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Appellate Procedure

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APPELLATE PROCEDURE

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RIGHT TO APPEAL

Contingent on prepayment of costs.—Florida Statutes Section 59.09, requiring prepayment by the original plaintiff of all costs which have accrued as a condition to the right of appeal, refers to such costs as have been judicially determined, and a judgment dismissing a case "at the cost of the plaintiff" is not a sufficient adjudication.[1] This statute has usually been liberally construed so as to advance or preserve the right to appeal. This decision is consistent with another,[2] which also held that the statute is not applicable when the plaintiff is a cross-appellant.

No right to review when not aggrieved.—A temporary injunction was issued enjoining the telephone company from discontinuing its service to the plaintiff. While the real parties in interest abided further proceedings, the Railroad and Public Utility Commission, a defendant, sought review by certiorari. The petition was denied as the petitioner was not aggrieved.[3]

FINAL JUDGMENTS AND DECREES APPEALABLE

What are.—Where the trial court "Ordered and Adjudged that final judgment herein be and the same is hereby entered for and on behalf of the defendant," it was held to be a final and appealable judgment. In a subsequent judgment of approved form and substance it was ordered that the plaintiff "take nothing by his suit" and that the defendant "go hence without day." The court held that even if the first adjudication was not a final judgment, there was no error in denying the appellant leave to file a third amended declaration.[4] The appeal was from the second and formal judgment, and it was dismissed because it was not timely taken: since the time commenced to run from the entry of the first "judgment."

Final judgment sufficient in form not sufficient in fact.—The plaintiff's motion to strike one of several pleas was denied. Thereafter, insisting on the merits of his motion to strike, he invited the court to enter a final judgment without prejudice to his right to appeal. The court entered a judgment that the plaintiff "take nothing by his suit" and that the defendant "go hence without day." Upon appeal from the "final judgment,"

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1. McNeil v. Marks, 61 So.2d 648 (Fla. 1952).
2. Thomas Awning Co. v. Morgan, 57 So.2d 427 (Fla. 1952).
3. King v. Brown, 55 So.2d 187 (Fla. 1951).
4. Wolf v. Cleveland Electric Co., 58 So.2d 153 (Fla. 1952).

a motion to dismiss it was granted for want of a final judgment. The motion of the appellant-plaintiff for entry of a final judgment recited that it would be impossible for him to recover at the trial since the trial court had held a specified defense sufficient in law. The opinion, which was en banc, recites that there are other defenses "the validity of which have never been questioned."[5] The defenses seem to have been treated collectively and not severally.

Appealable orders at law.—An order denying a timely motion to set aside a default and a final judgment was held to be an appealable judgment.[6] The motion to set aside was filed within the time allowed for appeal from the final judgment, but the appeal was not from the final judgment.[7]

Death and Review

Death before appeal.—When an appeal is taken after the death of a defendant who had procured a favorable judgment, without the action being revived first, the appeal will be dismissed on motion.[8] The Florida Statutes provide:

> No appeal shall be dismissed for want of proper parties if the notice of entry of appeal shall identify with reasonable certainty the judgment or decree sought to be reviewed. In case of numerous parties it shall be sufficient designation to identify the cause of its usual title in the inferior court and the abbreviation 'et al' may be used to designate parties other than those expressly named. To this end the proceedings upon appeal shall be taken and considered as a step in the cause.[9]

Federal Rule 73(b) provides that the clerk shall mail notification of the filing of the notice of appeal. The mailing of this notice "is sufficient notwithstanding the death of the party or his attorney prior to the giving of the notification."

Saving Point of Adverse Ruling

Objection to jury charges.—The provision of Common Law Rule 39(b) that "no party may assign as error the giving of any instruction unless he objects thereto at such time" has no application when the party did not know that such a jury charge had been requested, and no conference was held as prescribed by the Rule.[10] Assignments of error relating to instructions to the jury will not be considered where the charges given

5. Hoskins v. Jackson Grain Co., 59 So.2d 24 (Fla. 1952).
6. Roberts v. South Seas Hotel, 64 So.2d 314 (Fla. 1953).
7. Compare the effect of motions for new trial in Kent v. Marvin, 59 So.2d 791 (Fla. 1952).
8. Alford v. Moore, 48 So.2d 754 (Fla. 1950); *accord*, Ropes v. McCabe, 47 Fla. 289, 36 So. 715 (1904).
9. Fla. Stat. § 59.30 (1951).
10. Tampa Transit Co. v. Corbin, 62 So.2d 10 (Fla. 1953).

were neither objected to, nor where instructions requested were contrary to those given.[11]

Necessity of adverse ruling.—Assignment of errors not based on an adverse ruling or "timely objection" will not be considered on appeal.[12] The assignment of errors relied on for reversal, questioned the sufficiency of the evidence to support the verdict. No motion for new trial was made or ruled upon. The assignment of errors were not grounded on a judicial act, therefore, there was no judicial error, even if the jury erred.

Waiving points for review.—A defendant served with process by a deputy constable cannot raise questions of sufficiency of service on appeal for the first time on the grounds of unconstitutionality of the law authorizing appointments of the deputy constable.[13]

Entry of Appeal

Sufficiency of.—An appeal must be from an appealable order, decree or judgment. A notice of appeal of "the above styled cause" was held insufficient.[14]

Manner of acquiring jurisdiction does not comprehend manner of exercising jurisdiction.—Florida Statutes Section 33.11, granting the circuit court jurisdiction to review judgments of the civil court of record "in the same manner and with like powers" as the Supreme Court has to review judgments of the circuit court was held to be a manner of proceeding, and not to relate to the composition of the judges of the court.[15] This decision overrules *Provident Life & Accident Ins. Co. v. Mather*,[16] which reversed the circuit court, because three, instead of four, circuit judges composed the court on an appeal from the civil court of record.

Statutory certiorari treated as appeal.—A pure appeal from an interlocutory order in chancery will be treated as a certiorari appeal by authority of Florida Statutes Section 59.45, which was patterned after 28 United States Code Section 2103, authorizing the United States Supreme Court to treat improvident appeals from a state court as a petition for certiorari. The Federal Statute is not applicable to improvident appeals from a court of appeals.

Time, motion for new trial; effect of.—A judgment at law is not final for purposes of appeal until a timely motion for new trial is disposed

11. Eli Witt Cigar & Tobacco v. Matatics, 55 So.2d 549 (Fla. 1951).
12. Jarkesy v. Daniel, 58 So.2d 516 (Fla. 1952).
13. Greene v. Alexander Film Co., 65 So.2d 53 (Fla. 1953).
14. Longo v. Aliweiss, 65 So.2d 556 (Fla. 1953).
15. Ferry v. Ferreria, 51 So.2d 426 (Fla. 1951).
16. 157 Fla. 661, 26 So.2d 814 (1946).
17. Kent v. Marvin, 59 So.2d 791 (Fla. 1952).
18. *But see* Ludman Corp. v. Moyer, 64 So.2d 424 (Fla. 1953); Beck v. Littlefield, 65 So.2d 722 (Fla. 1953). These destructions might well be eliminated for the better administration of justice.

of.[17] This follows a long line of decisions, but, in equity, the filing of a motion for rehearing does not postpone the time for appeal.[18]

Time, petition for rehearing; effect of.—Unless the chancellor orders a stay of proceedings, the filing of a petition for rehearing, in an equity case, will not toll the running of the time limited for review by certiorari.[19]

Time for appeal tolled by petition for rehearing.—A petition for rehearing of a final decree, which grants no affirmative relief, tolls time for appeal.[20]

Time for appeal, calculation of end, Sunday.—When time for taking an appeal is 60 days,[21] and it is taken 61 days after entry of the decree, this is a timely appeal since the 60th day was Sunday.[22]

Time, when commences.—A statute,[23] limiting the time for a statutory certiorari appeal to 60 days from "date of order," is construed to mean 60 days from time the order is recorded.[24]

Certiorari denied means appeal affirmed.—On at least three occasions, it has been held that when review by statutory certiorari is petitioned for, a denial of the petition is to affirm the lower court. A negative act is construed to have an affirmative effect.

The statute covering review of interlocutory decrees in equity is as follows:

> *Interlocutory orders and decrees in equity.* Review of interlocutory orders and decrees in equity, including those after final decree, may be by proceedings in the nature of certiorari in the Supreme Court. This subsection shall not be construed as precluding the review of such orders and decrees on appeal from the final decree, if found more expedient. The Supreme Court may by rule regulate proceedings under this subsection.[25]

It is further provided:

> *Denial of petition, effect.* The denial of a petition shall have the force and effect upon the act order, decree or judgment of which review is sought only to the extent that the court may affirmatively and expressly act, but the mere denial of such petition shall have no greater force and effect than to deny the further exercise of jurisdiction.[26]

In *Mc Closky v. Johnson*,[27] the decision of Division B was "certiorari denied without opinion," and in this, a subsequent appeal of the same case, Division A of the court stated (per Justice Thomas):

19. Ludman Corp. v. Moyer, 64 So.2d 424 (Fla. 1953).
20. Beck v. Littlefield, 65 So.2d 722 (Fla. 1953).
21. See Florida Equity Rule 32(a), which is patterned after Federal Rule 6(a).
22. Carlile v. Spofford, 65 So.2d 545 (Fla. 1953).
23. FLA. STAT. § 59.08 (1951).
24. Berry v. Robson, 65 So.2d 739 (Fla. 1953).
25. FLA. STAT. § 59.02(3) (1951).
26. FLA. STAT. § 59.02(1) (1951).
27. 43 So.2d 725 (Fla. 1949).

> We will not reexamine the sufficiency of the bill as some of appellant's questions imply we should for the reason that Division B of this court denied a petition for certiorari to review the order of the chancellor denying a motion to dismiss directed to the pleading after it was amended, but we will confine our observations to the merits of the objection we have described, the sufficienecy of the offer to overcome it, and related matters.[28]

In the case of *Ludman Corp. v. Moyer*,[29] it is stated (per Justice Hobson), concerning the petition for certiorari, "This petition is one authorized by Supreme Court Rule 34, 30 F.S.A. and it is in fact an interlocutory appeal." In *Sawyer Industries, Inc. v. Advertects, Inc.*,[30] the decision of the court was, "Certiorari denied without opinion." Thereafter, on appeal of the same case, the court (per Justice Mathews) in reference to the certiorari proceedings stated, "The order appointing the receiver was reviewed by this Court on a petition for certiorari and this court affirmed the order of the Chancellor by denying the petition for certiorari."[31]

The effect of the foregoing cases seems to place review of equity decisions on certiorari in the status of an appeal, making the decisions thereon the law of the case and making review obligatory and not discretionary as in certiorari proceedings in the Supreme Court of the United States.[32]

Supersedeas or Stay

As of right.—When a declaratory decree to the right of the office of chief of police is adverse to the one functioning as such and favorable to another, and there is an appeal supersedeas pending, it is a matter of right when prerequisites to granting are performed, and the effect is to stay all proceedings.[33] The trial judge has no discretion, except as to conditions and the amount of bond. Supreme Court Rule 35(a) states, "If the appeal is from a money judgment or a final decree the stay or supersedeas shall be as of right on posting of the bond."

Improper conditions.—Attorneys fees are not recoverable for resisting an appeal from a final judgment or decree. It is improper to require such a condition in a supersedeas bond, since such an appeal is a matter of right and the defense on the appeal is optional to the appellee at all times.[34]

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28. 54 So.2d 517, 518 (Fla. 1951).
29. 64 So.2d 424, 425 (Fla. 1953).
30. 53 So.2d 671 (Fla. 1951).
31. Advertects, Inc., v. Sawyer Industries, 64 So.2d 300 (Fla. 1953).
32. See Maryland v. Baltimore Radio Show, 338 U.S. 912 (1949), holding that a denial of the petition "carries with it no implication whatever regarding the court's view on the merits."
33. Lockleer v. West Palm Beach, 50 So.2d 348 (Fla. 1951).
34. Larson v. Higginbotham, 66 So.2d 40 (Fla. 1953).

Assignment of Errors

Joint assignment of errors.—Conforming to common law pleading principles, that matters jointly pleaded must be construed jointly and not severably, the court held that the joint assignment of errors must be good as to all, and if not good as to one, it will be overruled as to all.[35] In some states,[36] it has been provided by statute or rule of court that assignment of errors or points relied on for reversal shall be construed jointly as to all and several as to each appellant.

Necessity of.—The court refused to pass on issues framed by the briefs concerning instructions to the jury, since such issues were not based on any assignment of errors.[37] An adjudication to which no assignment of error has been addressed will not be reviewed,[38] and assignments of error not argued are treated as abandoned.[39]

Record on Appeal

It is the duty of appellant and appellee to see to it that the record on appeal is one that can be used with a minimum of time loss.[40] The opinion of the circuit judge emphasized that something need be done to overcome the difficulty in our appellate practice of arriving at what is to be decided.

Use of original records on appeal.—When the record on appeal consisted of certified copies of some of the pleadings and orders entered in the lower court, four volumes of testimony containing 751 pages, depositions containing 85 pages, and numerous exhibits, the appeal was dismissed for failure to comply with Supreme Court Rule 11.[41]

About the time of the rendition of the foregoing decision, Chapter 28087 of the 1953 Laws of Florida was enacted which provides:

> Section 1. When it appears practicable, the circuit judges are hereby authorized to forward the original file or such parts as are designated by opposing counsel or directions and cross directions (or by stipulation) to the Supreme Court without the necessity of preparing a new and appellate transcript. This section is designed to eliminate unnecessary cost and duplication of cumbersome appellate records and is cumulative to all other laws on appellate records. The Supreme Court is authorized to promulgate all rules pertaining to this section.

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35. Universal Construction Co. v. Gore, 51 So.2d 429 (Fla. 1951).
36. Elmore v. Cunninghame, 208 Ala. 15, 93 So. 814 (1922); Hawkins v. Lake County, 303 Ill. 624, 136 N.E. 487 (1922); Manweiler v. Truman, 71 Ind. App. 658, 125 N.E. 412 (1919).
37. General Ready-Mixed Concrete v. Wheeler, 55 So.2d 331 (Fla. 1951).
38. Bowden v. Carter, 65 So.2d 871 (Fla. 1953).
39. *In re* Vidal's Estate, 67 So.2d 198 (Fla. 1953).
40. Lithgow Funeral Homes v. Loftin, 60 So.2d 745 (Fla. 1952).
41. Touby v. Touby, 66 So.2d 222 (Fla. 1953).

Federal courts.—The use of the original records of the federal district courts is in effect in the first, third, fourth, sixth, eighth and ninth court of appeals. In other circuits, a typed record on appeal is filed and printed under the supervision of the appellate court. When copies of the printed record and printed brief are furnished each judge or justice and their clerks it enables all to work on a case at one time, which is not the case when only one typed record and brief is filed. Furthermore, printed matter can be read with much more speed than typed matter.

In the courts of appeals of the federal system, where the original records of the district court are used, their rules require that the parties shall print and appendix to their briefs that part of the record that "the court ought to read." This allows the appellate court, in most instances, to get everything without reference to the original records on file with the clerk. In the eighth circuit, the original records are not actually sent up unless a party so requests or the appellate court directs.[42]

Merely to direct the trial court clerk to forward the original records in such fashion as kept by him will frustrate and not advance a speedy administration of justice. Furthermore, in cases of lengthy record, the use of the original records for a record on appeal should require the printing of that part of the record which the "court ought to read." The printers of the state might do well to confer with the local bar association and the Supreme Court Bar Committee to see what can be done along this line. The problem of the record on appeal, as to length and composition, is the greatest appellate problem. Better records on appeal would advance speedier and better judicial products. It will take more than the law to accomplish much. The cost of printing as an appendix that which the "court ought to read" and the cost of typing a copy of the original record on appeal is not likely to differ much in amount of money expended, but will require more labor by the attorneys involved.

Review

Review limited to judges' reasons.—When the trial court grants a motion for a new trial, containing several grounds, the appellate court on appeal will restrict itself to the grounds stated for the order granting a new trial.[43] An order granting a new trial will be reversed when the trial judge fails to state his reasons.[44]

Those decisions appear to limit the scope of review to the grounds stated for granting a new trial, unless its appellee cross-assign error for not granting a new trial on grounds not stated by the trial judge, the

42. See 13 F.R.D. 31 (1952).
43. Marlin v. Stone, 51 So.2d 33 (Fla. 1951).
44. Ebersole v. Tepperman, 65 So.2d 564 (Fla. 1953).

effect of which is yet to be determined. Common Law Rule 39(d) requires that the trial judge indicate the grounds for granting a new trial.

Dismissal

Moot cases.—A decision, adjudicating the validity of a city ordinance regulating the use of the highway, will be dismissed as moot when there is no substantial controversy raised by an aggrieved party.[45] However, because of the public interest, the court may retain jurisdiction when the controversy has become moot after the entry of the appeal.[46]

Common Law Certiorari

Standard.—A common law writ of certioari will issue when the petitioner has made a showing that there has been a clear departure from the essential requirements of the law and that he will not have a full, adequate and complete remedy by appeal after final judgment.[47] This is a statement of the standard test usually applied to petitions for a common law writ of certiorari.

Want of evidence.—In common law certiorari, to review an action of a civil service board of city in dismissing an employee, the court is not authorized to reweigh the evidence, but should examine the record to determine whether there is substantial evidence to support the action taken.[48]

Dismissal for want of assignment of errors.—A common law writ of certiorari was granted to quash the dismissal of an appeal to the circuit court from the civil court of record for a delay in filing an assignment of errors.[49] The appeal gives the appellate court jurisdiction and the filing of an assignment of errors is a procedural step in the prosecution of the appeal. The brief contained the assignment of errors, which were not filed in compliance with the rule. This is probably the first opinion on this point in Florida, but it conforms to previous holdings rendered without opinion.

The Federal Rule 73(a), in this respect, provides that after a timely notice of appeal has been filed, "failure of the appellant to take any further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as one specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

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45. Ervin v. North Miami Beach, 66 So.2d 235 (Fla. 1953).
46. Bowden v. Carter, 65 So.2d 871 (Fla. 1953).
47. Wolf v. Industrial Supply Corp., 62 So.2d 30 (Fla. 1952).
48. Pensacola v. Maxwell, 49 So.2d 527 (Fla. 1950).
49. Holland v. Miami Springs Bank, 53 So.2d 646 (Fla. 1951).

Order requiring production of documents.—In law actions, orders requiring a party to produce for inspection reports, memoranda and correspondence may be reviewed by common law certiorari.[50]

Time.—When the trial court has entered a final judgment against a defendant for default, and there was no default, the Supreme Court may issue a common law writ of certiorari to review an order denying a motion to stay execution, to vacate default and final judgment entered without notice, when more than 60 days for review has run against the judgment, but less than 60 days after order on motion.[51]

Time limitation.—By Supreme Court Rule 28, the time limitation for petitioning for a common law writ of certiorari is limited to 60 days from the date of the order or judgment sought to be reviewed.[52] In the past, cases have held that the legislature cannot limit the issuing of a certiorari by the Supreme Court in the matter of time.[53] Does the court have more power in this respect than the legislature?

50. Seaboard Air Line R.R. v. Timmons, 61 So.2d 426 (Fla. 1952).
51. Atlantic Coast Line R.R. v. Lake County Citrus Sales, Inc., 48 So.2d 922 (Fla. 1950).
52. Atlantic Coast Line R.R. v. Mack, 64 So.2d 304 (Fla. 1953).
53. Sinclair Refining Co. v. Hunter, 139 Fla. 89, 190 So. 501 (1939); Brinson v. Tharin, 99 Fla. 696, 127 So. 313 (1930); Palmer v. Johnson, 97 Fla. 479, 121 So. 466 (1929).