amendment, some trial court orders which either passed on the validity of a statute or which construed the state or federal constitutions would be appealed directly to the supreme court.[269] If the court's immediate attention were required, either of the parties to the lawsuit could ask the court to expedite consideration of the matter, or

265. FLA. CONST. art. V, § 3(b)(4).

266. *See* Statistics obtained from Appellate Structure Commission (memorandum from Elaine Williams to Justice Overton (Mar. 1, 1979)).

267. Statistics obtained from the Clerk of the Supreme Court of Florida.

268. FLA. CONST. art. V, § 3(b)(5).

269. See note 88 and accompanying text, *supra*.

the court on its own motion could recognize the urgency of a particular case and process it ahead of others. The appeal process had been so abused, however, with attorneys rather than the justices holding the potential control of the supreme court's docket, that the framers of the 1980 amendment unanimously agreed on the need to eliminate all direct appeals from trial courts (except in death penalty and bond validation cases) throughout the developmental stage of the amendment.[270]

Nonetheless, the framers were aware that on a limited number of occasions the proper administration of justice throughout the state required a prompt resolution of certain matters by the supreme court. The Appellate Structure Commission, for example, had fresh in mind the chaos which had developed in the administration of the traffic laws due to the uncertain validity of a 1977 statute requiring the collection of fines and penalties on each traffic offense as a means of funding a Crimes Compensation Commission.[271] By the time the supreme court received and concluded the case which tested the validity of that statute,[272] millions of dollars had been collected in small amounts by clerks throughout the state. The court's decision declaring the statute invalid necessitated the return of a portion of those collections, creating severe administrative hardships and some injustices.

The proper administration of justice throughout the state was also severely affected by trial judges' variant interpretations of a statute which created a bifurcated proceeding for criminal proceedings in which the defense of insanity was raised.[273] By the time the supreme court decided that the new enactment was invalid,[274] many new trials were required to unwind the disparate effects of these varying interpretations of the law.[275]

The need for an expeditious method by which the state's highest court could resolve cases of this type was identified in the 1979 Report on the Florida Judiciary, submitted to the 1979 legislature by the chief justice.[276] To meet this need, that report contained a recommendation of the Appellate Structure Commission[277] that the constitution permit the court to "reach-down," and pull up for expeditious treatment those cases in the lower courts which required immediate resolution. As stated earlier,[278] this provision generated considerable controversy in the legislature and among bar members, although it had been approved by the Judicial Council.

During the summer of 1979 when members of the court, the bar and the Appellate Structure Commission reconsidered the so-called "reach-down" provision, two possibilities emerged as a necessary "safety valve" for the system. One, which was later rejected, required a certification from a trial court judge

270. See notes 93-97 and accompanying text, *supra*.
271. 1977 Fla. Laws, ch. 77-452.
272. State v. Champe, 373 So. 2d 874 (Fla. 1978).
273. 1977 Fla. Laws, ch. 77-312.
274. State *ex rel.* Boyd v. Green, 355 So. 2d 789 (Fla. 1978).
275. *See, e.g.*, Freeman v. State, 377 So. 2d 1152 (Fla. 1979); Ashcraft v. State, 367 So. 2d 630 (Fla. 1979).
276. 1979 Report, *supra* note 33, 53 FLA. B.J. at 299-300.
277. *Id.* at 300.
278. See notes 36-40 and accompanying text, *supra*.

or from the chief judge of any judicial circuit with respect to which cases required immediate supreme court attention. The other was the district court certification process which was written into the 1980 amendment.

The rationale for the provision which was adopted is essentially twofold. First, there must be some way in the judicial system by which the supreme court can obtain and decide promptly those cases which have an immediate statewide impact on the administration of justice. Second, by allowing an appeal to take its ordinary course from a judgment or order of a trial court to a district court of appeal, the extra delay over direct processing in the supreme court would be, at the maximum, the amount of time taken by the district court to identify the need and act on the certification. Upon receipt of the appeal papers, a district court may on its own motion or at the request of any party[279] immediately certify the matter to the supreme court in order to avoid the delay inherent in rendering a decision at the district court level.

This "bypass" provision has counterparts in other judicial systems. Indeed, the famous Nixon tapes case[280] decided by the United States Supreme Court came directly from a decision of district court Judge John Sirica under a procedure very much like the one which now appears as section 3(b)(5).[281]

As the bypass provision was developed in various drafting stages, the certification authority was conferred only where the matter might involve a question of great public importance. The alternate phrase, "or to have a great effect on the proper administration of justice throughout the state," had previously appeared in the Appellate Structure Commission[282] recommendation for a rule proceeding by which the supreme court could decide which cases it would take under the then proposed "reach-down" authority. The Senate thought the latter phrase had significance beyond that of "great public importance," and it was therefore added to section 3(b)(5) by the Senate drafting subcommittee and staff during the short November special session at which the constitutional proposal was adopted.[283] When hastily consulted as to the wisdom of this provision, or by then the difficulty of having it removed, members of the bar, the court and others who were monitoring the amendment elected to leave the language in as an alternate predicate for certification. It was generally believed that the language was not harmful, although it did not add anything of significance to the "great public importance" test. Section 3(b)(5) now provides, however, two alternate bases for the certification of trial court orders requiring immediate resolution. It remains for the courts to define or distinguish those two concepts.

The most important aspect of section 3(b)(5) is its clearly narrow intended application. Not more than two or three cases each year are expected to be certified to the supreme court under this provision. A great deal of responsibil-

279. The supreme court has tentatively promulgated rules implementing this procedure. FLA. R. APP. P. 9.125, as adopted in *In re* Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370 (Fla. 1980).

280. United States v. Nixon, 418 U.S. 683 (1974).

281. 28 U.S.C. §§ 1254(1), 2101(c) (1976).

282. 1979 Report, *supra* note 33, 53 FLA. B.J. at 300.

283. *Senate Committee Hearings on S.J. Res. 20-C*, Nov. 26, 1979, *supra* note 47.

ity will repose with the district court judges to distinguish inappropriate cases for which no certification would be appropriate from all those certifications requested by individual litigants. Inevitably, some cases may be certified because they seem to the district court judges politically sensitive in their geographic area of the state. If these cases do not require immediate resolution in order to resolve difficult questions of law having an important impact throughout the state, the supreme court may well decline immediate review and return the case for normal handling.[284]

(11) Questions certified from federal courts — section 3(b)(6)

The 1980 amendment provides that the supreme court

> [m]ay review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.[285]

The 1980 amendment provides express authority for the supreme court to consider questions of state law certified from federal appellate courts which are dispositive of litigation pending in the federal judicial system. Before the amendment there was no comparable provision in the constitution, although the supreme court had provided by rule[286] and judicial decision[287] for the receipt and disposition of these types of questions, and the legislature had authorized their being entertained by statute.[288] The language of section 3(b)(6) is precisely the language which formerly governed these types of decisions under the statute, the rule and case law.[289] Accordingly, the addition of this provision to the constitution can be seen as no more than a constitutional codification of existing authority for the supreme court to deal with such cases. The representations of the framers of this provision to legislative committees were, in fact, all to that effect.[290]

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284. The court's temporary rules to implement the 1980 amendment state that the record should be retained in the district court until the court has exercised its discretion to accept or reject review. If review is rejected, the case will simply remain in the district court for a resolution of the appeal in that forum. FLA. R. APP. P. 9.125(g), as adopted in *In re* Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370 (Fla. 1980).

285. FLA. CONST. art. V, § 3(b)(6).

286. FLA. R. APP. P. 9.510.

287. *See* Mobil Oil Corp. v. Shevin, 354 So. 2d 372 (Fla. 1977); Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961) (upholding the constitutionality of the federal court certification process).

288. FLA. STAT. § 25.031 (1979).

289. Federal courts have made regular use of the certification process. *See, e.g.*, Greene v. Massey, 595 F.2d 221 (5th Cir. 1979); Everglades Marina, Inc. v. American E. Dev. Corp., 374 So. 2d 517 (Fla. 1979); Cesary v. Second Nat'l Bank, 369 So. 2d 917 (Fla. 1979).

290. *Senate Committee Hearings on S.J. Res. 20-C*, Nov. 26, 1979, *supra* note 47 (remarks of Chief Justice England).

The Clerk of the supreme court estimates that federal appellate courts will continue to send the court approximately 5 cases per year.[291]

(12) Writs of prohibition to courts and commissions — section 3(b)(7); formerly section 3(b)(4)

The 1980 amendment provides that the supreme court

> [m]ay issue writs of prohibition to courts ~~and commissions in causes within the jurisdiction of the supreme court to review~~, and all writs necessary to the complete exercise of its jurisdiction.[292]

When the supreme court's authority to review administrative action was narrowed to the limited category described earlier, conforming amendments were made to other provisions of the constitution which had conferred broader authority either by direct review or by writs of prohibition. Former section 3(b)(7), of course, was deleted in its entirety by the 1980 amendment,[293] and was replaced with the narrower section 3(b)(2). Section 3(b)(3) was amended to delete certiorari jurisdiction over statewide commissions.

Former section 3(b)(4) was also altered to delete language which had conferred express authority on the supreme court to issue writs of prohibition to commissions in causes within the jurisdiction of the supreme court to review. The framers of the 1980 amendment considered whether the deletion of that express authority to issue this type of extraordinary writ to commissions would preclude the issuance of a writ of prohibition to the Public Service Commission — the only agency having statewide jurisdiction over the rates and service of electric, gas and telephone companies. They concluded it would not. The authority to issue writs of prohibition, as well as any other appropriate extraordinary writ directed to that agency, was retained through section 3(b)(7), where the court is authorized to issue all writs necessary to the complete exercise of its jurisdiction.[294]

VI. Conclusions and Recommendations

Several general conclusions may be drawn from the adoption of the 1980 amendment, and several recommendations are appropriate.

1. District court judges have been given more responsibility under the con-

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291. Statistics obtained from the Clerk of the Supreme Court of Florida.

292. Fla. Const. art. V, § 3(b)(7).

293. See notes 146-156 and accompanying text, *supra*.

294. The "all writs" power of the supreme court has been defined to exclude writs which initiate jurisdiction in the court, as opposed to those which are necessary after jurisdiction is otherwise properly invoked. Besoner v. Crawford, 357 So. 2d 414 (Fla. 1978); Shevin *ex rel.* State v. Public Serv. Comm'n, 333 So. 2d 9 (Fla. 1976). *Contra*, Couse v. Canal Auth., 209 So. 2d 865 (Fla. 1968). Accordingly, the constitution does not give the court authority to issue an original writ of prohibition to the Public Service Commission (or any other statewide agency falling within the ambit of the court's authority under § 3(b)(2)), absent an independent basis for the court's jurisdiction.

stitution for the finality of judicial decisions and for the control of cases which might come to the supreme court for review.

(a) Additional authority has been granted district court judges to certify urgent matters of great public importance under the bypass provision, and to certify direct conflicts in district court decisions.

(b) Under the supreme court's rule providing for en banc rehearings, intra-district conflicts will be resolved within the district courts so that district court judges can deal en banc with important matters which are deemed suitable for full court analysis.

(c) A decision not to write an opinion in any particular case may be dispositive of the litigation. Therefore, district court judges will play a significant role in the state's justice system by the exercise of their judgment in this regard. No one questions the desirability of some dispositions without opinion at the district court level, for example, in cases which involve a straightforward application of existing law to individual and non-unique fact situations. On the other hand, the responsibility for articulating decisions on questions of law which might have statewide importance, or which might be in conflict with other appellate decisions, now rests more heavily on the district courts' judges. Perhaps greater precision will also be required of counsel to isolate, identify and discuss the issues of law which they present to the district courts.

2. The district courts appear to be candidates for more rehearing petitions, because of the en banc rehearing rules and the restrictions on supreme court review in certain categories of cases. New district court procedures may be necessary to accommodate this new round of rehearing requests. Ideally, uniformity will be achieved through the development of rules by the district courts for submission to the supreme court for adoption.

3. The extent to which the supreme court finds its necessary or desirable to identify and discuss in its opinions the bases for accepting jurisdiction in discretionary cases will, to a large extent, determine whether the 1980 amendment achieved all of the economies it was designed to accomplish. Notwithstanding the desirability of the court's attempts to guide review-seekers by articulating reasons for the exercise or nonexercise of the court's discretion, numerous commentators, commissioners and bar members condemned the extraordinary waste of judicial effort over the years from the supreme court's discussion of those matters.[295] The extensive case law defining "conflict certiorari," "questions of great public interest," "classes of constitutional or state officers," "record proper" and the like, highlights a loss of the justices' otherwise valuable time.

The clear intent of the framers of the 1980 amendment was to relieve the court of the time-consuming process of explaining the basis for an acceptance or rejection of jurisdiction. It is true, of course, that those who opposed the 1980 amendment (because it created categories of review, rather than allowing unlimited discretionary review) argued that categorical "pigeon holes" would necessitate the same kind of judicial effort which has heretofore hindered the substantive decision-making responsibilities of the court.[296] Probably, strong-

295. See note 200 and accompanying text, *supra*.

296. Letter from Tobias Simon to members of The Florida Bar, 4-5 app. (Jan. 7, 1980).

minded justices will debate the exercise of jurisdiction in terms of their analysis of the revised constitutional pigeon holes. Nonetheless, there is no compelling reason for the court to articulate its reasons for exercising jurisdiction in every particular case, and many who proposed and supported the 1980 amendment hope that the court would dispense with that practice for the most part. It remains to be seen whether the justices will view the revised constitution in this light.

4. Additional and revised appellate rules will be necessary to govern the procedures by which cases come to the supreme court and are considered in the district courts.[297] Amendments to the supreme court's Manual of Internal Operating Procedures will, of course, also be needed.

Among the new rules that should be developed is a new page limitation for review petitions filed with the supreme court. During the debates leading to the adoption of the 1980 amendment, it was frequently suggested that review petitions should be limited to five page applications by attorneys, simply stating the district court decision and attaching a copy of the court's opinion.[298] A page or two might be needed to identify the law in conflict, the class affected, or the like, but the bulk of the five pages would be devoted to a discussion of the reasons for exercising review.

A limitation on the size of jurisdictional briefs is consistent with the amendment in another respect. Extensive discussions of the basis for jurisdiction appear less necessary now that all district courts' opinions must "expressly" discuss or mention the issue or issues of law which are brought for review. A required copy of the district court's opinion to a large extent will obviate the need for an advocate's paraphrasing.

5. The district courts should give special attention to those decisions which declare a statute valid, and are thereby eligible for discretionary review by the supreme court. If a district court elects not to write an opinion, but simply adopts a trial court order, it would seem desirable to reproduce the trial court's order in the district court's decision. In that way, not only the parties but the general public will know what statute has been passed upon. Where that is not done, but the requisite jurisdiction for review is conferred by a simple announcement that the statute has been upheld, counsel should at least include as an appendix to the review petition a copy of the trial court's order which articulates the reasons for that action (if a written expression from the trial judge is available).

6. The 1980 amendment will not provide a leisurely pace for the supreme court's justices; certainly, never again in the range of 450 cases which the court considered in 1957. The estimated, annual caseload will be 2090, consisting of approximately 70 mandatory appeals, 1500 discretionary petitions for review, and all other matters (totaling 520 in 1979) which are unaffected by the changes

297. On March 27, 1980, the court temporarily adopted a series of emergency amendments to the Florida Rules of Appellate Procedure to govern all proceedings within their scope after 12:01 a.m., April 1, 1980 (the effective date of the 1980 amendment). *In re* Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370 (Fla. 1980). Cases pending in the court prior to April 1, 1980, will continue to be governed by the former rules. *Id.* at 1371.

298. *See* app. D.

— such as extraordinary writs, practice and procedure rules, bar admissions and disciplinary action, judicial discipline and advisory opinions to the governor. Thus, although jurisdictionally streamlined, the Supreme Court of Florida will remain one of the nation's high volume high courts. Although the amendment becomes effective on April 1, 1980, the effects of the 1980 amendment will not be realized until at least 1981 because the backlog of pending cases will occupy the justices for a significant period of time.

7. By redefining the supreme court's jurisdiction, the 1980 amendment provided the opportunity for the district courts, the attorneys of Florida, and particularly the justices of the supreme court to redefine the role of the supreme court in Florida's judicial system. The clear import of the change has been to free the court from non-policy types of decisions, and direct its efforts to issues of statewide importance or jurisprudential significance. The opportunity to exercise the new role requires a collective mentality which perceives the court as a limited policy-maker and law-harmonizer, rather than just a second level of trial reviewer for every litigant. Should the justices lose the mantle of restrained supremacy which the amendment invites them to don, or should the justices allow the bar to diminish the court's proper role with importunings for trivia, many of the benefits conferred by the amendment will have been lost. Should that occur, and an attendant new round of caseload pressures, revised internal screening procedures, and delayed dispositions ensue, the justices themselves must bear direct responsibility for the consequences.

BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors, Bankruptcy, Mortgages, Constitutional Law, Interpretation of Laws, Rescission and Cancellation of Contracts, Etc.

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THE PUBLISHER'S EDITORIAL STAFF

Contributing Authors

JOSEPH R. NOLAN

Associate Justice, Massachusetts Supreme Judicial Court

and

M. J. CONNOLLY

Associate Professor of Linguistics and Eastern Languages, Boston College

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heard on appeal. Mize v. Crail, 29 C.A.3d 797, 106 Cal.Rptr. 34, 38. To be "party aggrieved" by judgment, appellant's interest must be immediate, pecuniary and substantial and not nominal or remote consequence of judgment. Leoke v. San Bernardino County, 249 C.A.2d 767, 57 Cal.Rptr. 770, 772, 773. See also **Aggrieved party.**

Party to be charged. A phrase used in the statute of frauds, meaning the party against whom the contract is sought to be enforced. The party to be charged in the action—that is, the defendant.

Political party. A body of voters organized for the purpose of influencing or controlling the policies and conduct of government through the nomination and election of its candidates to office.

Real party in interest. Fed.R. Civil P. 17(a) provides that every action shall be prosecuted by the "real party in interest." The adoption of this rule was intended to change the common law rule which permitted suit to be brought only in the name of the person having the legal title to the right of action, and thus precluded suit by persons who had only equitable or beneficial interests. Under the rule the "real party in interest" is the party who, by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery. This is illustrated by the further language of the rule stating that executors, administrators, and other named representatives may sue in their own name without joining with them the party for whose benefit the action is brought.

Third parties. A term used to include all persons who are not parties to the contract, agreement, or instrument of writing by which their interest in the thing conveyed is sought to be affected. See also **Beneficiary.**

In civil actions, a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiffs' claim against him. A similar right is afforded to the plaintiff when a counterclaim is asserted against him. Fed.R. Civil P. 14. See **Third party complaint; Third-party practice.**

Party wall. A wall erected on a property boundary as a common support to structures on both sides, which are under different ownerships. A wall built partly on the land of one owner, and partly on the land of another, for the common benefit of both in supporting the construction of contiguous buildings. A division wall between two adjacent properties belonging to different persons and used for mutual benefit of both parties, but it is not necessary that the wall should stand part upon each of two adjoining lots, and it may stand wholly upon one lot. Soma Realty Co. v. Romeo, 31 Misc.2d 20, 220 N.Y.S.2d 752, 755.

In the primary and most ordinary meaning of the term, a party-wall is (1) a wall of which the two adjoining owners are tenants in common. But it may also mean (2) a wall divided longitudinally into two strips, one belonging to each of the neighboring owners; (3) a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements (the term is so used in some of the English building acts); or (4) a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety.

Parum /pérəm/. Lat. Little; but little.

Parum cavisse videtur /pérəm kəvísiy vədíydər/. Lat. Roman law. He seems to have taken too little care; he seems to have been incautious, or not sufficiently upon his guard. A form of expression used by the judge or magistrate in pronouncing sentence of death upon a criminal.

Parum differunt quæ re concordant /pérəm dífərənt kwíy ríy kənkórdənt/. Things which agree in substance differ but little.

Parum est latam esse sententiam nisi mandetur executioni /pérəm èst léydəm ésiy sənténsh(iy)əm náysay mændéydər èksəkyùwshiyównay/. It is little [or to little purpose] that judgment be given unless it be committed to execution.

Parum proficit scire quid fieri debet, si non cognoscas quomodo sit facturum /pérəm prófəsət sáyriy kwìd fáyəray débət, sày nón kəgnóskəs kwówməd sìt fækt(y)úrəm/. It profits little to know what ought to be done, if you do not know how it is to be done.

Par value. As regards stock, the face value of a share of stock. With reference to mortgages or trust deeds, the value of the mortgage based on the balance owing, without discount.

In the case of a common share, par means a dollar amount assigned to the share by the company's charter. Par value may also be used to compute the dollar amount of the common shares on the balance sheet. Par value has little significance so far as market value of common stock is concerned. Many companies today issue no-par stock but give a stated per share value on the balance sheet. In the case of preferred shares and bonds, however, par is important. It often signifies the dollar value upon which dividends on preferred stocks, and interest on bonds, are figured. In the case of bonds and stock, the face value appearing on the certificate is the par value. Those stocks not containing such a statement have no par value.

Parva serjeantia /párvə sərjiyénsh(iy)ə/. Petty serjeanty *(q.v.).*

Parvum cape /párvəm kéyp(iy)/. See **Petit cape.**

Pas /pá/. In French. Precedence; right of going foremost.

Pass, *v.* To utter or pronounce, as when the court *passes* sentence upon a prisoner. Also to proceed; to be rendered or given, as when judgment is said to *pass* for the plaintiff in a suit.

In legislative parlance, a bill or resolution is said to *pass* when it is agreed to or enacted by the house, or when the body has sanctioned its adoption by the requisite majority of votes; in the same circumstances, the body is said to *pass* the bill or motion. See also **Passage.**

When an auditor appointed to examine into any accounts certifies to their correctness, he is said to

pass them; *i.e.*, they pass through the examination without being detained or sent back for inaccuracy or imperfection.

The term also means to examine into anything and then authoritatively determine the disputed questions which it involves. In this sense a jury is said to *pass upon* the rights or issues in litigation before them.

In the language of conveyancing, the term means to move from one person to another; *i.e.* to be transferred or conveyed from one owner to another.

To publish; utter; transfer; circulate; impose fraudulently. This is the meaning of the word when the offense of *passing* counterfeit money or a forged paper is spoken of.

"Pass," "utter," "publish," and "sell" are in some respects convertible terms, and, in a given case, "pass" may include utter, publish, and sell. The words "uttering" and "passing," used of notes, do not necessarily import that they are transferred as genuine. The words include any delivery of a note to another for value, with intent that it shall be put into circulation as money. Word "pass" when used in connection with negotiable instrument means to deliver, to circulate, to hand from one person to another. State v. Beaver, 266 N.C. 115, 145 S.E.2d 330, 331. See **Delivery; Negotiation; Transfer; Utter.**

Pass, *n.* Permission to pass; a license to go or come; a certificate, emanating from authority, wherein it is declared that a designated person is permitted to go beyond certain boundaries which, without such authority, he could not lawfully pass. Also a ticket issued by a railroad or other transportation company, authorizing a designated person to travel free on its lines, between certain points or for a limited time.

Passage. Act of passing; transit; transition. A way over water or land or through the air. An easement giving the right to pass over a piece of private water. Travel by sea; a voyage over water; the carriage of passengers by water; price paid for such carriage.

Enactment; the act of carrying a bill or resolution through a legislative or deliberative body in accordance with the prescribed forms and requisites. The emergence of the bill in the form of a law, or the motion in the form of a resolution. Passage may mean when bill has passed either or both houses of legislature or when it is signed by President or Governor.

Passagio /pæséyj(iy)ow/. An ancient writ addressed to the keepers of the ports to permit a man who had the king's leave to pass over sea.

Passator /pæséydər/. In old English law, he who has the interest or command of the passage of a river; or a lord to whom a duty is paid for passage.

Passbook. Document issued by a bank in which the customer's transactions (*i.e.* savings deposits and withdrawals) are recorded.

Passenger. In general, a passenger is one who gives compensation for a ride. Shapiro v. Bookspan, 155 Cal.App.2d 353, 318 P.2d 123, 126. The word passenger has however various meanings, depending upon the circumstances under which and the context in which the word is used; sometimes it is construed in a restricted legal sense as referring to one who is being carried by another for hire; on other occasions, the word is interpreted as meaning any occupant of a vehicle other than the person operating it. American Mercury Ins. Co. v. Bifulco, 74 N.J.Super. 191, 181 A.2d 20, 22.

The essential elements of "passenger" as opposed to "guest" under guest statute are that driver must receive some benefit sufficiently real, tangible, and substantial to serve as the inducing cause of the transportation so as to completely overshadow mere hospitality or friendship; it may be easier to find compensation where the trip has commercial or business flavor. Friedhoff v. Engberg, 82 S.D. 522, 149 N.W.2d 759, 761, 762, 763.

A person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care either upon the means of conveyance, or at the point of departure of that means of conveyance.

Passenger mile. In statistics of transportation, a unit of measure equal to the transport of one passenger over one mile of route.

Passim /pésəm/. Lat. Everywhere. Often used to indicate a very general reference to a book or legal authority.

Passion. In the definition of manslaughter as homicide committed without premeditation but under the influence of sudden "passion" or "heat of passion", this term means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection.

Passive. As used in law, this term means inactive; permissive; consisting in endurance or submission, rather than action; and in some connections it carries the implication of being subjected to a burden or charge.

As to passive Debt; Negligence; Title; Trust; and Use; see those titles.

Passport. A document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular offices. U. S. v. Laub, U.S.N.Y., 385 U.S. 475, 87 S.Ct. 574, 578, 17 L.Ed.2d 526. A passport is evidence of permission from sovereign to its citizen to travel to foreign countries and to return to land of his allegiance, as well as request to foreign powers that such citizen be allowed to pass freely and safely. Worthy v. U. S., C.A.Fla., 328 F.2d 386, 391.

In international law. A license or safe-conduct, issued during the progress of a war, authorizing a person to remove himself or his effects from the territory of one of the belligerent nations to another country, or to travel from country to country without arrest or detention on account of the war.

Maritime. A document issued to a neutral merchant vessel, by her own government, during the progress of a war, to be carried on the voyage, to evidence her nationality and protect her against the cruisers of the belligerent powers. This paper is otherwise called a "pass," "sea-pass," "sea-letter," "sea-brief." It usu-

REGULAR SESSION 1955

GENERAL ACTS AND RESOLUTIONS

ADOPTED BY THE

LEGISLATURE OF FLORIDA

At its Thirty-fifth Regular Session

April 5th to and including June 3, 1955

UNDER THE CONSTITUTION OF A. D. 1885

PUBLISHED BY AUTHORITY OF LAW

VOLUME I, PART ONE

1955

COMMITTEE SUBSTITUTE FOR
HOUSE JOINT RESOLUTION NO. 810

A JOINT RESOLUTION proposing the revision of Article V of the Constitution of the State of Florida relating to the Judicial Department of the Government.

Be It Resolved by the Legislature of the State of Florida:

That the following proposed revision of Article V of the Constitution of the State of Florida is hereby agreed to and shall be submitted to the electors of this state for ratification or rejection at the next general election to be held in November of 1956, that is to say:

ARTICLE V
JUDICIAL DEPARTMENT

Section 1. *Courts.* The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish.

Section 2. *Administration.* The chief justice of the supreme court is vested with, and shall exercise in accordance with rules of that court, authority temporarily to assign justices of the supreme court to district courts of appeal and circuit courts, judges of district courts of appeal and circuit judges to the supreme court, district courts of appeal, and circuit courts, and judges of other courts, except municipal courts, to judicial service in any court of the same or lesser jurisdiction. Any retired justice or judge may, with his consent, be likewise assigned to judicial service.

Section 3. *Practice and Procedure.* The practice and procedure in all courts shall be governed by rules adopted by the supreme court.

Section 4. *Supreme Court.*

(a) *Organization.* The supreme court shall consist of seven members, one of whom shall be the chief justice. Five justices

shall constitute a quorum, but the concurrence of four shall be necessary to a decision.

(b) *Jurisdiction.* Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

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

The supreme court or any justice thereof may issue writs of

habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

(c) *Chief Justice.* The chief justice of the supreme court shall be chosen by the members of the court and shall serve for a term of two years. In the event of a vacancy, a successor shall be chosen within sixty days for a like term. During a vacancy or whenever the chief justice is unable to act for any reason, the justice longest in continuous service and able to act shall act as chief justice.

(d) *Clerk and Marshal; Process.* The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

Section 5. *District Courts of Appeal.*

(a) *Appellate Districts.* The state shall be divided into three appellate districts of contiguous counties as the legislature may prescribe.

(b) *Organization; number and selection of judges.* A district court of appeal shall be organized in each appellate district. There shall be three judges of each district court of appeal. Not less than three judges shall consider each case and the concurrence of a majority shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact.

The judges of the district courts of appeal organized hereunder shall be selected as follows: Between June first and July first, 1957, the governor shall appoint three persons to serve as judges of each district court of appeal until their successors are elected, as herein provided. The judges so appointed shall take office and assume their duties on July first, 1957, and shall serve for a term

to be designated by the governor in accordance with the following schedule: The governor shall appoint one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1959, following the election of his successor at the general election in November 1958, which judges shall be identified as Group "A"; one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which judges shall be identified as Group "B"; and one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1963, following the election of his successor at the general election in November 1962, which judges shall be identified as Group "C".

The successors of the original judges of the district courts of appeal shall be elected at the general election next preceding the expiration of their respective terms of office.

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

The supreme court shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal, and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.

A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.

(d) *Clerks and Marshals.* Each district court of appeal shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court may

direct. Their compensation shall be fixed by law. The marshal shall have power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

Section 6. *Circuit Courts.*

(a) *Judicial Circuits.* The legislature may establish not more than sixteen judicial circuits each composed of a county or contiguous counties and of not less than fifty thousand inhabitants according to the last census authorized by law, except that the county of Monroe shall constitute one of the circuits.

(b) *Circuit Judges.* The legislature shall provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof according to the last census authorized by law. In circuits having more than one judge the legislature may designate the place of residence of any such additional judge or judges.

(c) *Jurisdiction.* The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts, in all cases involving the legality of any tax, assessment, or toll, in the action of ejectment, in all actions involving the titles or boundaries of real estate, and in all criminal cases not cognizable by subordinate courts. They shall have original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.

The circuit courts and circuit judges shall have such extraterritorial jurisdiction in chancery cases as may be prescribed by law.

(d) *Court Commissioners.* A circuit judge may appoint in

each county in his circuit one or more attorneys at law, to be court commissioners, who shall have power in the absence from the county of the circuit judge, to allow writs of injunction and to issue writs of habeas corpus, returnable before himself or the circuit judge. Their orders in such matters may be reviewed by the circuit judge, and confirmed, qualified or vacated. They may be removed by the circuit judge. The legislature may confer upon them further powers, not judicial, and shall fix their compensation.

(e) *Recommendation to Attorney General; Report to Legislature.* It shall be the duty of the judges of the circuit courts to report to the attorney general at least thirty days before each session of the legislature such defects in the laws as may have been brought to their attention, and to suggest such amendments or additional legislation as may be deemed necessary. The attorney general shall report to the legislature at each session such legislation as he may deem advisable.

(f) *State Attorneys.* In each judicial circuit a state attorney shall be elected by the qualified electors of that circuit in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

(g) *Clerks of the Circuit Courts.* In each county a clerk of the circuit court, who shall also be clerk of the board of county commissioners, recorder, and ex officio auditor of the county, shall be elected by the qualified electors of that county in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

Section 7. *County Judges' Courts.*

(a) *Establishment.* There shall be a county judges' court in each county.

(b) *County Judges.* There shall be in each county not less than one county judge who shall be elected by the qualified electors of said county at the time and places of voting for other county officers and shall hold his office for four years. His compensation shall be provided for by law.

In any county having a population in excess of one hundred and twenty-five thousand, and not more than two hundred and

fifty thousand, according to the last decennial federal census, or census authorized by the legislature and paid for by the county, the legislature may provide for an additional county judge for such county, provided, that any law having for its purpose the creating of an additional county judge in such county shall not become effective unless ratified by a majority of the participating voters of such county at an election presenting the same for approval or rejection. In any county having a population of more than two hundred and fifty thousand according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.

(c) *Jurisdiction.* The county judge's courts shall have original jurisdiction in all cases at law in which the demand or value of property involved shall not exceed one hundred dollars; of proceedings relating to the forcible entry or unlawful detention of lands and tenements; and of such criminal cases as the legislature may prescribe. The county judge's courts shall have jurisdiction of the settlement of the estate of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate. The county judges shall have the power of committing magistrates and shall issue all licenses required by law to be issued in the county.

Section 8. *County Courts; organization and officers.* The legislature may organize in such counties, as it may think proper, county courts which shall have jurisdiction of all cases at law in which the demand or value of the property involved shall not exceed five hundred dollars; of proceedings relating to the forcible entry or unlawful detention of lands and tenements, and of misdemeanors. The county judge shall be the judge of said court. There shall be elected by the qualified electors of said county at the time when the said judge is elected a prosecuting attorney for said county, who shall hold office for four years. His duties and compensation shall be prescribed by law. Such courts may be abolished at the pleasure of the legislature.

Section 9. *Criminal Courts of Record.*

(a) *Organization and judges.* The legislature may provide for the establishment of a criminal court of record in any county. Judges of criminal courts of record shall be elected for a term of four years by the qualified electors of the county, in the same manner as other state and county officials. Their compensation shall be fixed by law and paid by the county.

In any county having a population in excess of 125,000, and not more than 250,000, according to the last decennial federal census, or census authorized by the legislature and paid for by the county, the legislature may provide for an additional judge of the criminal court of record for such county, provided that any law having for its purpose the creating of an additional judge of said court in such county shall not become effective unless ratified by a majority of the participating voters of such county in an election presenting the same for approval or rejection. In any county having a population of more than 250,000 according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.

(b) *Jurisdiction.* The said courts shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively.

(c) *Terms.* There shall be six terms of said courts in each year.

(d) *Prosecuting Attorney; term.* There shall be for each of said courts a prosecuting attorney who shall be elected for a term of four years by the qualified electors of the county as other state and county officials are elected and whose compensation shall be fixed by law.

(e) *Indictment and information.* All offenses triable in said court shall be prosecuted upon information under oath, to be filed by the prosecuting attorney, but the grand jury of the circuit court for the county in which said criminal court is held may indict for offenses triable in the criminal court. Upon the finding of such indictment the circuit judge shall commit or bail the accused for trial in the criminal court, which trial shall be upon information.

(f) *Criminal courts of record supersede criminal jurisdiction of county courts.* The county courts in counties where such criminal courts are established shall have no criminal jurisdiction and no prosecuting attorney.

(g) *Clerk.* The clerk of said court shall be elected by the electors of the county in which the court is held and shall hold office for four years, and his compensation shall be fixed by law. He shall also be clerk of the county court. The sheriff of the county shall be the executive officer of said court, and his duties and fees shall be fixed by law.

(h) *State attorney eligible for appointment as county solicitor.* The state attorney residing in the county where such court is held shall be eligible for appointment as county solicitor for said county.

(i) *Criminal courts of record may be abolished by legislature.* Such courts may be abolished by the legislature.

Section 10. *Court of Record of Escambia County.* In Escambia County there shall be a court of record with two or more judges as the legislature may provide, who shall be elected for a term of six years by the qualified electors of said county as other county officials are elected, and whose compensation shall be fixed by the legislature. Said court shall have exclusive jurisdiction of all criminal cases not capital and, concurrent with the circuit court of said county and the judges thereof, the same original jurisdiction of all cases and matters and the same power and authority to issue all writs as the circuit court of said county and the judges thereof, excepting the power to summon and empanel a grand jury, and jurisdiction of such other matters as the legislature may provide. The rules of procedure and practice applicable to the circuit court of said county shall obtain in the court of record.

The provisions of this constitution and all laws enacted in consonance therewith pertaining to circuit courts and the officers thereof and to appeals and writs of error from circuit courts, including the manner of the appointment or election and the terms of office and compensation of said officers, shall apply with like effect to the court of record of Escambia County and the officers

thereof except as otherwise provided in this section; provided that the compensation and expense allowances of said judges of said court of record shall be paid by Escambia County and shall be the same as paid to and received from all sources by judges of the circuit court of said county resident in said county.

At the request of a judge of the circuit court of Escambia County evidenced as now provided by law a judge of the court of record may assume and perform in every respect the jurisdiction and duties of the circuit court of Escambia County or a judge thereof, including the trial of capital cases and the power to summon and empanel a grand jury; and at the request of a judge of the court of record evidenced as now provided by law a judge of the circuit court of Escambia County may assume and perform in every respect the duties and jurisdiction of the court of record of Escambia County or a judge thereof.

Nothing herein contained shall operate to lengthen or shorten the term of any officer, nor alter the expiration date of such officer's commission, nor the date of any election.

Section 11. *Courts of Justices of the Peace.*

(a) *Districts and presiding officer.* There shall be not more than five justice districts in each county, and there shall be elected one justice of the peace for each justice district, who shall hold office for four years. Existing justice districts are hereby recognized, but the legislature may, by special act, from time to time change the boundaries of any such district now or hereafter established, and may establish new or abolish any such district now or hereafter existing. Provided, however, that any such changes shall be submitted to the people of any county so affected, by referendum at the next ensuing general election.

(b) *Jurisdiction.* The justices of the peace shall have jurisdiction in cases at law in which the demand or value of the property involved does not exceed $100.00, and in which the cause of action accrued or the defendant resides in his district; and in such criminal cases, except felonies, as may be prescribed by law, and he shall have power to issue process for the arrest of all persons charged with felonies and misdemeanors not within his jurisdiction to try, and make the same returnable before himself or the county judge for examination, discharge, commitment or bail of the accused.

Justices of the peace shall have the power to hold inquests of the dead. Appeal from justices of the peace courts in criminal cases may be tried de novo under such regulations as the legislature may prescribe.

(c) *Constables.* A constable shall be elected by the registered voters in each justice's district, who shall perform such duties, and under such regulations as may be prescribed by law.

Section 12. *Juvenile Courts; establishment; jurisdiction; judge; officers; procedure.* The legislature shall have power to create and establish juvenile courts in such county or counties or districts within the state as it may deem proper, and to define the jurisdiction and powers of such courts and the officers thereof, and to vest in such courts exclusive original jurisdiction of all or any criminal cases where minors under any age specified by the legislature from time to time are accused, including the right to define any or all offenses committed by any such persons as acts of delinquency instead of crimes; to provide for the qualification, election or selection and appointment of judges, probation officers and such other officers and employees of such courts as the legislature may determine, and to fix their compensation and term of office; all in such manner, for such time, and according to such methods as the legislature may prescribe and determine, without being limited therein by the provisions in this constitution as to trial by jury in Sections 3 and 11 of the Declaration of Rights, as to the use of the terms "prosecuting attorney" and "information" in Section 10 of the Declaration of Rights, as to election or appointment of officers in Section 27 of Article 3, as to jurisdiction of criminal cases in Sections 6, 7, 9, and 11 of this Article, as to original jurisdiction of the interests of minors in Section 6 of this Article, and as to style of process and prosecuting in the the name of the state in Section 20 of this Article, or other existing conflicting provisions of this constitution.

Section 13. *Eligibility requirements for justices and judges.* No person shall be eligible for the office of justice of the supreme court or judge of a district court of appeal unless he is a citizen of this state, and unless he is, at the time, a member of the Florida Bar in good standing and for a period of at least ten years has been, a member of the bar of Florida; and no person shall be eligible for the office of judge of a circuit court or criminal court of

record who is not twenty-five years of age and a member of the bar of Florida. Any senator or member of the house of representatives otherwise qualified shall be eligible for appointment or election to any judicial office which may have been created, or the emoluments whereof may have been increased, during the time for which he was elected.

Section 14. *Vacancies in office of judge, how filled.* When the office of any judge shall become vacant from any cause, the successor to fill such vacancy shall be appointed or elected only for the unexpired term of the judge whose death, resignation, retirement, or other cause created such vacancy.

Section 15. *Election of judges.* Circuit judges shall be elected by the qualified electors of their respective judicial circuits as other state and county officials are elected.

Judges of district courts of appeal shall be elected by the qualified electors of their respective districts as other state and county officials are elected.

Justices of the supreme court shall be elected by the qualified electors of the state as other state and county officials are elected.

The judges of district courts of appeal identified as belonging to Group "A" shall be elected in 1958 and every six years thereafter; those identified as belonging to Group "B" shall be elected in 1960 and every six years thereafter; and those identified as belonging to Group "C" shall be elected in 1962 and every six years thereafter.

Election of circuit judges shall be held in the year 1960 and every six years thereafter.

Two justices of the supreme court shall be elected in 1958 and every six years thereafter; three justices of the supreme court shall be elected in 1960 and every six years thereafter; two justices of the supreme court shall be elected in 1962 and every six years thereafter.

Such elected justices and judges shall take office on the first Tuesday after the first Monday in the following January.

Section 16. *Terms of office of certain judges.* The terms of

office of justices of the supreme court, judges of district courts of appeal, and circuit judges shall be six years.

Section 17. *Retirement, suspension and removal of judges.* Notwithstanding the provisions of this Article relating to terms of office:

(a) All justices and judges shall automatically retire at age 70;

(b) Subject to rules of procedure to be established by the supreme court, and after notice and hearing, any justice or judge may be retired for disability at retirement pay to be fixed by law, which shall be not less than two-thirds of his then compensation if he has served for ten years or more, by a commission composed of one justice of the supreme court to be selected by that court, two judges of the district courts of appeal to be selected by the judges of said district courts of appeal, and two circuit judges and two county judges to be selected by the supreme court.

(c) Any justice of the supreme court, judge of the district court of appeal, or circuit judge shall be liable to impeachment for any misdemeanor in office.

Section 18. *Prohibited activities of judges.* Justices of the supreme court, judges of district courts of appeal and circuit judges shall devote full time to their judicial duties, shall not engage in the practice of law or hold any office or position of profit under this state or any office of profit under the United States, and shall not hold office in any political party.

Compensation for service in the state militia or the armed forces of the United States or other defense agencies recognized by the supreme court for such periods of time as may be determined by the supreme court shall not be deemed profit.

Section 19. *Judicial salaries and expenses.* Justices of the supreme court and judges of all other courts shall receive for their services salaries or compensation provided by law. A retired justice or judge assigned to active judicial service shall, while so serving, receive as additional compensation the difference between his retirement benefits and the compensation applicable to such service. Salaries of circuit judges may be supplemented in any county or counties when authorized by law. Judicial officers shall be paid

such actual and necessary expenses as may be authorized by law.

Section 20. *Style of process.* The style of all process shall be "The State of Florida" and all prosecutions shall be conducted in the name and by the authority of the State.

Section 21. *Referees.* Any civil cause may be tried before a practicing attorney as referee upon the applications of the parties and an order from the court in whose jurisdiction the case may be, authorizing such trial and appointing such referee. The referee shall keep a complete record of the case, including the evidence taken, and such record shall be filed with the papers in the case in the office of the clerk; and the cause shall be subject to an appeal in the manner prescribed by law.

Section 22. *Juries.* The number of jurors for trial of causes in any court may be fixed by law but shall not be less than six in any case.

Section 23. *Admission and discipline of attorneys.* The supreme court shall have exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted. It may provide for an agency to handle admissions subject to its supervision. It may also provide for the handling of disciplinary matters in the circuit courts and the district courts of appeal, or by commissions consisting of members of the bar to be designated by it, the supreme court, subject to its supervision and review.

Section 24. *Effect of reduction of number of judges.* Any law reducing the number of judges of any court shall not shorten the term of any judge then in office.

Section 25. *Judicial Officers as conservators of the peace.* All judicial officers in this state shall be conservators of the peace.

Section 26. *Schedule.*

(1) This Article shall become effective on the first day of July 1957 and shall replace all of Article V, and shall supersede any other provisions of the present constitution of Florida in conflict herewith, which shall then stand repealed.

(2) Until changed by law as authorized in this Article, the appellate districts shall be composed as follows:

FIRST DISTRICT:	The 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 14th judicial circuits as presently constituted.
SECOND DISTRICT:	The 6th, 9th, 10th, 12th, and 13th judicial circuits as presently constituted.
THIRD DISTRICT:	The 11th, 15th and 16th judicial circuits as presently constituted.

(3) The provisions of the Article governing eligibility for office shall not affect the right of any incumbent to continue in office or to seek reelection.

(4) Except to the extent inconsistent with the provisions of this Article, all provisions of law and rules of court in force on the effective date of this Article shall continue in effect until superseded in a manner authorized by the constitution.

(5) Judges of the district courts of appeal appointed by the governor shall take office on the effective date of this Article.

(6) The supreme court may transfer to the respective district courts of appeal such causes, matters and proceedings as are pending in the supreme court on the effective date of this Article which are within the jurisdiction of such courts as the supreme court may see fit. No case that has been orally argued before the supreme court shall be so transferred. The supreme court shall have and retain jurisdiction and authority over all causes, matters and proceedings not so transferred to the district courts of appeal.

(7) All trial courts as organized and constituted on the effective date of this Article shall, except as otherwise provided herein, continue with their jurisdiction, judges and officers, including the manner of their election or appointment, until otherwise provided by the legislature.

(8) Until otherwise provided by law, there shall be an additional judge for the Fourth Judicial Circuit who shall reside in Duval County, and shall receive the same salary and allowances for expenses as other circuit judges in and for the circuit court of said county, which salary and expenses shall be paid by said county out of its general revenue. The additional judge of the circuit court of Duval County holding office on the effective date of this Article under former Section 42 of Article V shall become

the additional judge here provided for until the expiration of his then term of office.

(9) There shall be an additional circuit judge for the circuit court of the judicial circuit wherein the state capital is located. Subseqeunt to the first Tuesday after the first Monday in January 1957, the governor shall appoint the first judge hereunder to serve for a term expiring on the first Tuesday after the first Monday in January 1959, following the election of his successor at the general election in November 1958, which successor shall serve for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which successor shall serve for the full term and his successors chosen as otherwise provided for circuit judges.

(10) Until otherwise provided by the legislature, orders of the Florida Industrial Commission shall be subject to review only by petition to the district courts of appeal for writ of certiorari.

(11) All provisions of law pertaining to the State Board of Law Examiners shall continue in effect until superseded in a manner authorized by this Article.

(12) This Article shall not disturb the terms of incumbent judges.

(13) The provision for automatic retirement in Section 17 of this Article does not apply to any person now holding office.

(14) Upon the adoption of this Article, the legislature shall enact such laws and make such appropriations and the supreme court shall make such rules as may be necessary or proper to give effect to its provisions.

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FLORIDA STATE BAR ASSOCIATION

SHOULD FLORIDA ADOPT THE FEDERAL RULES OF CIVIL PROCEDURE BY RULE OF COURT?

By GILBERT B. NEWKERK, University of Miami
Winner of D. H. Redfearn Award

Many authorities divide the history of adjective law into three periods: (1) the period of the common law when procedure was regulated by the court, (2) the period when the fever of codification seized the legislatures of the various States, and (3) the present period demonstrated by the tendency to return to procedure governed and determined by rule of Court. Civil procedure in Florida does not properly fit in any of these divisions; that is, to the exclusion of any two other divisions. Rather, our procedure represents and exemplifies all three periods. Florida procedure is governed by the common law, subject to such alterations, modifications and additions as the legislature has seen fit to enact, and subject to rules of Court not inconsistent with law. Leaving Florida in this curious state of affairs, let's glance back through the pages of history to the year of the Norman Conquest.

William the Conqueror subdued the Saxons in the year 1066, and by 1071, the feudal system was almost fully installed in England. All power was in the King; there was not the separation of powers that we know today. As the King became overburdened with his executive and judicial functions—the King was the "fountain of justice"—he delegated to members of his "Curia Regis" certain executive and judicial functions. These officials, "Justiciars", were charged with the duty of collecting the royal revenues, and the duty of hearing matters of a civil nature which the King had been wont to hear. As the justiciars increased in prestige, the pre-Conquest Saxon County Courts decreased in prestige and were soon supplanted by the King's representatives. As complaints became more numerous, and the use of the King's Court became the established practise, regular circuits were established, the justiciar faded from the picture, and by the time of the reign of Henry II, the system of itinerant justices—twelve justices in circuit from the King's Court—was fully established. Thus, Courts were established, and procedure therein defined to a certain degree fully one hundred years prior to the advent of the first real and regular Parliament in 1265.[1] Historically, the rule-making power; the power to define procedure is either executive or judicial. It is not legislative!

Parliament in its fight for dominance, however, did attempt to interfere and force on the Courts procedure concocted in Parliament. Francis Bacon advocated such a course in 1592, but the attempt failed. Yet, all through the years, form and technical niceties of pleading became of increasing importance; at least in the eyes of the Court. Conditions became intolerable and Parliament forced the Court to take action to alleviate the harshness, and to remedy the burdensome technicalities of the common law procedure. This coercion and pressure resulted in the Hilary Rules of 1834. These rules did not truly correct the abuses of the adjective law. Yet, the Hilary Rules marks the transition to the second period in the growth of procedural law. This initial attempt at reform led finally to the Judicature Act of 1873. For the background of this Act, we must return to the United States.

Administration of justice in New York in the 19th century was bogged down in a mire of technicalities. There were many, many forms of action—sixty in all. Delay pervaded the administration. Litigants were honking the horns of impatience and disgust. The Legislature of New York appointed David Dudley Field to head a commission to revamp the civil procedure. In 1848, the Field Code was presented to the Legislature and adopted. The Field Code marks the transition from the period of the

1 9 Rocky Mt. Law R. 122; 1 Wash. L. R. 163.

common law to the period of codification in America; that is, the assumption by the Legislatures of the various States of the power to determine procedure in the Courts.[2]

The code reduced the multitude of actions to one—a civil action; abolished the distinction between law and equity, and simplified pleadings. However, the code proved to be a dismal failure. There is a difference of opinion as to whom was at fault—the Legislature or the Courts. The Courts blamed the failure on the Legislature, and the Legislators on the Courts and lawyers. Possibly, both views are correct. Nevertheless, the code took the rigid form of statutory law, and the rules could not be clarified without actual controversy. In 1910, 53.32 per cent of the cases turned on points of practise.[3] Many people, especially lawyers, concluded that the Legislature was not the proper body to pass on the procedure in the Courts. They reasoned that the Legislature could not properly pass on details of practise, that political matters occupied the Legislator's time, and that when the procedure was considered, the result was piecemeal and sometimes inconsistent legislation. Matters came to a head when a Board of Statutory Consolidation was created to recommend revision of practise in the Courts. In 1912, the board reported and said, "The present code system of regulating details of practise by statute has been tried and so lamentably failed and has been condemned in such unmeasured terms that it may be passed by without further comment." Thus, the fate of the Field Code. Despite the failure of the Code, it is a landmark, and it has had tremendous effect both at home and abroad. This Code started the swing to unification and simplification of procedure. The method—by legislation—however, has not really solved the problem. Though the fever of codification swept the country and swept across the ocean and seized reformers in England, the method of accomplishing the reform in England was quite different from the method employed in this country.

Jeremy Bentham did not live to see or witness the passage of the Judicature Act of 1873. This act effectively abolished the distinction between law and equity; it abolished all technical objections; it abolished forms of action, terms of Court, and most important of all, it created a rules committee. The effect of the Field Code is quite evident in the Judicature Act of 1873, but it must be remembered that the substance of the act was not concocted in Parliament. The committee was composed of members of the Bench and Bar, and the act was the result of their deliberations, not the result of deliberations in Parliament. Parliament merely put its stamp of approval on the rules promulgated by the committee, a committee composed of members of the Bench and Bar. Parliament has the right of veto, but the right has not yet, as far as I can determine, been exercised. Technically, the right to promulgate rules of procedure is now a statutory right of the English Courts. But, the Lord High Chancellor said in a report to His Majesty and Parliament, "The powers given by modern statutes are often essentially similar to the powers which were assumed by many organs of the government at an earlier period. One illustration is the right of the Court to make rules of procedure. This authority, which was assumed by the Courts in the eighteenth and earlier centuries, now rests upon a statutory basis and is exercised by a Joint Committee of Judges, Barristers and Solicitors known as the Rules Committee".[5] Thus, the Courts have never, in England, been divested of their power to determine the procedure in those Courts, and this is the essential difference between reform of procedure in England and in the United States. Procedure in England may thus be confined to the first two periods of growth of adjective law, and from a practical standpoint, the method of determining the procedure has never changed.

These highlights from the history of the growth of the adjective law demonstrate that the common law system of procedure was found to be unfit for use under present day conditions both at home and abroad. As a reform in procedure, various States

2 1 Wash. L. R. 163.

3 10 Ill. L. R. 171; 2 Minn. L. R. 92.

5 Report of Lord High Chancellor to Parliament, April, 1932.

adopted codes of procedure. While these codes represented an improvement, yet, they could not stand the test of time. Two periods of growth have thus been passed. The period of the common law, and the period of codification. Let us now inspect the latest evidence of the transition to the third period—regulating and defining procedure by rule of court.

In 1934, Congress passed an act giving to the Supreme Court the power to promulgate rules of civil procedure; also, the power to unite law and equity. Mr. Chief Justice Hughes speaking before the American Law Institute said, "It is manifest that the goal we seek is a simplified practise which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decisions on their merits with a minimum of procedural encumbrances. It is true that in certain jurisdictions * * * the simplified forms of unified procedure originally adopted came to be overlaid with procedural monstrosities due to legislative tinkering and elaboration. Such experiences have taught a lesson * * * we shall have the advantage of the simplicity and flexibility made possible by the exercise on the part of the Court of its rule-making power". These words sum up the reason for, and the foundation on which the new rules rest.

The new rules do abolish the distinction between law and equity, and do unify the procedure. Today, there is the single cause of action; rather, single form of action. Technical pleadings were done away with, and the emphasis is on the speedy, inexpensive determination of the case on the merits. The new rules are the result of intensive study, and exemplify the best thought on the proper civil procedure. The wealth of experience of other states and countries was drawn on, and the result should be a great improvement in the disposition of cases. The main feature is the ability of the Court to adapt the rules to meet changing conditions. Flexibility! This does away with the most objectionable feature of the Field Code—rigidity! A commendable innovation in the Federal practise is the adoption of the pre-trial procedure. Rule 16 provides that in any action, the Court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: (1) the simplification of the issues, (2) the necessity or desirability of amendments to the pleadings, (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, (4) the limitation of the number of expert witnesses, (5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury, and (6) such other matters as may aid in the disposition of the action. The Court shall enter an order reciting the action taken at the conference. A pre-trial calendar may be established. Such is the gist of Rule 16 of the Federal Rules of Civil Procedure. For the full text and import of Rule 16, I could refer the reader to an order entered by the Supreme Court of Florida.[6] Yes, the Supreme Court has seen fit to adopt the rule! Could this be prophetic? Can this action signal a more progressive attitude as to the proper function of the adjective law?

Civil procedure in Florida is still governed by the common law, subject to such changes and modifications as the Legislature has seen fit to enact, and subject to rules of Court not inconsistent with law. Florida still clings to the unsound division between law and equity, though the division has been relaxed by statute allowing the interposition of an equitable defense to an action at law.[7] There have been other more minor changes. Conditions precedent may now be alleged generally.[8] But, we retain forms of action, all manner of pleadings, and these coupled with rule days make the procedure in the State of Florida rather a slow-moving, costly affair. Quite frankly, I think our procedure rules the "little fellow" out of Court. I have tremendous faith in the future of

6 In re: Petition of Jacksonville Bar Ass'n for Rule Permitting the Establishment of Pre-Trial Procedure. Rule ordered entered Jan. 12, 1940. Effective Feb. 1, 1940.

7 C. G. L. of 1927, Section 4301.

8 C. G. L. of 1927, Section 4299.

the State of Florida and it is my belief that the Courts should prepare for an increase in population and the consequent increase in litigation. With our present cumbersome machinery—machinery discarded in England, machinery discarded in the majority of States—I cannot see how the Courts can discharge their duty to the public to handle cases swiftly, inexpensively and on the merits. In the interest of the public good, I think the present procedure should be scrapped. In its place I would adopt the Federal Rules of Civil Procedure. A procedure combining the good, and embodying the wealth of experience accruing in other jurisdictions. The result would be a single system of procedure for Florida attorneys applicable in both the local State Courts and in the Federal Courts. A consequent increase in justified litigation when the little fellow asserts his rights. From the selfish viewpoint of the attorney, if I may term it selfish, and from the viewpoint of the public interest, the adoption of the new rules would best serve the attorney and the public.

The Supreme Court of Florida has said that it has inherent power to make rules of procedure. The latest evidence of the exercise of the rule-making power is, of course, the adoption of the pre-trial procedure by rule of Court. Yet, the Court has said that the rules so promulgated must not be inconsistent with law; that is, statutory enactment.[9] The pre-trial procedure rule does not seem inconsistent with the law, and evidences the submission of the Court to the Legislature in matters of procedure. Historically, the rule-making power is inherently judicial and is not legislative. Yet, the Legislature does exercise the rule-making power. It would seem that the Court has either acquiesced, submitted or is indifferent to the exercise by the Legislature of the rule-making power. Yet, experience with legislative codes has shown that the Legislature is not the proper body to exercise the power. It is interesting to note that Mr. Wigmore contends that legislative interference is a "usurpation of judicial power" and that all legislative rules are therefore void.[10] Historically, Mr. Wigmore has ample foundation for this conclusion. I can find no provision in the Constitution of Florida conferring the rule-making power on the Legislature. The power must, by implication, remain in the Court, though the Constitution does not confer the power on the Court. That is why the power remains by implication in the Court. However, a statute confers on the Court the power to make rules of procedure.[11] It is difficult to see how a statute could grant or confer power which the Court already inherently possessed. A statute of similar type was under consideration in a Colorado case.

In the case of Kolkman v. People, the Supreme Court of Colorado was considering the section which conferred on the Court the power to make rules of procedure not inconsistent with law.[12] The statute is thus similar to the Florida statute. The Colorado Court said, "We wish it to be understood that our right to make rules of procedure is not granted or limited by this section. Aside from any common law right or statutory grant, the power to make rules of procedure is our Constitutional right". Yet, as far as I can determine, the Constitution of Colorado does not expressly confer the rule-making power on the Court. Mr. Wigmore calls the legislators "usurpers" and the Supreme Court of Colorado administers a "verbal spanking" to the Legislature(much to the delight of the Bench and Bar).

I believe the Supreme Court of Florida should exercise its inherent power and adopt the Federal Rules of Civil Procedure. Leaving aside questions of political expediency, I believe the Court should take full responsibility for the proper performance of the functions of the Courts. The Court is under a duty to make such changes necessary to expedite efficiency of administration, and thus aim for the goal of "simplified practise which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decisions on their merits with a minimum of procedural encumbrances".

9 In re: Petition of Jacksonville Bar Ass'n, 169 So. 574.

10 23 Ill. L. R. 276.

11 C. G. L. of 1927. Section 4632.

12 Kolkman v. People, 300 p. 575; Comp. L. Colo., 1921, p. 184, Section 444.

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RULES OF CIVIL PROCEDURE

By GLENN TERRELL

Justice Supreme Court

On September 13, 1949, the Supreme Court will consider the petition of the Florida State Bar Association for the adoption and promulgation of the Common Law and Equity Rules of Civil Procedure as revised by the Committee appointed by the Court and the Committee appointed by the State Bar Association. The common law and equity rules are in separate volumes and will hereafter be referred to as the Common Law Rules and the Equity Rules. A tentative revision of the Common Law Rules was published in the Florida Law Journal in the April number, 1948, and in the Advanced Sheets, Southern Reporter of April 1, 1948.

The purpose of this article is to give the members of the bar in as concise statement as I can, the basis for this revision, the manner in which it was accomplished, and the primary changes that are proposed. We are attempting to get the revision published and distributed before the hearing September 13th. In the meantime, each member of the committee has a copy and the clerk of the Supreme Court has a copy that may be secured for study by those who desire to do so. The revision of the Common Law Rules is not materially different from that published in the Advanced Sheets, Southern Reporter and the Florida Law Journal, last year.

The basis for this revision is Chapter 21995, Acts of 1943, authorizing the Supreme Court to "prescribe rules, forms of process, writs, pleadings, motions, and the practice and procedure in actions either at law or in equity, and in statutory and extraordinary proceedings in the Circuit Courts and Civil Courts of Record and County Courts of the State of Florida."

Pursuant to this act the Florida State Bar Association filed a petition in this Court, praying that the distinction between Common Law and Equity be abolished and that the Federal Rules of Civil Procedure be substituted for our system of Common Law and Equity practice. Opinion was filed in response to this petition March 9, 1945. See 155 Fla. 710, 21 So. (2d) 605. By this opinion we declined to abolish the distinction between Common Law and Equity and substitute the Federal Rules of Civil Procedure for our system of Common Law and Equity practice, but we recognized the necessity for procedural revision and the Chief Justice designated a Committee to make a study of the matter and report to this Court. The President of the State Bar Association also appointed a Committee for the same purpose.

The Committee appointed by the Chief Justice, hereinafter referred to as the Court Committee, was composed of two members of this Court, two Circuit Judges and seven practitioners. The Court Committee commenced its work at once, gathered a great deal of information, had several conferences and prepared a tentative revision of the Common Law Rules which was filed with the legislature at the 1945 session as the Act requires.

The Rules Committee of the Florida State Bar Association, hereinafter referred to as the Bar Committee, thoroughly worked over the draft of the Common Law Rules prepared by the Court Committee, it offered some amendments that were approved by the Court Committee and the Bar Committee in joint session. A joint meeting of the Court Committee and the Bar Committee was held October 1st and 2nd, 1948, and members of the bar were notified and given an opportunity to offer criticisms and amendments to the joint Committee draft. A great many criticisms were offered and considered,

some were offered in person and some by letter, many of them were approved by the joint committees and integrated into the draft.

The essential features of the proposed revision of the Common Law Rules are these: (1) It retains the distinction between common law and equity. (2) It makes some changes in the Common Law practice that will be more fully detailed later. (3) It also adds some features that will be more fully detailed later. (4) It attempts to harmonize common law and equity practice in the matter of preparing and filing and serving pleadings and serving process. (5) It attempts to harmonize State and Federal practice in material particulars and provides a single volume of rules that the lawyer can resort to with assurance that it is the last word on the subject of procedure in this State.

Epitomized, the changes proposed in the Common Law Rules to accomplish these results are as follows:

1. Rule days are abolished in so far as they govern the time of pleading and return of process. Rule 5.
2. An action is commenced when the declaration is filed except in attachment, replevin and other statutory proceedings. Such a proceeding is commenced when the affidavit, petition or other initial pleading is filed. Rule 4.
3. The declaration or other initial pleading must be filed in duplicate and one copy delivered to defendant or his attorney. If there be more than one defendant, the initial pleading should be filed in triplicate. Rule 6.
4. Summons ad respondendum issues without praecipe when the declaration or other initial pleading is filed. (See Rule 5 for extensions and limitations of service of process.)
5. Any service required under these rules may be made on the party's attorney unless the court requires it to be made on the party. (See Rule 6 for limitations of such service.)
6. Pleadings are limited to a declaration and an answer. The declaration must state a cause of action. If the answer contains a counterclaim or a crossclaim, there shall be a reply. All other pleadings but motions are abolished. Rule 8, Rule 9 for common rules of pleading.
7. Defendant must serve his answer within twenty days after service of process or not later than the appearance day fixed in the notice. Answers to crossclaim and counterclaim follow same rule. See Rule 13 for details in pleading defenses.

Epitomized, the following rules comprehend additions to, rather than changes in the Common Law Rules.

1. Rule 16 is essentially the Federal pretrial conference Rule, slightly modified, and approved for general use in Circuit Courts. It has heretofore been permissive.
2. Rules 20 to 30 inclusive, provide for taking depositions when actions are pending or before they are commenced. They include physical and mental examination of parties and the examination of property. These rules are an adaptation of the Federal Rules of Civil Procedure as amended October 1, 1947, to Florida practice. Some phases of these rules were embraced in Chapter 24041, Acts of 1947. Other phases were embraced in Sections 62.15 and 91.30, Florida Statutes 1941, which have been in effect since 1828, more than one hundred years.

3. Rule 41 adopts the Federal practice on summary judgments. Like Rules 20 to 30, referred to in paragraph immediately preceding this, this rule is in some aspects new to the practice. Its value lies in the future.
4. Rules 1 to 3 inclusive, rules 7, 10, 11, 12, 15, 17, 18 and Rules 31 to 53 inclusive, except Rule 41, are repetitions of the present Common Law Rules, some of them amended by additions from the Federal Rules and from other sources.
5. Rules 54 to 61 inclusive, have to do with extraordinary writs under Section 5, Article V of the Constitution and adopt the Supreme Court practice, the Supreme and Circuit Courts having concurrent jurisdiction as to these writs.
6. The effect of this adoption with other changes over recent years will abrogate or repeal about 40 of the Common Law Rules. See 122 Fla. 881, for last revision. It leaves in effect many of the present Common Law Rules and combines the substance of some of the present Common Law Rules with the coresponding Federal Rules.

Now let us consider the changes proposed in the Equity Rules. The chancery practice or rules is embraced in the 1931 Chancery Act, Chapter 63, Florida Statutes 1941. This act was thoroughly considered, section by section, in its relation to both the Federal practice and the proposed Common Law Rules. Practice under the chancery act has been quite satisfactory and no revision of it has been undertaken. We have attempted no more than to harmonize some of its provisions with the Common Law and Federal practice, in particular those relating to the abolition of Rule Days, those relating to the service of pleadings and those relating to the time and manner of presenting defenses. As a basis to accomplish this the following changes are proposed:

1. Every suit in equity shall be deemed to have been commenced when the bill of complaint is filed. (See Common Law Rule 4a) Equity Rule 4.
2. Section 1, Chancery Act, relating to Rule Days is repealed and Common Law Rule 5 with appropriate modifications substituted. This substitution will require slight change in the "form of a summons in chancery", Section 3, Chancery Act. This substitution will also repeal and take the place of Sections 4 and 5 Chancery Act.
3. Section 6, Chancery Act, relating to appearance is repealed and a date to plead as in Rule 13, Common Law Rules, is fixed.
4. Common Law Rule 6, relating to service of pleadings is modified as to terminology and prescribed in equity.
5. Section 7, Chancery Act, relating to signature of counsel is replaced by Common Law Rule 12.
6. Sections 7 to 16 inclusive of the Chancery Act are peculiar to equity and no changes are made.
7. Section 17, Chancery Act, relating to defective parties is amended by striking the words "at or before the next rule day" in lines three and four and the words "within ten days" are inserted in lieu thereof.
8. Sections 18 to 28 inclusive, of the Chancery Act, except Section 23 are not changed. Paragraph (e) and (b), Section 23 is the same as Common Law Rule 14 and paragraph (c) is same as Section 23, of the Chancery Act.

9. Section 29, Chancery Act, relating to amendment of the Bill of Complaint, is amended by striking or omitting all after the word "but" in line 3.
10. Sections 30 and 31, Chancery Act, are not changed.
11. Section 32 of the Chancery Act, relating to computation of time, same as proposed Common Law Rule 7 and Federal Rule 6. Section 33, Chancery Act, is replaced by proposed Common Law Rule 13, adjusted to equity.
12. Section 34, Chancery Act, relating to contents of the answer is not changed.
13. Sections 35 to 39 inclusive, Chancery Act, are not changed. Section 40, Chancery Act, combination of proposed Common Law Rule 41 and Section 40, Chancery Act. Section 41, Chancery Act, no change.
14. Section 42, Chancery Act, relating to defaults and decrees pro confesso, no change.
15. Section 42 to 46 inclusive, Chancery Act, no change.
16. Sections 47 to 52 inclusive, Chancery Act, have to do with discovery and depositions de bene esse and no change is made. Common Law Rules 20 to 30 inclusive deal with similar subject matter. Paragraph (4) Section 47, Chancery Act, makes the de bene esse rule an "Additional and optional procedure for the taking of depositions." Section 53, Chancery Act is about the same as proposed Common Law Rule 25.
17. Sections 55 to 65 inclusive, Chancery Act, have to do with the appointment of General and Special Masters, their powers and duties, hearings and proceedings before them, including the preparation and filing of their reports, and are not changed.
18. Sections 66 to 75 inclusive, Chancery Act, have to do with decrees and orders and their enforcement, rehearings, injunctions, receivers, and the transfer of causes from equity to law, and are not changed.
19. Section 76, Chancery Act, has reference to notice and how it shall be served and is not changed.
20. Common Law Rule 14, relating to sham pleas, and Common Law Rule 16, relating to pretrial procedure are added to the equity practice.
21. Throughout this discussion of the Chancery Act, it has been referred to by sections, but, as a matter of convenience, the committees have changed the sections to "rules", making a rule out of each section and numbering them consecutively. A few sections of the 1931 Chancery Act have been amended by the legislature, but they are not material to this revision since the Court has power to revise or repeal any act relating to rules.

In preparing this revision the committees have been materially aided by the plan adopted by Texas, Missouri, Iowa, Nebraska, New Jersey, Michigan and other states that have lately revised their practice. We have not scrapped our system of pleading and practice but we retained that which was good and integrated into it such of the new as would render it more efficient. It is hoped that a careful reading of this abstract will reduce to a minimum the labor of the bar in acquiring a picture of the objectives to be accomplished by the revision.

One of the primary objects of procedural revision in Florida is harmony in State and Federal practice where it can be done consistently with the essential differences between the two systems. The number of old rules retained in this revision is to me adequate showing of the inadequacy of

the Federal Rules alone to our system. As to the Common Law Rules, I think the real changes are embraced in Rule 5, relating to the abolition of Rule Days, Rule 6 relating to the service of pleadings and Rule 13, relating to the time and manner of presenting defenses, Rules 20 to 30 relating to depositions and discovery, Rule 41 relating to summary judgments and others are adaptions from the Federal practice and may serve a useful purpose.

It is of course, admitted that Rule 5, relating to the abolition of Rule Days, Rule 6, relating to the service of pleadings and Rule 13 relating to the time and manner of presenting defenses introduce a new method for conducting a litigated cause to issue. It is not however, different from the Federal practice which we are required to follow in this and all other states and it is not different from the procedure followed in a dozen or more states which have revised their system of practice the last ten years.

In defense of the committee's recommendation that Rule Days be abolished, I might say that I have examined the rules of procedure in every state in the Union and some states have never adopted Rule Days, while those that once had them, have abolished them. Florida is the only state that now has rule days and not a revision of the rules of procedure made in any state in over twenty-five years has retained them. Rule Days to plead by are accordingly outmoded and result in the waste of much time in reducing the pleadings to an issue.

Because of the practice of filing pleadings on the first Monday we have come to think of Rule Days as a convenience to the bar, but the interest of the public requires that litigation be dispatched promptly at the minimum cost, and it must be admitted that Rule Days detract from dispatch. Any one who has practiced law knows this. Pleadings are filed from month to month and under such a system it sometimes takes a year or more of pleading to arrive at the issues in a cause. Under the system set up in the proposed revision, the defendant is required to plead within twenty days. In many cases the cause will then be at issue and ready for trial. The fact that the Federal Courts and the State Courts in every state in the Union, but Florida, have adopted this system, would seem to have plenty to recommend it.

It would be foolish to contend that the revision proposed is perfect. Certainly many of the rules could be improved by refining, but abstract criticism leveled at them without a tender of something to improve them, are distructive and get us no where. Rules of procedure are not static, nothing that serves a good purpose is static. The constitution, the declaration of Independence, the Bill of Rights, have grown and expanded by amendment and interpretation to meet the demands of an expanding democracy. Our concept of freedom and democracy change with circumstances and requires interpretation. In my judgment the best single feature of the proposed revision is that which seeks to harmonize common law, equity and Federal procedure in the manner provided by rules 5, 6 and 13, heretofore discussed. There can be no reason whatever why we should have three separate procedures for initiating a law suit and making up the issues in a common law equity and Federal suit.

I am also convinced that the pretrial conference rule can be made to serve a very useful purpose. I think however, that nine-tenths of its value will depend on the sound sense and good judgment exercised by the Circuit Judge in its application. There is not a change in the offered proposed rules or an addition to them that has not been tried elsewhere and its value proven. I know of no greater responsibility imposed on the bench and bar than the one of keeping rules of procedure current. The Legislature has put the matter up to us and I think we will be derelict in our duty if we fail to

rise to it. The Courts belong to the public and if we do not keep them efficient the public will devise other agencies to handle litigation. The cost, delays and inefficiency of the courts have been very largely responsible for administrative boards, arbitration and other tribunals that are now handling a very large per cent of the litigation. These tribunals will grow in importance in proportion to the lack of skill and energy exemplified by the bench and bar in meeting them with something better.

The Court Committee and the Bar Committee have worked diligently to meet this need. Every procedural revision that has been made in the last twenty-five years has been carefully examined. Those that have not been lately revised have also been examined. Aid has been secured from many of these sources and I think the revision proposed will prove to be much superior to what we now have. I would be the last to say it cannot be improved upon. I understand the primary purpose of the hearing by the Court on September 13th, is to point out why all or any portion of the Committee's revision should not be finally approved and promulgated. The Court has the power to modify, approve or reject all or any portion of it.

NOTICE!

Notice is hereby given that the Petition of the Florida State Bar Association for adoption and promulgation of the revision of the Common Law and Equity Rules of Civil Procedure will be heard by this Court in the Supreme Court room at Tallahassee, Florida, September 13, 1949, at 9:30 A. M.

This revision was undertaken pursuant to Chapter 21995, Acts of 1943, and was prepared by a Committee appointed by the Chief Justice of this Court and a Committee appointed by the President of the State Bar Association. The joint report of said committees has been in the hands of the Court since February 11, 1949. At the hearing September 13, the Court will hear those who are in favor of and those who are opposed to the adoption of this report, if there are any who desire to be heard.

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From Common Law Rules to Rules of Court

Laurance M. Hyde
Missouri Supreme Court

FROM COMMON LAW RULES TO RULES OF COURT

LAURANCE M. HYDE†

After almost a century of practice and procedure fixed by statutory codes, this country is about to witness an experiment of nation-wide scope in regulation of these matters by court made rules. The Supreme Court of the United States has assumed responsibility, upon request and authorization of Congress,[1] for making rules of practice and procedure in civil cases for all federal courts. The committee, appointed by the court to prepare these rules, presented its preliminary draft for discussion at the 1936 session of the American Bar Association.[2] This great undertaking makes it worthwhile to consider how these matters came to be so minutely regulated by legislative codes; and what attempts have been heretofore made to regulate them by court made rules.

Our practice and procedure, as well as our substantive law, came to us as a part of the common law of England. It seems to be the popular impression that common law procedure was judge made procedure. It was, in fact, neither a set of rules made by courts nor a code adopted by a legislative body. Instead, it was a conglomeration of legislative enactments, rules and orders of courts, ancient usages, and judicial decisions; the haphazard growth of six centuries. Because it was a patchwork which had been patched until it could not be made suitable for modern conditions by more patching, it was finally superseded, about the middle of the last century in most American jurisdictions, by statutory codes fundamentally changing the whole system. Because the legislatures in this country, which enacted these new codes, retained the exclusive right to make any changes therein, our codes have remained to this time substantially the same as then enacted. In England, although agitation for law reform had been going on since the beginning of the century, the same fundamental changes did not come until about twenty-

† Commissioner, Supreme Court of Missouri.

1. 48 Stat. 1064, 28 U. S. C. A. secs. 723 b and c (1934).
2. See 22 A. B. A. Journal 780 (1936).

five years after the first procedural codes had been adopted here. A statutory code of procedure was finally adopted there, as part of the Judicature Acts of 1873 and 1875[3] but these acts gave to the Supreme Court of Judicature the power to change this code, and the result is that the original codes have been greatly changed and improved.[4]

It is now being urged that our courts may change our procedural codes without legislative authority. Whether this is true or not, consideration of the English governmental system makes it immediately apparent why an act of Parliament was necessary before English courts could have power to change statutory rules of practice and procedure. Under our state and federal Constitutions providing for separation of governmental functions into three coordinate branches, whether the judicial department has this power, without the consent of the legislative department, is at least a different question. Following the precedent of the English Parliament, American legislatures have always exercised authority to make or change procedural rules, and it is not the purpose of this article to discuss its constitutional basis.[5] The history of English procedure does, nevertheless, give us some light both upon inherent powers of courts in this field and the advisability of having them assume this responsibility.[6]

I

The governmental theory of the early Norman kings of England was very simple. "The will of the Prince was the law of the land."[7] Prior to Magna Charta, all governmental powers, executive, legislative, and judicial, could be directly exercised by the King. He was the final court of justice and, of course, his power to prescribe rules of practice and procedure in his courts was unquestioned. He appointed justices to act in his name because it was too great a burden for him to hear all cases. Magna Charta was partly due to dissatisfaction with the way King John conducted his courts, and it contained several provi-

3. 36 & 37 Vict. chap. 66 (1873); 38 & 39 Vict. chap. 77 (1875).
4. Higgins, English Courts and Procedure (1923) 7 Amer. Judicature Soc. Journal 185.
5. For a recent discussion see 1 U. of Mo. L. Rev. 261 (1936).
6. For a recent discussion see Tyler, Origin of the Rule Making Power (1936) 22 A. B. A. Journal 772.
7. 3 Green, *History of England* (1900) chap. 1.

sions concerning that subject.[8] Magna Charta limited the King's powers by bringing another body into the picture; a council, which the King agreed should be asked to give its consent to certain measures (the principal one mentioned was taxation) before they could become effective. This was the origin of that historic legislative body, the Parliament of England. Magna Charta did not grant the King's legislative power to Parliament (as does section 1, article I, of the Constitution of the United States); but the King only agreed not to exercise certain of his legislative powers without its consent. The distinction between governmental powers was probably not even thought of at the time of Magna Charta. However, through intervening centuries "the King in Parliament was established by the English common law as the English Legislature."[9] That is still the theory, if not the actual practice, of the exercise of legislative power in England.[10] Parliament is now perhaps more like a continuous constitutional convention than it is like our legislatures. Parliament also gained the right to require that the King obtain its consent, or the consent of its representatives (which it came to appoint as the King's advisors), in the exercise of his executive and judicial powers, so that finally all government powers were, in fact, exercised only with the advice and consent of Parliament. One House of Parliament still is the court of last resort to settle all questions of law, so naturally the courts get their authority from this source.

Perhaps the worst of the complications of the common law system were the numerous forms of actions. These originated from the ancient requirement of obtaining an original writ out of Chancery stating the nature of the plaintiff's claim, before any suit could be commenced. Blackstone says this was deemed

8. Section 17 provided that common pleas should not follow the king but could be held at a certain place so that people would know where to find the court (pursuant to this provision it was established at Westminster); sections 18 and 19 required regular holding of Assizes in every county four times a year and provided that the session should not end until the business was disposed of; and section 40 contained the famous provisions which prohibited selling, denying, or delaying justice to any man.

9. Dixon, The Law and the Constitution (1935) 51 Law Quarterly Rev. 590.

10. Acts of Parliament still recite: "*Be it enacted by the King's Most Excellent Majesty*, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same."

necessary since "it was a maxim introduced by the Normans, that there should be no proceeding in common pleas before the King's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the Crown, should take cognizance of anything but what was thus expressly referred to their judgment."[11] Therefore, plaintiff's declaration had to be based upon the statement in the original writ. Westminster II[12] made provision for framing new writs to provide for new situations, and the number of forms of action continued to grow. It is said that the early judges were not interested in preventing the increase of forms because in those days they were paid fees according to the number of suits, and by technical construction preventing joinder of similar or related claims into one action they increased their compensation. This demonstrates the necessity of intelligent and faithful administration to make any system work.

In spite of the constantly increasing influence of Parliament, the King's power to appoint judges and remove them at his pleasure lasted until after the overthrow of James II in 1688. During that period, we might have expected to find the courts making all procedural rules. While many such rules were established by court orders and decisions, it is really surprising to find how much of common law procedure was statutory and how early Parliament did enter this field. Chronological Tables of Statutes, Rules and Orders, and cases, which made up common law procedure,[13] show that very soon after Magna Charta, Parliament began to provide rules of practice and procedure by statute. It was soon established that no rule or custom of procedure could prevail against a specific Act of Parliament. "After 1688, no claim was made that any rules of the common law were too fundamental to admit of change."[14] Some procedural statutes were even passed during the reign of King John's successor (his son Henry III); and during the reign of his grandson Edward I, Parliament enacted important procedural statutes, which have remained basic rules of procedure even in America down to our day. Westminster II,[15] among other things, provided for

11. 3 Blackstone's, *Commentaries* (1872) 274.
12. 13 Edw. 1 (1285).
13. See Tidd's *Practice.*
14. Supra, note 9, at p. 593.
15. 13 Edw. 1 (1285).

bills of exceptions as a means to bring matters, not shown by the record proper, before an appellate court, thus making it possible for the first time to obtain appellate review of errors occurring in the course of a trial. Although with modern methods of court reporting, this ancient method is an unnecessarily cumbersome way to make up a record bringing up the trial court's rulings for appellate review, it is interesting to note that Missouri still uses this method of 1279 as the only way to complete the record for appeal.[16] Section 1008, R. S. Mo. 1929, is strikingly similar in language to that passed more than six centuries ago when Edward I ruled England.[17]

The technical rules of bills of exceptions have many times resulted in failure to obtain appellate consideration of important matters on their merits. Especially was this true before 1911 when the present section 1009, R. S. 1929, was amended to permit the allowance of bills of exceptions in vacation at any time prior to the time required by appellate court rules for service of abstracts.[18] When this amendment was made the Legislature declared an emergency to exist due to the fact "that many judgments are affirmed from time to time because the bill of exceptions in the actions in which such judgments are rendered are not filed within the time allowed by the trial court and are not considered upon the merits." It would seem that this emergency might have justified the more drastic remedy of abolishing bills of exceptions. They had, long prior to that time, been abolished in England by the Judicature Act, and the simpler method employed there of appeal by merely giving notice and filing in the appellate court copies of pleadings, documents and evidence. Order 58,[19] provides: "Evidence taken in the court below (orally) * * * shall, subject to any special order, be brought before the Court of Appeal * * * by the production of the judge's notes, or such other materials as the court may deem expedient." Writs

16. Spotts v. Spotts, 331 Mo. 917, 55 S. W. (2d) 977 (1932).
17. 13 Edw. 1: "If the party write the exceptions, and pray that the justices may put their seals to it for a testimony, the justices shall put their seals etc." 2 Tidd's, *Practice* 852. R. S. Mo. 1929 sec. 1008: "Whenever either party shall write his exception and pray the court to allow and sign the same, the person composing the court shall, if such bill be true, sign the same"; as first enacted almost the identical language of the Statute of Westminster II was used, see Vol. 2, R. S. Mo. 1825, p. 631.
18. Law of Mo. 1911, p. 139.
19. Statutory Rules and Orders, Rev. vol. 7.

of error, the only common law method of obtaining appellate review, were likewise abolished in England in 1873. This is another even more ancient relic, still authorized by the laws of Missouri, which has now little but historical reasons for continued existence. Nevertheless, our status continue to carry an elaborate code of rules for the use of writs of error.[20] Surely a party should be able to decide whether he desires to appeal, within a month after final judgment is rendered, but, under our practice (because of the right to commence further proceedings by writ of error), actual finality of all judgments is delayed for a year, even though no appeal is ever taken.

The vitality of old methods to continue existence, and their resistance to change by legislation is remarkable. Procedural rules come to be looked upon as vested rights for purposes of delay and strategy, instead of means for facilitating the dispatch of business. The personnel of a legislature changes with every session; time is short and there are many problems before them which seem to require more immediate consideration; so it is not difficult to postpone action on such matters as procedure. We should, therefore, be able to understand to some extent why the struggle for law reform, in England, began earlier and took longer than it did in this country. No doubt because England became a great commercial and industrial nation before we did, the inconvenience of delay due to inadequate procedure was noticed sooner, but forces in opposition were well organized and had been long entrenched.[21] We started with a new system of courts in a new country and they were not immediately congested.

Our own state was the second in America to adopt a legislative code of procedure. Some idea of the inconvenience and delay resulting from the adherence to common law forms of actions, both in England and America, may be gained from a statement made in 1848 by Judge R. W. Wells in his successful effort to urge the Missouri Legislature to adopt the New York code. It was, as follows:

> "The old system of actions at law abounds in contradictions and absurdities. Thus you have a promissory note; it

20. R. S. Mo. 1929, secs. 1034-1053.
21. See Sunderland, English Struggle for Law Reform (1926) 39 Harv. Law Rev. 725.

has something like a scroll, by way of seal. You sue in assumpsit, and allege what is always required to be alleged in assumpsit, that the defendant *promised* to pay you the amount of the note. Now every word of your declaration may be *true* and present an undeniable cause of action; yet the court will tell you this flourish near the signature is a scroll by way of seal. You cannot sue in assumpsit; it must be *debt*. You should not have said that the defendant *promised* to pay you, which to be sure is the exact truth, but that he was *indebted* to you. * * * Let me amend my declarations and put it right. O no! the system will not permit it; you must go out of court, pay all the costs and begin anew. In many actions, if you tell nothing but the truth, you cannot recover, although you have an undoubted cause of action. You must tell a falsehood or your declaration will be bad! Thus, in assumpsit, you must state a *promise* to pay, although there was none: In Trover, that you lost the property, and it came to the possession of the defendant by *finding*, none of which is true. In trespass, that the injury was committed with *force and arms;* although there was nothing of the kind used. In these cases, the truth would not answer at all. * * * Then come the distinctions between law and equity. If you mistake here, either as plaintiff or defendant, nothing can save you. If you are sued at law, and have an equitable defence, you must let judgment go against you and pay all the costs, and then bring a suit in Chancery. * * * Almost every suit of any importance has to go through both law and equity."[22]

Whatever may be said about our code it is far better than the common law system. Perhaps the earliest legislative attempts to allow the merits to prevail over the technicalities of common law procedure were the Statutes of Jeofails. By one of the first of such statutes (18 Eliz.), the want of an original writ was aided after verdict. By 21 Jac. I, a reversal was not required for variance in form only between original writ and declaration.[23] Early in the nineteenth century, the efforts of Bentham, Brougham, Dickens and many others gradually produced results in England. The pressure for improvement came from the public rather than from the bar.[23a] The first attempt brought about the Hillary Rules of 1834 providing for simplification of pleading.

22. Wells, *Law Reforms, Pleadings and Practice*, 90-91.
23. For a History of these and later statutes see 2 Tidd's *Practice* 823; as to recognition of right to amend see 1 Tidd's, *Practice* 697.
23a. Supra, note 21.

These rules were made by the judges of the Superior Courts and laid before Parliament, but, after receiving its sanction, they were considered statutory.[24] Further progress was made by the common law procedure acts of 1852 and 1860.[25] But a real remedy was not found until the Judicature Act of 1873 consolidated Chancery, Queen's Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce, Bankruptcy and other courts into the Supreme Court of Judicature with both trial and appellate divisions. This act also adopted a code of procedure which like our American codes abolished forms of actions and the distinctions between actions at law and suits in equity. But this code of procedure instead of regulating every detail of procedure left much to be filled in by court rules. More important still, it provided that the rules of practice enacted could be "annulled or altered" by the new court. Limitations on making rules by the court were that "any rule made in the exercise of this power, whether for altering or annulling any then existing rule, or for any other purpose shall be laid before both Houses of Parliament"; that either House by majority vote within 40 days could have any rule annulled; and that no rule should change the mode of oral examination of witnesses, rules of evidence or the laws concerning juries.[26] The court was likewise authorized to make rules for "practice and procedure in all criminal causes."[27]

In 1875 the Judicature Act was amended and a new and much more comprehensive code of procedural rules, with model forms for pleadings, was adopted. It was, however, clearly stated that these rules and all others whether made before or after the act might "be annulled or altered" by the court, but concurrences of the Lord Chancellor, Chief Justice, other designated presiding judges of divisions, and Justices of Appeal were required rather than only a majority of the judges, as provided by the 1873 Act. It was evidently soon found that it was not satisfactory to place the function of rule making entirely upon judges. Rules are now made by a Rules Committee composed of the Lord Chancellor, Chief Justice, Master of the Rolls, President of the Probate Division (which also has jurisdiction of Divorce and Admiralty)

24. 1 Tidd's, *Practice* 675, note 1.
25. 2 *Blackstone* (Cooley's ed. 1872) 1194-5 note.
26. Secs. 68-74 Judicature Act.
27. Sec. 71, Judicature Act.

four other judges of the Supreme Court, two practicing barristers who are members of the Bar Council, and two practicing solicitors. The last eight are appointed by the Lord Chancellor, who with four other members may make rules. Rules must still be laid before Parliament and may be annulled as provided in the original act.[28] It is said that no rule has ever been so annulled.

The first complete code promulgated as Rules of Court was completed in 1883. They have been amended and added to by subsequent sets of rules, but many of them are still in force as then written. The Consolidation Act of 1925 (15 and 16 Geo. V) brought all legislation since 1873 into one act with such changes as were deemed necessary. The Criminal Justice Act of 1925[29] provided similar improvements in the organization and functions of the criminal courts. It is significant that not only was the rule making power, both for civil and criminal cases, continued in the Rules Committee, as above composed, but provision was also made for a council of judges to meet and report annually "on what amendments and additions they think expedient for the better administration of justice." This council is charged "to consider the operation of the Supreme Court of Judicature Consolidation Act, 1925, and the rules of court and the working of the offices of the Supreme Court, and to inquire into any defects which may appear to exist in the procedure of or administration of law in the High Court or the Court of Appeal, or in any inferior court."[30] Thus England not only has provided means for promptly making needed changes in procedure but has now required also regular and frequent investigation to determine such need. Who should be better qualified to perform these functions than lawyers and judges who work by these rules all the time?

It must not be assumed that the method of regulating practice by rules of court was immediately satisfactory to everyone in England, or that all evils were cured at once. It takes time and lessons from experience to make any system work well. The reason that this method will work well is not that courts make no mistakes in regulating procedure by rules but that they have the means of knowing when they have done so, by daily contact with

28. Supreme Court of Judicature Consolidation Act of 1925 (15 & 16 Geo. V); 8 Halsbury's, *Laws of England* (2nd ed. 1933) 595.
29. 15 & 16 Geo. V. c. 86.
30. 8 Halsbury's, *Laws of England* (2nd ed. 1933) 594.

the working of the rules, and they have the power to correct mistakes, as soon as they are observed, by changing rules. After the new system was established, many felt as did one English lawyer, who said: "The only thing I ever knew was special pleading, and the moment I had learned that, the law reformers went and abolished it."[31] In an English work on evidence in 1884, Taylor, a former English Judge, said: "The fusion of law and equity, which was to overthrow such a phalanx of abuses, and to frustrate so many knavish tricks, has resulted not only in confusion, but, to use the vigorous language of our blind bard, in 'confusion worse confounded'."[32] Cooley even quotes Sir Frederick Pollock, the great English law writer, as saying in the early nineties "that for several years (after fusion of law and equity) the latter state of the suitor was worse than the former"; and that "repeated revision of the rules of court and some fresh legislation was needed before the reconstructed machine would work smoothly."[33] The thing that should not be overlooked is that when these conditions developed there was the means at hand to do something about it, *and it was done.*

How well this was done can be better judged now, after sixty years' trial, than was possible in the nineties when it had been in operation for only one-third of that time. Certainly it can now be said that much has been done to eliminate delay and to save judicial time, from construction of procedural technicalities, for the consideration of the merits of cases. It is not possible, without making this discussion too long, to go into the details of the code now in operation there, but the following outstanding features, which show how this is done, might well be mentioned.

First: Trial judges are not required to waste court time for attacks on pleadings, default judgments, or for proof of formal matters, and other details that tend to delay and prolong trials. This is accomplished by proceedings before masters who dispose of cases in which no trial is necessary and narrow the issues to be heard in cases which must go to trial. Some of the methods employed are:

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31. Practice and Procedure (1935) 51 Law Quarterly Rev. 13, 17.
32. 2 *Blackstone* (Cooley's ed. 1872) 1196 n.
33. For a failure of judges to agree upon what some of the early rules meant, which was at first not unusual, see Haunay v. Smwithwaite, 69 L. T. N. S. 677 (1893).

(a) *Simplification of Pleadings.* While pleadings must state sufficient ultimate facts to make a case, or a defense, simple forms are provided to eliminate unnecessary details, and prolixity or other violation of the rules may be penalized by assessment of costs. General denials are not permitted and a party "must deal specifically with each allegation of fact of which he does not admit the truth."[34] Demurrers are not allowed, but a case may, by leave, be set down for trial on the pleadings.[35] These rules of pleading are very effective in eliminating dilatory pleas or concealment of real issues, and tend to materially reduce the disputed issues to be tried. Rules authorizing imposition of costs upon a party who either asserts or denies a fact without any reasonable basis therefor, go far to prevent smoke screens of false issues for strategic purposes.

(b) *Disclosure and Discovery.* Orders specifying the disclosures required are made by a master, after a conference with counsel on what is known as Summons for Directions. These include admission of facts, formally in issue, but not actually disputed (unreasonable refusal to admit them will be penalized by assessment of costs of proof); production of documents for inspection; information as to documents not in the possession of the parties; and examination of witnesses as to material facts (similar to our Missouri deposition practice).[36] As to the results of these preliminary preparations for trial, Professor Sunderland of Michigan University, after a study of English procedure, said: "With the facts on each side mutually understood by both parties when the trial opens, leading questions no longer become objectionable on many features of the case and the witness is brought at once to the point in controversy * * * the necessity for cross examination is greatly reduced, * * * formal admissions of facts, and answers to interrogatories, eliminate many features of the case which with us would call for extensive proof, * * * there is no occasion for that elaborate maneuvering for advantage, that vigilant and tireless eagerness to insist on every objection, * * * which not only prolongs and complicates the

34. Higgins, English Courts and Procedure (1923) 7 Amer. Judicature Soc. Journal 185 at 209-217.

35. Practice and Procedure (1935) 51 Law Quarterly Rev. 13, 17.

36. 23 Halsbury's, *Laws of England* (1st ed. 1912) 143, 145; 7 Amer. Judicature Soc. Journal 217-220 (1923).

trial, but helps to make the outcome of an American lawsuit turn as much upon the skill of counsel as upon the merits of the case."[37]

(c) *Summons for Directions.* An ordinary action in King's Bench or Chancery is commenced by writ of summons, prepared by plaintiff's solicitor, sealed by the proper officer, and indorsed with a statement of the nature of the claim made or relief sought.[38] After service or acceptance, defendant makes appearance, which may be conditional or unconditional, usually within eight days although more time may be given.[39] At one time a Summons for Directions could be had before pleadings, but since 1932 plaintiff usually delivers his statement either with the writ or within ten days after appearance thereto, and defendant delivers his defense within fourteen days after appearance or receipt of plaintiff's statement. Plaintiff may within seven days thereafter deliver a reply.[40] The Summons for Directions is usually the next step, and by it the parties are notified to appear before a master who may then make orders in the case concerning the following matters: Pleadings, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial, and any other interlocutory matter.[41] The parties informally come before the Master, talk over the nature of the case and the procedural steps they think necessary to bring it to an issue. He makes the required orders. How much time in court can be thus saved is apparent.

Second: Great benefits accrue to the commercial community, as well as a saving of judicial time, from having machinery for prompt collection of debts in cases where the claim is not actually controverted. The means is provided for getting an immediate judgment on such a claim without delay or expense. When there is no appearance this is done by allowing default judgment to be entered by a master. If defendant does appear, plaintiff may file affidavit stating the facts of his claim and his belief that there is

37. Sunderland, An Appraisal of the English Procedure (1925) 50 A. B. A. Reports 242, 248.
38. 23 Halsbury's, *Laws of England* (1st ed. 1912) 109-110.
39. 23 Halsbury's, *Laws of England* (1st ed. 1912) 124.
40. Supra, note 31, at p. 18-19.
41. 23 Halsbury's, *Laws of England* (1st ed. 1912) 136; 7 Amer. Judicature Soc. Journal 204 (1923).

no defense. He may then have summary judgment unless defendant can make affidavit showing a fair probability of a real defense. Generalities, conclusions and sham defenses for delay are of no avail. However, if a master refuses leave to defend, defendant is protected by the right to appeal to a judge in Chambers. If the judge grants leave, plaintiff cannot appeal and the case proceeds for trial, but if he refuses it, defendant can still appeal to the Court of Appeals. Those appeals are immediately decided.[42] This speedily disposes of a great number of cases seeking only to put in operation the legal machinery for collecting debts.

Third: A remedy is provided for immediately determining rights dependent upon the construction of deeds, wills, contracts, and statutes by Declaratory Judgments settling the rights of parties before they have acted thereunder and before any damage has been sustained from such action. Concerning this practice, Professor Sunderland has said: "The service rendered by the courts under the declaratory judgment practice is quite analagous to that rendered by modern hospitals which diagnose and treat diseases in their incipient stages and thereby prevent the development of more dangerous conditions. So useful and effective has this practice become in England that several judges of the High Court are frequently engaged simultaneously in making declarations of rights, and the size of the dockets which they dispose of is eloquent testimony of the speed with which the work can be done.[43] Since our last Legislature adopted a Declaratory Judgments Act[44] precedents and procedure therefore under the English practice should now be of particular interest to Missouri lawyers.

Fourth: The conduct of a trial is under the control of a judge, who has life tenure, and who, although chosen by the leaders of his political party in control of Parliament, is selected only if he has really demonstrated legal ability. Englishmen believe the judge's control is impartially exercised for the purpose of finding

42. 23 Halsbury's, *Laws of England* (1st ed. 1912) 134: Sunderland, supra, note 37, at 244; 7 Amer. Judicature Soc. Journal 223; 51 Law Quarterly Rev. 15 (1935).

43. Supra, note 37, at p. 246.

44. Laws of Mo. 1935, p. 218. See for discussion Note, Declaratory Judgments with Recent Missouri Developments (1935) 21 ST. LOUIS LAW REVIEW 49.

the truth of the controversy so that the merits may prevail. This belief is shown by the fact that most civil cases there are now tried before the court without a jury.[45]

Fifth: The rules of procedure are flexible. They not only can be changed by the method authorized by Parliament, but they are meant to be applied according to the circumstances of the case. Discretionary powers are granted to the judges throughout the rules to give special leave for additional time and to allow amendments; and it is provided that "non-compliance * * * with any rule of practice * * * shall not render any proceedings void unless the court or judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."[46] Violation of procedural rules does not prevent a consideration on the merits but may bring assessment of costs as a penalty. Costs do not follow the result of the case, but are awarded as the court deems to be proper.

Sixth: Appeals are promptly heard and decided. New trials are few and can be granted only by the court of appeal and they may be limited to specific issues instead of a retrial of the whole case. Writs of error, bills of exceptions, and assignments of error have been abolished. Written or printed briefs are not required and appeals are heard, on copies of the records of the trial divisions, upon oral argument and the decision is usually announced then and there. The trial and appellate divisions are part of the same court and sit in the same court house, except where cases are heard in assizes or county courts, but since there is no local venue of actions, most important civil cases are tried in London. Order 58[47] provides that all appeals "shall be by way of rehearing" on "the whole or any part of any judgment or order * * * whether final or interlocutory"; that the appellate court has "discretionary power to receive further evidence upon questions of fact"; ("without special leave upon interlocutory applications" but "upon appeals from a judgment after trial * * * on special grounds only and not without special leave"); that the court of appeal shall have power to draw inference of

45. See secs. 99-101 Consolidated Act of 1925, 15 & 16 Geo. V.
46. Order 70, 7 Statutory Rules and Orders Rev. 179.
47. 7 Statutory Rules and Orders Rev. 142.

fact and to give any judgment and to make any order which ought to have been made"; and that "such powers may also be exercised in favor of all or any of the respondents or parties although such respondents or parties may not have appealed." The court of appeal, therefore, has supervisory power over the trial divisions at all stages of the case and this provides safeguards against arbitrary or erroneous action before rights are prejudiced thereby. Furthermore, the purpose of appellate review after judgment is to afford a full rehearing on the merits and end the case. A complete new trial of a case once tried is very unusual. Of course a system of appeals from all interlocutory orders grafted onto our present system would result here in endless delay. It does not do so under the English system because such appeals are quickly decided on summary hearing and because unreasonable appeals are penalized by assessment of costs. The English bar has been educated not to attempt to gain advantage by mere delay.

An idea of the kind of procedural system, that the English method may ultimately make possible, can be gained from a statement, which the writer heard made by Lord Wright, Master of the Rolls (as such he is presiding judge of the Chancery Division of the Supreme Court of England, and a member of the Rules Committee), at the Harvard University Law School's recent conference on the Future of the Common Law. He said, in substance, that it was now hoped that the rules could soon be further simplified and rewritten; that the courts could then stop taking any space in opinions to discuss the construction and application of procedural rules; and that they would work smoothly enough so that it would only be necessary for members of the bar to become familiar with how the court applied them, through experience in their practice. Thus procedural rules would truly become working tools of lawyers to bring controversies to prompt decision on the merits, rather than (as some of ours have become) obstacles to overcome before they can get their cases decided. It seems to an American lawyer that much progress has already been made toward this goal. A comparison of points of law decided in recent English cases, with those ruled in cases in any jurisdiction in this country, very strikingly shows that procedure is now rarely discussed in English decisions, but that

our books are filled with rulings upon how our statutory procedural rules are to be construed and applied.

II

The writer does not hold the opinion that the English system is perfect, or that everything which works well there would necessarily do as well here. Nevertheless, a system of procedure which does work well in a great commercial and industrial nation, where the fundamental principles of our laws and institutions were developed, is worthy of our examination and study, especially in view of increasing dissatisfaction with our own. We may justly say that England did not have satisfactory procedure for modern times until she came to us for the idea of abolishing common law forms of action and removing the distinctions between law and equity. We may now well consider whether the method adopted there, of procedural rules made by courts (or councils or committees under their guidance and control), will better enable our system of code pleading to be brought up to date and to continue in the future to keep pace with the times, so that it will function efficiently in the increasingly intricate and changing conditions, created in business and industry by modern science and invention. The English people, during the last six centuries, have perhaps endured about as much bad government as any other people, but they have to their credit much worthwhile accomplishment, in modern good government, due to ability to learn from their experience, and we could profit by it too. A recent English review of their own system points out these results: "That of every hundred actions commenced by a writ in the Supreme Court only one comes to trial"; that "the other ninety-nine" by means of the interlocutory administration of details by masters "undergo a process of elimination"; and that this method usually disposes of cases without a trial in one of the following ways: "The defendant * * * may pay out on the writ"; the case may end because disclosure may reveal that "defendent may have no defence" or "plaintiff no real case"; or "parties may come to terms" because "Master or Judge suggests a *via media* which leads to the amicable settlement of the action."[48] To waste judicial time by dilatory tactics intended

48. Practice and Procedure (1935) 51 Law Quarterly Rev. 13, 23.

only to delay action, in cases which could be thus disposed of, in an economic loss to everybody.

It cannot be fairly denied that during the last quarter of a century, many new problems arising from modern industrial and urban conditions have been unable to get quick and efficient treatment in our courts. Because of popular demand for a forum for prompt settlement of these new questions, new administrative tribunals have been created. It is indicative, of the popular attitude toward the ability of lawyers and courts to dispatch business promptly by the methods they have been using, that members of these new tribunals are not usually required to be learned in the law, and that they are allowed to determine their own procedure. Laymen are authorized to decide questions of law and determine facts without requiring that they be guided by knowledge or instructions concerning the law. Usually their determination of facts is made binding upon courts in whatever judicial review is provided, so that there is no appeal from or review of decisions of these laymen as to many ultimate facts, in the determination of which the application of rules of substantive law are necessarily involved. Many relations of employer and employee, public utilities and their customers, railroads and shippers, and rights and duties of other agencies of transportation have been largely removed from the courts. Measures are being proposed to also place in the hands of law administrative bodies such matters as injuries caused by operation of motor vehicles, labor relations, insurance, and many other problems of commerce, industry and agriculture. This development has only begun. Where it will lead to we cannot know.

It is especially worthy of notice, that acts creating such administrative tribunals usually emphasize the provisions that hearings shall be simple and summary and that these bodies shall have the power to make their own rules of practice and procedure. In our Workmen's Compensation Commission Act,[49] provides: "All proceedings before the Commission or any commissioner shall be simple, informal and summary. * * * Except as herein otherwise provided, all such proceedings shall be according to such rules and regulations as may be adopted by the Commission." In our Public Service Commission Act,[50] provides:

49. R. S. Mo. 1929, sec. 3349.
50. R. S. Mo. 1929, sec. 5144.

"All hearings before the Commission shall be governed by rules to be adopted and prescribed by the Commission." Similar examples will be found in other states and in Federal legislation.

Why do not legislatures, in creating administrative tribunals, provide them with a complete statutory code of practice and procedure? Undoubtedly it is because they do not want to hamstring and delay their action, impair their efficiency, and limit their ability to promptly determine the merits of questions entrusted to them for solution. Why then are the courts kept in strait-jackets of strict statutory procedural codes which provide so many means for delaying and evading a determination of the merits of cases? Surely lawyers and judges are not less capable than laymen of making rules of procedure, which will make possible prompt determination of cases on the merits. At least they have shown, in England, that they can do so when given the opportunity and responsibility.

Let it be recognized that the adoption of our statutory codes marked a tremendous advance, although they carried over and continued many ancient common law practices. Their great defect was that, in failing to provide adequate means for improvement, they froze the rules of practice and thereby lost the opportunity to continue that advance so well begun. Procedural codes made for conditions of the times of circuit riders of the eighteen forties could not be expected to function, in all respects, for prompt and efficient dispatch of business under modern urban industrial conditions. Rules of substantive law, which establish fundamental rights and determine the principles upon which they are based, determine *what rights* an individual shall have. They should not be changed without most careful and extended deliberation and then only when such a change is a vital necessity to prevent future injustice to others. Rules of procedure only determine *how and when* a dispute about such rights shall be brought to an issue. Whenever a rule operates to prevent bringing such a dispute promptly to an issue it ought to be abolished. Whenever a rule can be improved to bring the disputed question to definite issues in a clearer way within a more reasonable time it ought to be amended. It is often a complete denial of the benefit of a substantial right to unduly delay a decision concerning it, because changed conditions may make the right valueless before it can be established.

New means of communication and transportation have speeded up all business, and new procedural methods are required to promptly transact the great volume of judicial business arising from these new relations and new conditions of today. There would be more legal business for lawyers to transact if this could be done, because unquestionably the surest way for lawyers to have more business is for courts and lawyers to handle business that comes to them promptly and efficiently. People will not tolerate forever any system which delays unreasonably the determination of questions they seek to have decided. If courts do not function without vexatious delay, they will find means to have them decided outside of the courts. Surely, lawyers ought to see that what is in the public interest is in their own interest. Surely, if this matter is given intelligent consideration, both lawyers and laymen would see, from its results in England and its adoption in our federal courts, that regulation of practice and procedure by rules of court is worth a trial in our state courts. Of course the details of a system fitted to our needs would differ from those of England where ten times the population of this state live in an area little more than half its size. If both lawyers and laymen desire that it be tried, it will not be difficult to devise either the means of putting it into operation or the broad outlines to be followed in its development. Will our bar lead such a movement for improvement, or will it overlook this great opportunity for leadership toward worthwhile accomplishment to fulfill a pressing public need?

RADIN

Law Dictionary

By

PROFESSOR MAX RADIN,
Ph.D., LL.D., LL.B.

Late Professor of Law at the University of California at Berkley

Edited by

LAWRENCE G. GREENE, LL.B.

Member of New York and Federal Bars

OCEANA PUBLICATIONS, INC.
DOBBS FERRY, N. Y.

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law writ used in England before 1833, to partition land.

PARTNER. A member of a **partnership.**

PARTNERSHIP. An association of two or more persons in a common enterprise in such a way that each may act as agent for the others, and each is liable for the debts incurred in the carrying out of the enterprise. The contract between them will, at common law, be assumed, unless other provision is made, to require joint management and an equal division of the profits and losses. The partnership will be dissolved by death, **bankruptcy** or withdrawal of any partner. This will be the case even if a fixed period is agreed upon. The effect of such an agreement may be that a withdrawing partner will be held to have breached his agreement.

The partnership at common law was not treated as an entity separate from the partners. Following mercantile practice, modern statutes have to a limited extent recognized the partnership as an entity, but never to the extent of relieving a partner from partnership debts, except in the case of a limited partnership. For tax purposes, a partnership is considered an entity to the extent that it is required to file a partnership return or report, although the partners are individually liable.

A number of states have adopted a Uniform Partnership Act in an attempt to codify the existing law on the subject. See Rowley, Modern Law of Partnership.

PARTNERSHIP ACT. An English Act of 1865 (called Bovill's Act) making extensive changes in the law of partnership. In 1890, a Partnership Act was enacted in England which codified the partnership laws in a manner similar to the Uniform Partnership Act in the United States.

PART OWNERS. Owners in common or jointly of the same property; especially said of a vessel.

PART PAYMENT. Payment of a part of a debt due. This satisfies the debt pro tanto, and **tolls** the **Statute of Limitations** for the balance. It will also satisfy the **Statute** of **Frauds** in the case of sale of goods.

PART PERFORMANCE. The partial carrying out of an obligation to do something, which will in some cases prevent, in equity, the defense of informality in the making of the contract. See **Frauds, Statute of.**

PARTY. 1. A person who takes part in a legal transaction, especially in an agreement. The various parties are described as "parties of the first part," "of the second part," etc.

2. A litigant, whether as plaintiff, defendant or intervener.

3. A group of persons, organized for political purposes, and recognized by law in the United States as entitled to nominate candidates for office. The legislature has the constitutional power to regulate such political parties, so far as they involve the rights of a citizen freely to select his party and to participate in its organization.

PARTY IN INTEREST. 1. In the law of procedure, a party in interest is a person who has a beneficial interest in the result of the action or who might be injured as the result thereof, and who is entitled to maintain an action. Edwards' Est., 234 Wis. 40, 289 N.W. 605.

2. In some jurisdictions, evidentiary rules prohibit a party in interest from testifying as to transactions with a decedent. Jackson's Est., 200 Wash. 116, 93 P. (2) 349.

PARTY-WALL. The wall which is a common wall to two adjoining buildings so that it forms part of the structure of both. It generally stands on the dividing line. Both owners have rights in it. Usually they own it as tenants in common. They may also own it in **severalty,** in which case each will have an easement in the other. Or one may own it separately, in which case the other will have an easement in it. Nabers v. Wise, 241 Ala. 612, 4 S. (2) 149.

PARVISE. Another name for moot.

PASS. 1. To transfer, as in the case of title to property of any kind; or, intransitely, to be transferred, as in the phrases, "the title passes" or "the estate passes."

2. To accept as valid or to allow, a report or an account. With the preposition "on" or "upon," it is equivalent to "decide" or "determine."

3. A free ticket to the use of certain privileges, as to ride on a railroad. Such passes are subject to restrictions contained in The Federal Interstate Commerce Act.

PASSAGE. 1. The privilege of transportation or transit, especially by water. 2. The voyage itself, especially by water. 3. The money paid for passage.

PASSENGER. One who is carried by a public carrier from one place to another, whether for consideration or without it. The master, mate and crew of a ship,

Journal of the Senate

Number 2—Special Session **Wednesday, November 28, 1979**

The Senate was called to order by Senator Williamson for the purpose of conducting the order of business of introduction and reference of resolutions, memorials, bills and joint resolutions pursuant to Rule 4.3. Senator Gordon represented the Committee on Rules and Calendar.

INTRODUCTION

By Senator Gordon (by request)—

SB 23-C—A bill to be entitled An act relating to ad valorem taxation; providing legislative intent with respect to equalization of funding efforts among school districts; amending s. 236.081(4), Florida Statutes; providing duties of Department of Revenue and Commissioner of Education with respect to computation of required local effort under the Florida Education Finance Program; providing for consideration of the school district's assessment level; providing a limitation; providing definitions; amending s. 236.25(1), Florida Statutes; providing requirements with respect to computation of the district school tax; amending s. 195.098(1) and (2), Florida Statutes; providing duties of the Assessment Administration Review Commission with respect to complaints relating to the determination of the level of assessment; providing for actions by the school board or the Commissioner of Education to contest such determination; amending s. 195.096, Florida Statutes; providing requirements with respect to review of county assessment rolls by the Division of Ad Valorem Tax; revising time periods; providing for publication of results; providing for determination of projected levels of assessment for certain counties; providing requirements with respect to audits of the administration of ad valorem tax laws by the Auditor General; amending s. 195.097, Florida Statutes; providing requirements and procedures with respect to notification by the executive director of the department to property appraisers regarding defects in assessment rolls; providing duties of property appraiser upon receipt of an administrative order relating thereto; providing for continuing supervision; revising time periods and providing for an extension of deadlines; providing an appropriation; providing an effective date.

—was read the first time by title and referred to the Committee on Ways and Means.

By Senator Gordon (by request)—

SB 24-C—A bill to be entitled An act relating to ad valorem taxation; creating s. 193.1145, Florida Statutes, providing intent; providing for interim assessment rolls under specified circumstances; specifying the valuations to be shown on such assessment rolls; requiring taxing units to levy provision millage rates upon such assessment rolls and to certify the rates to the property appraiser; providing for the applicability of certain laws to such rates; providing duties of property appraisers, tax collectors, and circuit court clerks with respect to such interim assessment rolls; specifying certain notice in tax bills based on such assessment rolls; providing for the recomputation of millage rates and for the reconciliation of interim and approved assessment rolls for certain purposes; providing for and restricting billings and refunds based upon such reconciliation; authorizing delays in supplemental billing or refunding; providing a form for notice of supplemental bills or refunds; providing for review of interim assessments; providing for the applicability of certain delinquent tax provisions to delinquent provisional taxes based upon such interim assessment rolls; providing that the recomputation of millage rates shall not affect the amount of revenues to school districts, counties and municipalities; providing for the effect of provisional millage rates levied by multi-county taxing authorities; amending s. 197.012, Florida Statutes, specifying an alternative date by which tax collectors must collect delinquent taxes; creating s. 197.0125, Florida Statutes, authorizing certain delays in time requirements relating to the collection of or administrative procedures regarding delinquent taxes; amending s. 120.57(1)(b), Florida Statutes, conforming provisions relating to formal proceedings to the act; creating s. 120.571, Florida Statutes, providing uniform procedures for decisions relating to the levy, assessment or refund of certain taxes, tax roll approvals, and county assessment levels; including the Comptroller as a party in matters involving refunds; providing that the hearing officer's order shall constitute final agency action; providing for judicial review; adding a new subsection (3) to s. 120.65, Florida Statutes, creating a bureau within the Division of Administrative Hearings of the Department of Administration to conduct hearings relating to such taxes, tax roll approvals, and county assessment levels; adding a new subsection (2) to s. 120.69, Florida Statutes, providing for the enforcement of final agency action on such tax matters; providing for severability; providing an effective date.

—was read the first time by title and referred to the Committee on Ways and Means.

By Senator Gordon (by request)—

SJR 25-C—A joint resolution proposing a revision of Article VII of the State Constitution relating to finance and taxation.

—was read the first time by title and referred to the Committee on Ways and Means.

The Senate adjourned to reconvene at 9:00 a.m.

The Senate was called to order by the President at 9:00 a.m. A quorum present—40:

Mr. President	Gordon	Maxwell	Spicola
Anderson	Gorman	McClain	Steinberg
Barron	Grizzle	McKnight	Stuart
Carlucci	Hair	Myers	Thomas
Chamberlin	Henderson	Neal	Tobiassen
Childers, D.	Hill	Peterson	Trask
Childers, W. D.	Holloway	Poole	Vogt
Dunn	Jenne	Scarborough	Ware
Fechtel	Johnston	Scott	Williamson
Frank	MacKay	Skinner	Winn

Prayer by Senator Trask:

Father, as we begin this day we pause to give you thanks for your great love and the great blessings that you've given us.

Father, we raise to you this morning heavy hearts because of the world situation. We ask that you will be with our fellow countrymen around this world who find themselves in tense situations and find their lives in danger. We ask you to give a special measure of wisdom to the leaders of this country as they cope with these very complex problems.

Father, we ask you to guide us now as we deal with the problems of this state. Give us wisdom to find the right answers, give us courage to do the right thing, and strength and peace as we go back among our constituents and face the everyday problems.

Father, now as we get on with this day we ask that you would become more real to each of us because we know that in you we find all the answers for all the problems of all mankind. We ask these things in the name of Christ. Amen.

REPORTS OF COMMITTEES

The Committee on Judiciary-Civil recommends the following pass: SB 20-C with 2 amendments

The bill was referred to the Committee on Rules and Calendar under the original reference.

The Committee on Judiciary-Civil recommends the following pass: SB 11-C with 3 amendments

The bill was referred to the Committee on Ways and Means under the original reference.

The Committee on Commerce recommends the following pass: SB 19-C

The Committee on Judiciary-Civil recommends the following pass: SB 21-C

The Committee on Ways and Means recommends the following pass:

SB 11-C
SB 17-C with 3 amendments
SB 18-C with 6 amendments

The bills contained in the foregoing reports were placed on the calendar.

Senator Barron moved that the provision of Rule 4.17 which is in effect during a regular session, be adopted which permits the chairman of the Committee on Rules and Calendar or his designee, the minority leader or his designee, and two other members of the committee designated by the chairman to submit each day a special order calendar determining the priority for consideration of bills. The motion was adopted without objection.

MOTIONS RELATING TO COMMITTEE REFERENCE

On motion by Senator Barron, by two-thirds vote SJR 20-C was withdrawn from the Committee on Rules and Calendar.

The President declared the Senate in recess at 9:08 a.m. until 9:35 a.m.

The Senate was called to order by the President at 9:35 a.m. A quorum present.

By permission the following report was received:

REPORTS OF COMMITTEES

The Committee on Rules and Calendar submits the following bills to be placed on the Special Order Calendar for Wednesday, November 28, 1979:

SB 18-C	SB 11-C	SB 21-C
SB 19-C	SJR 20-C	SB 17-C

Respectfully submitted,
Dempsey J. Barron, Chairman

SPECIAL ORDER

SB 18-C—A bill to be entitled An act relating to governmental auditing; amending s. 11.45(1)-(4), (8), Florida Statutes, as amended; providing definitions; replacing references to post-audits with references to financial audits; providing for selection of accountants to audit county agencies; creating the County Government Audit Trust Fund in the Department of Banking and Finance; providing circumstances for reimbursement of county agencies for certain costs of auditing; providing an appropriation; providing an effective date.

—was read the second time by title.

The Committee on Ways and Means offered the following amendments which were moved by Senator Johnston and adopted;

Amendment 1—On page 7, on line 22 strike "$12,700,000" and insert: $6,700,000; on line 24 strike "$12,700,000" and insert: $6,700,000; on line 27 strike "1981" and insert: 1980

Amendment 2—On page 7, line 21, strike "1982" and insert: 1981

Amendment 3—On page 7, line 19, after "any" insert: reasonable

Amendment 4—On page 4, line 1, strike the period and insert: according to the following procedure:

(i) In each non-charter county, an Auditor Selection Committee shall be established consisting of the county officers elected pursuant to Article VIII, section 1(d), Florida Constitution, and one member of the Board of County Commissioners or its designee.

(ii) The Auditor Selection Committee shall review requests for proposals for auditing services required pursuant to Chapter 79-183, Laws of Florida.

(iii) Following their review of qualifications, abilities of professional personnel, past performance, willingness to meet time and budget requirements, and recent, current and projected work loads of auditors or auditing firms desiring to perform the annual independent audit required pursuant to Chapter 79-183, Laws of Florida, the Auditor Selection Committee shall rank in order of preference, not less than three firms which they shall recommend to the Board of County Commissioners.

(iv) If fewer than three firms respond to a request for proposals for the annual independent audit, the Auditor Selection Committee may recommend a single firm to the Board of County Commissioners.

(v) The Board of County Commissioners may accept or reject the recommendation of the Auditor Selection Committee. If the Board of County Commissioners accepts the recommendation of the Auditor Selection Committee, it shall begin negotiations pursuant to Section 16 of Chapter 79-202, Laws of Florida. If the Board of County Commissioners rejects the recommendation of the Auditor Selection Committee, it shall direct the Auditor Selection Committee to review the proposals submitted and submit another recommendation. Should the Board of County Commissioners reject the recommendation of the Auditor Selection Committee, the selection process shall continue in accordance with this act until a recommendation is accepted.

Amendment 5—On page 7, between lines 21 and 22, insert a new section 3: All agencies, other than state agencies as defined herein, and all district school boards and district boards of trustees of community colleges shall have the power to have a performance audit or postaudit of their accounts and records by an independent certified public accountant retained by them and paid from their public funds.

Renumber subsequent sections.

Amendment 6—On page 1 in title, strike line 7 and insert: establishment of an auditor selection committee in noncharter counties and providing duties thereof with respect to selection of qualified auditors to audit county

On motion by Senator Johnston, by two-thirds vote SB 18-C as amended was read the third time by title, passed, ordered engrossed and then certified to the House. The vote on passage was:

Yeas—36

Mr. President	Gorman	Maxwell	Steinberg
Anderson	Grizzle	McKnight	Stuart
Barron	Hair	Myers	Thomas
Carlucci	Henderson	Neal	Tobiassen
Childers, D.	Hill	Peterson	Trask
Childers, W. D.	Holloway	Poole	Vogt
Fechtel	Jenne	Scarborough	Ware
Frank	Johnston	Scott	Williamson
Gordon	MacKay	Spicola	Winn

Nays—1

Skinner

Votes after roll call:

Yea—Chamberlin, Dunn, McClain

SB 19-C—A bill to be entitled An act relating to banking; amending s. 659.06, Florida Statutes; authorizing the establishment of branches by merger anywhere in the state with certain restrictions; providing for the establishment of not more than two branches per calendar year in a county in which a branch is established by merger; providing certain considerations and procedures for the granting of a branch application; requiring written notification to the Department of Banking and Finance prior to operating a bank facility; providing for the conversion of certain military facilities into branches; providing an effective date.

—was read the second time by title.

Senator Scarborough moved the following amendment:

Amendment 1—On page 6, line 1, insert new Section 3:

No bank may charge an individual more than 12% interest annually.

Renumber subsequent section.

Point of Order

Senator Barron raised a point of order that the amendment was not germane to the bill. The President ruled the point well taken and the amendment out of order.

On motion by Senator Frank, by two-thirds vote SB 19-C was read the third time by title, passed and certified to the House. The vote on passage was:

Yeas—35

Mr. President	Gorman	Maxwell	Stuart
Anderson	Grizzle	McKnight	Thomas
Barron	Hair	Myers	Tobiassen
Chamberlin	Henderson	Neal	Trask
Childers, D.	Hill	Peterson	Vogt
Childers, W. D.	Holloway	Poole	Ware
Fechtel	Jenne	Scott	Williamson
Frank	Johnston	Skinner	Winn
Gordon	MacKay	Steinberg	

Nays—2

Carlucci	Scarborough

Votes after roll call:

Yea—Dunn, McClain, Spicola

SB 11-C—A bill to be entitled An act relating to public defenders; amending s. 27.51(4), Florida Statutes; providing that the public defender of the tenth judicial circuit handle all appeals arising within the district comprising the Second District Court of Appeal; providing that the public defender for the seventh judicial circuit handle all appeals within the district comprising the Fifth District Court of Appeal; removing the requirement that funds for certain staff and other expenses incurred by certain public defenders be appropriated on an annual basis; providing an effective date.

—was read the second time by title.

The Committee on Judiciary-Civil offered the following amendments which were moved by Senator Hair and adopted:

Amendment 1—On page 1, line 29, strike "*tenth* ~~twelfth~~" and insert: twelfth

Amendment 2—On page 2, line 11, strike "~~annually~~" and insert: annually

Amendment 3—Strike on page 1, all of lines 4 through and including line 13 and insert: the public defender for the seventh judicial circuit handle all appeals within the district comprising the Fifth District Court of Appeal;

On motion by Senator Hair, by two-thirds vote SB 11-C as amended was read the third time by title, passed, ordered engrossed and then certified to the House. The vote on passage was:

Yeas—37

Mr. President	Gorman	McKnight	Thomas
Anderson	Grizzle	Myers	Tobiassen
Barron	Hair	Neal	Trask
Carlucci	Henderson	Peterson	Vogt
Chamberlin	Hill	Poole	Ware
Childers, D.	Holloway	Scarborough	Williamson
Childers, W. D.	Jenne	Scott	Winn
Fechtel	Johnston	Skinner	
Frank	MacKay	Steinberg	
Gordon	Maxwell	Stuart	

Nays—None

Votes after roll call:

Yea—Dunn, McClain, Spicola

SJR 20-C—A joint resolution proposing an amendment to Section 3, Article V of the State Constitution, relating to the organization and jurisdiction of the Supreme Court.

—was read the second time.

The Committee on Judiciary-Civil offered the following amendment which was moved by Senator Hair and failed:

Amendment 1—On page 2, line 9, after the word "*Commission*" insert: *, or its successor,*

Senator Hair moved the following amendment which was adopted:

Amendment 2—On page 2, strike all of line 9 and insert: *review action of statewide agencies*

Legislative Intent

At the request of Senator Myers, by direction of the President the following statements were published in the Journal:

Senator Myers: To clarify the term "statewide agency" so that we have a clear expression of legislative intent in the record on this, I want to ask Senator Hair a question so that he can give me the answer and perhaps put that in the Senate Journal.

Mr. President: Does the Senator yield?

Senator Hair: I yield.

Senator Myers: Senator Hair, to clarify the matter, is it true that the term "statewide agency" will comport with the term "state agency" in chapter 120 insofar as review of orders of the Public Service Commission are concerned to the District Court of Appeal now that you are changing it, or to the Supreme Court with respect to electric, telephone and gas cases?

Senator Hair: That's correct.

Senator Myers: So that even though you have a difference of terminology between "statewide agency" in the constitutional language and the definition designated as "state agency" in chapter 120, insofar as review of Public Service Commission orders are concerned to respective courts they are one and the same?

Senator Hair: That's correct.

Senator Myers: I would respectfully request that this be shown in the Senate Journal as a direct statement of legislative intent, so we have a clear understanding, since there is a difference in terminology between "statewide agency" as used in this Constitutional amendment, and the definition "state agency" under Chapter 120.

The Committee on Judiciary-Civil offered the following amendment which was moved by Senator Hair and adopted:

Amendment 3—On page 2, lines 11 and 12, strike *"and shall review agency action of the Florida Commission on Ethics"*

Senator Hair moved the following amendment which was adopted:

Amendment 4—On page 2, line 16, strike "~~that affects a class of constitutional or state officers,~~" and insert: , *or* that *expressly* affects a class of constitutional or state officers,

On motion by Senator Hair, by two-thirds vote SJR 20-C as amended was read the third time in full as follows:

A joint resolution proposing an amendment to Section 3, Article V of the State Constitution, relating to the organization and jurisdiction of the Supreme Court.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 3 of Article V of the State Constitution is hereby agreed to and shall be submitted to the electors of this state for approval or rejection at a special election to be held in conjunction with the presidential preference primary election in March 1980; and which, if approved, shall take effect April 1, 1980.

ARTICLE V

JUDICIARY

SECTION 3. Supreme court.—

(a) ORGANIZATION.—The supreme court shall consist of seven justices. Of the seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of his original appointment or election. Five justices shall constitute a quorum. The concurrence of four justices shall be necessary to a decision. When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.

(b) JURISDICTION.—The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from ~~orders of trial courts and~~ decisions of district courts of appeal *declaring invalid a state statute or a provision of the state constitution* ~~initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.~~

(2) When provided by general law, shall hear appeals from final judgments ~~and orders of trial courts imposing life imprisonment or final judgments~~ entered in proceedings for ~~the validation~~ of bonds or certificates of indebtedness *and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.*

(3) May review ~~by certiorari~~ any decision of a district court of appeal *that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or* that *expressly* affects a class of constitutional or state officers~~, that passes upon a question certified by a district court of appeal to be of great public interest~~, or *that expressly and directly conflicts* ~~that is in direct conflict~~ with a decision of *another* ~~any~~ district court of appeal or of the supreme court on the same question of law~~, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court, and may issue writs of certiorari to commissions established by general law having statewide jurisdiction~~.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) ~~(4)~~ May issue writs of prohibition to courts ~~and commissions in cases within the jurisdiction of the supreme court to review,~~ and all writs necessary to the complete exercise of its jurisdiction.

(8) ~~(5)~~ May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) ~~(6)~~ May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

~~(7) Shall have the power of direct review of administrative action prescribed by general law.~~

(c) CLERK AND MARSHAL.—The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by general law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 3

Proposing an amendment to the State Constitution to modify the jurisdiction of the Supreme Court.

On motion by Senator Hair, SJR 20-C as amended passed by the required constitutional three-fifths vote of the membership, was ordered engrossed and then certified to the House. The vote on passage was:

Yeas—34

Mr. President	Grizzle	McKnight	Thomas
Anderson	Hair	Neal	Tobiassen
Barron	Henderson	Peterson	Trask
Chamberlin	Hill	Poole	Vogt
Childers, D.	Holloway	Scarborough	Ware
Childers, W. D.	Jenne	Scott	Williamson
Fechtel	Johnston	Skinner	Winn
Frank	MacKay	Steinberg	
Gorman	Maxwell	Stuart	

Nays—2

Carlucci	Gordon

Votes after roll call:

Yea—Dunn, McClain, Myers, Spicola

SB 21-C—A bill to be entitled An act relating to a special election to be held on March 11, 1980, pursuant to Section 5 of Article XI of the State Constitution, for the approval or rejection by the electors of a joint resolution amending Section 3 of Article V of the State Constitution relating to the judiciary; providing for publication of notice and for procedures; providing an effective date.

—was read the second time by title. On motion by Senator Hair, by two-thirds vote SB 21-C was read the third time by title, passed by the required constitutional three-fourths vote of the membership and was certified to the House. The vote on passage was:

Yeas—34

Mr. President	Childers, W. D.	Hair	Johnston
Anderson	Fechtel	Henderson	MacKay
Barron	Frank	Hill	Maxwell
Chamberlin	Gorman	Holloway	McKnight
Childers, D.	Grizzle	Jenne	Neal

Peterson	Skinner	Tobiassen	Williamson
Poole	Steinberg	Trask	Winn
Scarborough	Stuart	Vogt	
Scott	Thomas	Ware	

Nays—1

Carlucci

Votes after roll call:

Yea—Dunn, McClain, Myers, Spicola

On motion by Senator Hair, consideration of SB 17-C was deferred.

INTRODUCTION

On motion by Senator Holloway, by the required constitutional two-thirds vote of the membership, SCR 27-C was admitted for introduction.

By Senators Barron, Holloway, W. D. Childers, Skinner, Thomas, Henderson and Hill—

SCR 27-C—A concurrent resolution commending the Masons of Florida.

—was read the first time in full. On motions by Senator Holloway, by two-thirds vote SCR 27-C was placed on the calendar and by two-thirds vote read the second time by title, adopted, and certified to the House. The vote on adoption was:

Yeas—39

Mr. President	Gordon	McClain	Steinberg
Anderson	Gorman	McKnight	Stuart
Barron	Grizzle	Myers	Thomas
Carlucci	Hair	Neal	Tobiassen
Chamberlin	Henderson	Peterson	Trask
Childers, D.	Hill	Poole	Vogt
Childers, W. D.	Holloway	Scarborough	Ware
Dunn	Jenne	Scott	Williamson
Fechtel	Johnston	Skinner	Winn
Frank	MacKay	Spicola	

Nays—None

On motion by Senator Vogt, by the required constitutional two-thirds vote of the membership, SB 28-C was admitted for introduction.

By Senator Vogt—

SB 28-C—A bill to be entitled An act relating to the Department of Health and Rehabilitative Services; providing an appropriation for a fixed capital outlay project to the Office of Assistant Secretary for Operations - District Administration of the Department of Health and Rehabilitative Services; providing an effective date.

—was read the first time by title and referred to the Committee on Ways and Means.

On motion by Senator W.D. Childers, by the required constitutional two-thirds vote of the membership, SB 29-C was admitted for introduction.

By Senators W.D. Childers and Tobiassen—

SB 29-C—A bill to be entitled An act relating to Escambia County; amending s. 8.2, chapter 79-453, Laws of Florida; authorizing the Escambia County Civil Service Board to exempt from the provisions of chapter 79-453, Laws of Florida, employees employed by the Escambia County Public Health Trust; providing an effective date.

Proof of publication of the required notice was attached.

—was read the first time by title and referred to the Committee on Rules and Calendar.

On motions by Senator W.D. Childers, by two-thirds vote SB 29-C was withdrawn from the Committee on Rules and Calendar and by two-thirds vote placed on the special order calendar.

On motion by Senator W.D. Childers, by two-thirds vote SB 29-C was read the second time by title and by two-thirds vote was read the third time by title, passed and certified to the House. The vote on passage was:

Yeas—39

Mr. President	Gordon	Maxwell	Steinberg
Anderson	Gorman	McKnight	Stuart
Barron	Grizzle	Myers	Thomas
Carlucci	Hair	Neal	Tobiassen
Chamberlin	Henderson	Peterson	Trask
Childers, D.	Hill	Poole	Vogt
Childers, W. D.	Holloway	Scarborough	Ware
Dunn	Jenne	Scott	Williamson
Fechtel	Johnston	Skinner	Winn
Frank	MacKay	Spicola	

Nays—None

Vote after roll call:

Yea—McClain

On motion by Senator Barron, by the required constitutional two-thirds vote of the membership, SB 30-C was admitted for introduction.

By Senator Barron—

SB 30-C—A reviser's bill to be entitled An act relating to the Florida Statutes; reenacting ss. 120.63(2)(a), 121.052(1)(b), (d), 215.47(1), 319.22(2), 656.17(3)-(5), and 659.18(3)-(5), Florida Statutes; restoring provisions inadvertently omitted from republication in the amendatory process.

—was read the first time by title and referred to the Committee on Rules and Calendar.

On motion by Senator Gordon, by two-thirds vote SJR 13-C was withdrawn from the Committee on Rules and Calendar.

On motions by Senator Gordon, the rules were waived and the Committee on Ways and Means was granted permission to consider the following bills today: the Governor's Tax Package (SJR 25-C, SB-24-C, SB 23-C) or take up House-passed Package, if it is available to the committee; SJR 7-C, SJR 13-C, SB 6-C, SJR 10-C, SJR 15-C, SB 16-C, SB 28-C, proposed SB 22-C by Senator Peterson relating to remodeling, renovation and maintenance of educational facilities.

CO-INTRODUCERS

Senators McClain and Spicola SJR 4-C and SB 5-C

CORRECTION AND APPROVAL OF JOURNAL

The Journal of November 27 was corrected and approved.

On motion by Senator Barron, the Senate adjourned at 10:28 a.m. to convene upon call of the President, no earlier than 10:00 a.m., Thursday, November 29.

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"THE FEDERAL RULES OF CIVIL PROCEDURE"

Discussion by W. F. HIMES, Tampa, Florida
Before Annual Convention, Hollywood, May 6

The Supreme Court of the United States, on December 20, 1937, adopted 86 new rules designated therein as "Federal Rules of Civil Procedure," which will constitute, when these rules take effect, a code of pleading, practice and procedure in the District Courts of the United States. These rules will not take effect until three months after the adjournment of the present session of Congress, and in no event earlier than September 1, 1938. The rules will regulate the institution, conduct and disposition of what have heretofore constituted actions at law and suits in equity. They will govern actions instituted in or removed to the Federal Courts after their effective date, and will also apply in actions then pending except insofar as the Court in a particular case may order otherwise. The rules will not apply to proceedings in admirality or in bankruptcy, nor will they apply in habeas corpus or in quo warranto except upon appeal. And certain specially named proceedings, largely of statutory authorization, are excepted therefrom.

The new rules provide that they shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein.

Hereafter, there is to be but one form of action, to be known as a "civil action." The pleadings that have heretofore been incident to suits in equity and actions at law are abolished. The pleadings in the new form of action will consist chiefly of the complaint and answer, with motions allowable for certain restrictive purposes. Radical changes will take place in the method by which issues are reached and disposed of and cases are reviewed upon appeal. A lawyer well equipped for the present practice but unfamiliar with the new practice will be as inadequately prepared to conduct litigation under the new rules as a military genius of the middle ages to direct military operations in the present day.

Before attempting such a general discussion of the new rules as the time allotted to me makes permissible, it is quite appropriate that some consideration be given to the historical background which preceded the adoption of the rules. It has been said that no other example of such nationwide participation and cooperation on the part of both the Bar and the Judiciary is afforded by the history of this or any other country as preceded and resulted in the adoption of the new rules.

At the present time and throughout a large number of years, the conduct of suits in equity in the Federal Courts has been regulated by the rules adopted for that purpose by the Federal Supreme Court, while the practice, pleadings and modes of proceedings in actions at law have conformed to the form of practice, pleading and modes of proceeding existing in like causes of the State in which the District Courts were held. The occasion for this has been because of the fact that the Federal Supreme Court, from time to time, under the rule-making power with which such court was invested by Congress, adopted rules governing equity causes. The Federal Supreme Court never having attempted to adopt rules governing actions at law, Congress, by its Act of June 1, 1872, prescribed that the practice in such actions governing in the respective states should apply in such actions in the District Courts sitting in these states.

The existing diversity in practice and procedure in the Federal Courts in the various states resulted in a determined effort to abolish such diversity and for the substitution of a new uniform system of procedure which would be simple, inexpensive and expeditious. From 1912 until 1934 various acts were placed before Congress intended to accomplish the result referred to. During this twenty-year period, the acts pending before Congress were championed by the American Bar Association, the Bar Associations of various states, and by eminent jurists and members of the legal profession, among whom conspicious examples were the late Thomas W. Shelton of Virginia, Judge Henry D. Clayton of Alabama, Frank B. Kellogg, Elihu Root, and William H. Taft. However, none of the proposed measures became a law, and Congress did not act until it passed the act of June 19, 1934, championed by the Honorable Homer S. Cummings, the present Attorney General of the United States, which invested the Federal Supreme Court with the authority pursuant to which that Court adopted the new rules, with only Mr. Justice Brandeis disapproving. The act of Congress last referred to contained two sections, by the first of which the Supreme Court was given power to prescribe general rules to govern the conduct of civil actions at law, and by the second of which the Court was invested with the larger power of uniting the general rules prescribed by that Court for cases in equity with those for actions at law so as to secure "one form of civil action and procedure for both," with the proviso that in such union the right of trial by jury guaranteed by the 7th Amendment to the Federal Constituion should be preserved inviolate.

The Supreme Court apparently deliberated for an approximate period of twelve months after the passage by Congress of the Act above referred to, as to whether the Court thereunder should undertake only to adopt a uniform system of rules to govern actions at law in the Federal Courts, or whether it should undertake the adoption of such general rules for cases in equity and actions at law as would secure one form of civil action and procedure for both. On June 3, 1935, the Supreme Court, by its order of that date, determined upon the latter course, and appointed to assist the Court in such undertaking an Advisory Committee to serve without compensation, consisting of fifteen members, of which William D. Mitchell, former Solicitor General of the United States, was named Chairman, and the membership of which Committee included a number of eminent members of the legal profession and instructors of law at outstanding universities of the country, and of which Committee the Honorable Scott M. Loftin, of Florida, was made a member.

Some ten drafts were made by this Committee from time to time, of the proposed rules, and three of such drafts were printed and given wide distribution in order that the Committee might have the benefit of suggestions and criticisms from members of the Bar, the Judges of the various courts, and instructors of law at the various universities. In the course of its work, the Committee was aided by an able reporter and research staff, and extensive study and consideration was given throughout a period of years to the merits and demerits of the existing equity practice, pleading and practice as it existed at common law, and of the various reforms inaugurated in judicial procedure in the several states of the Union and in the English practice. The new rules, as finally adopted by the Federal Supreme Court on December 20, 1937, therefore represent a symposium of pleading, practice and procedure concurred in and found from experience by eminent authority as best calculated to bring about an inexpensive and expeditious administration of the law in civil actions.

The members of the legal profession in Florida will be interested to know from what sources aid may be obtained in becoming familiar with the new rules.

The rules themselves constitute,—

House Document No. 460, obtainable from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C. (Price 15c);

Notes to the Rules of Civil Procedure, March, 1938, obtainable from Advis-

ory Committee on Rules for Civil Procedure, Supreme Court of the United States Building, Washington, D. C. (No charge).

The following works are now in process of publication:

The New Federal Rules of Civil Procedure, Annotated, by Byron F. Babbitt, of the St. Louis Bar, Reviser of Rose's Fed. Jurisdiction and Procedure, Hopkins Federal Equity Rules; published by Thomas Law Book Company, St. Louis. Price $6.50.

Simpkin's Federal Practice, The Harrison Company of Atlanta, Ga. Price $15.00.

The New Federal Rules of Civil Procedure, by Judge Palmer D. Edmunds, Callaghan & Co. Price $10.00.

Moore's Federal Practice Under the New Federal Equity Rules, by James William Moore, Chief of the Research Staff of the Advisory Committee appointed by the Supreme Court, and Joseph M. Friedman, Assistant on the Research Staff; published by Matthew Bender & Company. Price $25.00. The following is a brief topical analysis of the rules,—

FEDERAL RULES OF CIVIL PROCEDURE (86)

I.	Scope of Rules—One form of action	(2)
II.	Commencement of Action; Service of Process, Pleadings, Motions and Orders	(4)
III.	Pleadings and Motions	(10)
IV.	Parties	(9)
V.	Depositions and Discovery	(12)
VI.	Trials	(16)
VII.	Judgment	(10)
VIII.	Provisional and Final Remedies and Special Proceedings	(8)
IX.	Appeals	(5)
X.	District Courts and Clerks	(4)
XI.	General Provisions	(6)
	Forms, 27.	
	Index.	

The provisions of the new rules in many respects are in conflict with and will either repeal, modify or extend existing provisions of law. That this should take place was provided for by Congress in the Act delegating power to the Supreme Court to adopt the rules. That the delegation of such power by Congress to the Court could lawfully be done was settled in Wayman et al v. Southard, et al, 10 Wheaton 1, decided in 1825, where Chief Justice Marshall, speaking for the Court, affirmed the right of Congress to delegate to the courts the power of altering by rules the modes of proceedings in suits established by law. Therefore, the new rules having been expressly authorized by Congress and approved by the Supreme Court, there remains no debatable question as to the binding force and validity of the provisions found therein. While the provisions of the Conformity Act, 28 U. S. C. A., par. 724, have in a very large measure been superseded by the provisions of the new rules, yet not so in their entirety, as illustrated by the provisions continuing the remedies afforded under state laws for the seizure of person or property to secure the satisfaction of judgments recovered or ultimately to be entered. I shall therefore make the bold statement that regardless of the merit which is inherent in the new procedure, a greater rather than a lesser knowledge of the law will hereafter be required of qualified and successful practitioner.

Preliminary to such discussion as is now permissible of the salient features of the new procedure, it is of the utmost importance to bear constantly in mind the greatly

increased power and the tremendously enlarged discretion with which the judges of the district courts of the United States will be invested, which may be exercised at almost every step in the cause, and for which in many instances no yardstick is prescribed. In the hands of a learned, wise and impartial judge, this authority will doubtless expedite the due disposition of causes, but in the hands of an unequipped, arbitrary or biased judge it may prove the weapon of a tyrant.

ARRIVING AT THE ISSUES

The new rules will consign to the Hall of Relics weapons of offense and defense with which the members of the Bar have heretofore conducted mighty legalistic encounters. Bills in equity, supplemental bills, bills of revivor, declarations, pleas, demurrers, rejoinders, rebutters and sur-rebutters, exceptions, writs of scire facias, and writs of mandamus are to become matters of memory only.

There is to be but one form of action, to wit, a civil action. In ordinary action the only pleadings permissible will be the complaint and the answer thereto, except that if the answer asserts a counter-claim a reply thereto will be permissible. Motions will be allowed to raise the following defenses:

(1) Lack of jurisdiction over subject matter.
(2) Lack of jurisdiction of person.
(3) Improper venue.
(4) Insufficiency of process.
(5) Insufficiency of service of process.
(6) Failure to state a claim upon which relief can be granted.

Motions will be permitted to require more definite allegations and to supply bills of particulars. Motions to strike will be permitted to reach redundant, immaterial, impertinent or scandalous matter found in any pleading. Two innovations of great significance are introduced by the new rules, to wit, the filing of cross claims and third party complaints. A cross-claim will be a pleading by which one party is permitted to allege and enforce against a co-party a claim arising out of the transaction or occurrence that is the subject matter either of the original action or of any counter-claim therein.

A third party complaint will be a pleading which may be filed by a defendant against one not a party to the cause alleging that such third party is or may be liable to the party filing the cross complaint or to the plaintiff in the action for all or some part of plaintiff's claim against the party filing the third party complaint. Where cross claims or third party complaints are filed, answers and counter-claims thereto will be in order.

The new rules require all counter-claims to be asserted in the answer of the defendant which arise out of the transaction or occurrence which is the subject-matter of the plaintiff's claim and which do not require for their adjudication the presence of third parties over whom the court cannot acquire jurisdiction. It is permissive for a party defendant to assert as counter-claims in his answer any and all existing claims against the plantiff whether or not they arise out of the transaction or occurrence which is the subject matter of the opposing party's claim.

Since in one action the plaintiff may combine all claims which the plaintiff has against the defendant, whether of legal or equitable character or both, and the corresponding right obtains with respect to the answer of the defendant, it becomes readily apparent that an action under the new rules has a potential scope not heretofore existing and wholly unknown to any practice which has obtained in Florida.

Another innovation which the new rules will inaugurate is a pre-trial conference which the court may call of the attorneys for the parties for a simplification of the issues, and for expediting the trial. A more detailed discussion of this feature has been reserved for another speaker.

When the summons is served, a copy of the complaint must be served with it. Copies must be served of all pleadings and motions thereafter filed in the cause. The return date of the summons will be twenty days after service thereof. The court may appoint a third party to make service of the summons or any subpoena to witnesses.

Another innovation introduced by the new rules is the privilege given a party to make an offer at any time ten days or more before trial to allow judgment to be taken against him for money or other property or to the effect specified in the offer with costs then accrued. If the offer be accepted, judgment accordingly will be entered. If the offer be refused and the party to whom the offer was made fails to obtain a judgment more favorable than that offered, the party to whom the offer was made is denied the right to recover costs accruing after the offer made.

PARTIES

Because under the new rules, a civil action may embrace all claims between the parties, whether of legal or equitable nature or both, and third party complaints are permitted to be filed, it becomes obvious for these reasons alone that the necessary and proper parties to such an action may become more numerous than heretofore allowable.

The new rules have other features, however, which must be reckoned with in determining who may be necessary or permissible parties to an action. Such features, among others, are,—

1st: All persons are permitted to join in one action if they assert any right to relief jointly or severally in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action.

2nd: All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action.

3rd: A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.

4th: Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not a ground for objection to the joinder that the claims do not have a common origin or are not identical but are adverse.

5th: The right of third persons to intervene is so expanded as to make the same permissible when the applicant's claim or defense and the main action have only a question of law or fact in common.

6th: Where a plaintiff has a claim heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined and enforced in a single action; e.g., a plaintiff may state a claim for money and a claim to have set aside a conveyance fradulent as to him without having first obtained a judgment on the money demand.

7th: Provision is made which permits a partnership or other incorporated association to sue and be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or Laws of the United States.

DEPOSITIONS AND DISCOVERY

No aspect of the new rules is of greater significance or importance than that which deals with the taking of depositions and the obtaining of discovery. The rights and liabilities of parties to an action are greatly extended by the new rules. The district courts are invested with powers not heretofore possessed by them. Provision is made

for the taking of depositions before action, during the pendency of an action, and while the action is on appeal. A party may be compelled to submit to a physical or mental examination by a physician. The party so examined is entitled upon request to be furnished a copy of the report of the examining physician. Thereafter, the examined party, if requested, is required to furnish any similar examination which he may previously or thereafter have caused to be made touching the same physical or mental condition.

A party may be compelled to produce and permit the inspection and copying or photographing by or on behalf of another party of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things which constitute or contain evidence material to any matter involved in the action which are in his possession, custody or control.

A party to an action is given the right to serve notice upon any other party to admit the genuineness of any documents described in and exhibited with the request, and the opposing party is held to admit the genuineness thereof unless such party within a prescribed time files a sworn statement denying the genuineness of the document or setting forth detailed reasons why he cannot truthfully admit or deny such matters.

The practice obtaining in Florida is in effect adopted and somewhat extended whereby any party may serve upon an adverse party written interrogatories, or if a public or private corporation or partnership or association, then to any officer thereof.

The rules make provision for the pre-trial examination of a party to the cause respecting claims, defenses and persons having knowledge of relevant facts, which I shall not discuss but will be the subject of a more detailed discussion by another speaker.

TRIAL

The new rules assure trial by jury only in those cases where that right is guaranteed by the Seventh Amendment to the Federal Constitution. Even in such cases the right to trial by jury is waived if not demanded by a party to the cause not later than ten days after the filing of the last pleading directed to the formation of the issues. In all other cases, it is permissible for the Court in its discretion to order a trial by jury of all or any of the issues, either that the verdict of the jury may be advisory only or have the same effect as if trial by jury had been a matter of right.

Separate trials are permissible of any claim, cross-claim, counter-claim, third party claim, or of any separate issue, or of any number of claims, cross-claims, counter-claims, third party claims or issues.

Not more than two alternate jurors may be empaneled in any case to replace jurors who may become unable or disqualified to perform their duties before the jury retires to consider its verdict. Parties are permitted to stipulate that a jury may consist of any number less than twelve, or that a verdict of a stated majority of the jurors shall be taken as the verdict of the jury.

Special verdicts are authorized. Also the submission to the jury of written interrogatories to be answered by them in connection with the general verdict. In case of inconsistency between special findings and the general verdict, the practice to be followed by the court is prescribed.

The charge of the court is to follow the arguments of counsel, but where a written request for charges is submitted, the court is required to advise counsel of its rulings thereon prior to the arguments.

Exceptions to the rulings of the court are no longer required.

In cases tried before the court without a jury, the court is required to make separate findings of fact and conclusions of law thereon, and such findings are subject to amend-

ment or to be supplemented by additional findings after judgment, and the final judgment may be amended accordingly. The appointment of general and special masters is authorized and proceedings before them are regulated, but it is prescribed that a reference to a master shall be the exception and not the rule.

JUDGMENTS

One of the innovations of the greatest importance which will be brought about by the new rules is that in a single case there may be a number of different judgments entered at different times. Where more than one claim is involved in an action, the court at any stage, upon a determination of the issues material to a particular claim and of any counter-claims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. Such judgment terminates the action with respect to the claim disposed of and permits the action to proceed as to the remaining claims. In case of the entry of a separate judgment, the court may or may not stay its enforcement until the entry of a subsequent judgment or judgments in the action. Like proceedings are prescribed as to counter-claims, cross claims and third party claims.

The new rules confer jurisdiction upon the court to entertain applications at any time after the institution of an action for a summary judgment in favor of or against all or any part thereof, and to render such summary judgment. Such summary judgments may be applied for by motion, and upon a hearing thereof the court may consider the pleadings, depositions and admissions on file, together with affidavits, and upon a finding by the court that there is no genuine issue, the moving party is entitlted to summary judgment. Although the court upon application for summary judgment determines that judgment should not be rendered upon the whole case or for all the relief asked and that a trial is necessary, the Court may nevertheless make an adjudication of the facts established and as to which there is no substantial controversy, and may limit further proceedings to a determination of the issues as to which the Court finds there is a substantial controversy.

Motions for new trials are permitted and ten days are allowed for the filing thereof, except that a longer time is allowed for such motions when based upon the ground of newly discovered evidence.

Rule 61 is of such significance and importance that it is quoted in full:—

"HARMLESS ERROR"

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

APPEALS

In appeals from the district courts to the circuit courts of appeals, among the changes made are—

(1) The necessity for the allowance of the appeal and the issuance and service of a citation is dispensed with.

(2) Parties interested jointly, severally or otherwise in a judgment, may join in an appeal therefrom; or without summons and severance, any one or more of them may appeal separately, or any two or more may join in an appeal.

(3) The testimony may be incorporated in the record in the form of question and answer.

(4) It is required that there be omitted from the transcript all matter not essential to the decision of the questions presented by the appeal, including formal parts of all exhibits. Documents are required to be abridged by omiting all irrelevant and formal portions thereof.

(5) In place of the ordinary transcript of record, provision is made for the use, with the approval of the district court, of an abbreviated record, which shall consist of a copy of the judgment appealed from and of the notice of appeal, and a statement of the points relied on by the appellant, and a signed statement by counsel showing how the questions arose and were decided in the district court, and setting forth only so many of the facts alleged and proven as are essential to a decision of the involved questions by the appellate court.

In concluding what of necessity has been an unsatisfactory and inadequate discussion of the new rules in view of the time allowed for that purpose, let me lay emphasis upon the importance of becoming familiar with the rules, let me stress the fact that the rules are the result of a non-political, non-partisan and unselfish effort on the part of both the Bench and the Bar to inaugurate a simplified, expeditious and inexpensive procedure for the disposition of causes in the Federal Courts, and let me express the hope of us all that in actual application the rules will accomplish the intent and purpose for which they were adopted.

JOHN DICKINSON OF ST. PETERSBURG NEW SECRETARY-TREASURER

At a meeting of the Executive Council held in Tallahassee on May 30 consideration was given to the selection of a secretary-treasurer of the Association. After much discussion of various possible selections, the President appointed John Dickinson of St. Petersburg, as provided by Article 14 of the Constitution, which appointment was unanimously approved by the Executive Council.

All members of the Executive Council were present except Richard H. Hunt, who was detained in Miami.

In line with two resolutions passed at the Hollywood convention, the president was authorized to appoint a committee of five to study the question of public relations, formulate a program and report the same back to the Council with all convenient speed.

In considering the report of the Conference of Delegates made to the Hollywood convention the Council voted to adopt Recommendation 3 and the president instructed to appoint a committee of five for the purpose of studying the advisability of sponsoring legal institutes and clinics.

Recommendation 5 in reference to the Lien Law was referred to the Committee of Judicial Administration and Legal Reform and the president instructed to contact the Title Association and Real Estate Board requesting that they sponsor what is regarded as necessary amendments to the present Lien Law. The president was also instructed to appoint a committee of five to cooperate with the Junior Bar Law Book Committee studying the question of an early revision of the Florida Statutes sought to be published in convenient form.

A resolution was adopted authorizing the president to appoint a committee of five to study the Common Law rules, particularly in reference to the advisability of working out a plan whereby they can be made to conform with the new Federal rules. Another committee to study married women's rights was authorized with the understanding that no legislation would be recommended for the 1939 Legislature.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed via the Florida Courts E-Filing Portal on February 28, 2020, and an electronic copy has been furnished to the following counsel of record:

Kansas R. Gooden, Esq.
BOYD & JENERETTE, P.A.
11767 S. Dixie Hwy., #274
Miami, FL 33156
Telephone: (305) 537-1238
Facsimile: (904) 493-5658
kgooden@boydjen.com
Attorney for Petitioner

Marc Schechter, Esq.
ROBINSON PECARO & MIER, P.A.
501 Shotgun Road, Suite 404
Sunrise, FL 33326
Telephone: (954) 761-9002
Facsimile: (954) 252-7199
mschechter@lawdrive.com
kristen@lawdrive.com
Attorney for Defendant/Petitioner

Kevin D. Franz, Esq.
BOYD & JENERETTE, P.A.
1001 Yamato Road, Suite 102
Boca Raton, FL 33431
Telephone: (954) 622-0093
Facsimile: (954) 622-0095
kfranz@boydjen.com
Attorney for Petitioner

Douglas F. Eaton, Esq.
EATON & WOLK, P.L.
2665 So. Bayshore Drive, Suite 609
Miami, Florida 33133
Telephone: (305) 249-1640
Facsimile: (786) 350-3079
deaton@eatonwolk.com
cgarcia@eatonwolk.com
Attorney for Respondent

Brett M. Rosen, Esq.
GOLDBERG & ROSEN, P.A.
1111 Brickell Ave., Suite 2180
Miami, FL, 33131
Telephone: (305) 374-4200
Facsimile: (305) 374-8024
pleadings@goldbergandrosen.com
bmr@goldbergandrosen.com
Attorney for Plaintiff/Respondent

Amber Stoner Nunnally, Esq.
Jason Gonzalez, Esq.
SHUTTS & BOWEN LLP
215 S. Monroe Street, Suite 804
Tallahassee, Florida 32301
Telephone: (850) 241-1717
jasongonzalez@shutts.com
anunnally@shutts.com
Attorneys for Amici Curiae Chamber of Commerce of the United States of America and Florida Justice Reform Institute

William W. Large, Esq.
FLORIDA JUSTICE REFORM INSTITUTE
210 S. Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 222-0170
william@fljustice.org
Attorney for Amici Curiae Chamber of Commerce of the United States of America and Florida Justice Reform Institute

John C. Hamilton, Esq.
LAW OFFICE OF JOHN HAMILTON OF TAMPA, P.A.
P.O. Box 1299
San Antonio, Florida, 33576
jhamlawyer@gmail.com
Attorney for Amici Curiae Drs. Michael Foley and John Shim

Patrick A. Brennan, Esq.
HD LAW PARTNERS, P.A.
P.O. Box 23567
Tampa, Florida, 33623
brennan@hdlawpartners.com,
maizo@hdlawpartners.com
Attorney for Amici Curiae Drs. Michael Foley and John Shim

/s/ *Bryan S. Gowdy*
Attorney