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## APPEAL AND ERROR - ORDER GRANTING A NEW TRIAL AS AN APPEALABLE ORDER

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APPEAL AND ERROR — ORDER GRANTING A NEW TRIAL AS AN APPEALABLE ORDER — By an Ohio statute a final order might be reversed, vacated, or modified on appeal.<sup>1</sup> After verdict was returned plaintiff filed a motion for a new trial claiming misconduct on the part of the jury. The trial court granted the motion and the defendant appealed. *Held*, the granting of a motion for a new trial is not a final order<sup>2</sup> and, therefore, not subject to review, except in cases where it clearly appears from the record that the trial court has abused its discretion in granting the motion. *Petro v. Donner*, 137 Ohio St. 168, 28 N. E. (2d) 503 (1940).

At common law neither appeal nor writ of error will lie from an order granting a motion for a new trial, either because such an order is addressed to the discretion of the trial court or because such an order is not a final order.<sup>3</sup> By statute, however, a majority of the states expressly allow an appeal or proceeding in error from such an order.<sup>4</sup> Other states, as Ohio, have adopted

<sup>1</sup> Ohio Gen. Code Ann. (Page, 1938), § 12223-27.

<sup>2</sup> *Id.*, § 12223-2.

<sup>3</sup> 4 C. J. S. 244 (1937); 2 R. C. L. 46 (1914). At common law error would lie only to a final judgment. *Wallace v. Middlebrook*, 28 Conn. 464 (1859); 4 C. J. S. 180 (1937). For a general discussion as to the reviewability of an order granting a new trial, see 38 MICH. L. REV. 208 (1939).

<sup>4</sup> For collected statutes, see 5 OHIO ST. UNIV. L. J. 369 at 372, note 17 (1939); 4 C. J. S. 246 (1937). Some statutes say the order is a "final order," as Ill. Stat. Ann. (Smith-Hurd, 1936), c. 110, § 201, while others merely make it an appealable order, as Mo. Rev. Stat. (1929), § 1018. When not governed by statute no decision has been found where an order granting a new trial has been held, of itself, prior to a final judgment, to be a final order. Cf. *Bales v. Brome*, 53 Wyo. 370 at 373 et seq., 84 P. (2d) 714 (1938), where an order granting a new trial was held reviewable as a final order on direct appeal but not in a proceeding in error; Wyo. Rev. Stat. (1931), §§ 89-4910, 89-4801. An order granting a new trial may be a final order for the purpose of bringing exception to the final judgment rendered in such new trial. *Chun Yin Kok v. Woo See Wo*, 30 Hawaii 29 at 36 (1927). And at least error will lie on the judgment rendered after such motion. 2 OHIO JUR. 144 (1929).

statutes allowing appeals to lie from a "final order,"<sup>5</sup> but the weight of authority under these statutes holds an order granting a new trial is not a "final order" and hence is not appealable.<sup>6</sup> For many years Ohio followed the general rule refusing appeal on the ground that such an order "is addressed to the sound legal discretion of the court";<sup>7</sup> and though an abuse of discretion would be grounds for reversal of the final judgment after the second hearing, it did not confer jurisdiction on the appellate courts to review the order as a "final order."<sup>8</sup> However, the principal case recognizes an exception to the general rule when it clearly appears that the trial court has abused its discretion in granting the new trial. Controlling precedent for the principal case lay in the decision of the Ohio Supreme Court in *Hoffman v. Knollman*.<sup>9</sup> At the time of the *Hoffman* decision there had been only one reported Ohio case, *Webster v. Pullman Co.*,<sup>10</sup> wherein an Ohio court actually took jurisdiction to review the granting of a motion for a new trial on the ground that the record clearly showed an abuse of discretion. The logic of the *Webster* case has been criticized,<sup>11</sup> and it has been distinguished on its facts.<sup>12</sup> Other cases cited in the *Hoffman* case merely contain dicta supporting the exception.<sup>13</sup> It seems clear from the decided cases that

<sup>5</sup> Kan. Gen. Stat. Ann. (1935), § 60-3301; Ky. Stat. Ann. (Carroll, 1930), § 950-1; Mich. Stat. Ann. (Henderson, 1938), § 27.2608; Minn. Stat. (Mason, 1927), § 9498 (7); Neb. Comp. Stat. (1929), § 20-1901; Ohio Gen. Code Ann. (Page, 1937), § 12223-27; 12 Pa. Stat. Ann. (Purdon, 1931), § 1092; Wyo. Rev. Stat. (1931), §§ 89-4802, 89-4803.

<sup>6</sup> *Rose v. Edmonds*, 271 Ky. 36 at 40, 111 S. W. (2d) 427 (1937); *Salters v. Uhlir*, 196 Minn. 541 at 542, 265 N. W. 333 (1936); *Johnson v. Parrotte*, 46 Neb. 51 at 56, 64 N. W. 363 (1895); *Flint v. Voiles*, 50 Wyo. 43 at 49, 58 P. (2d) 443 (1936).

<sup>7</sup> *Beatty v. Hatcher*, 13 Ohio St. 115 at 120 (1861); *Conord v. Runnels*, 23 Ohio St. 601 at 602 (1873); *Young v. Shallenberger*, 53 Ohio St. 291 at 301, 41 N. E. 518 (1895).

<sup>8</sup> See generally Baskin, "Granting Motion for New Trial as Final Order When Court Abused Its Discretion," 15 OHIO OP. 596 (1939). Federal courts and most state courts concur. 5 OHIO ST. UNIV. L. J. 369 at 371, note 13 (1939); *Frank Mercantile Corp. v. Prudential Ins. Co. of America*, (C. C. A. 3d, 1940) 115 F. (2d) 496. Cf. *Randall v. Randall*, 281 Ill. App. 169 at 176 (1935).

<sup>9</sup> 135 Ohio St. 170 at 183 et seq., 20 N. E. (2d) 221 (1939).

<sup>10</sup> 51 Ohio App. 131 at 143, 200 N. E. 188 (1935).

<sup>11</sup> The *Webster* case relied heavily on *Dean v. King*, *Pennock & King*, 22 Ohio St. 118 at 134 (1871), but no question as to a final order was involved in that case. See also Baskin, "Granting Motion for New Trial as Final Order When Court Abused its Discretion," 15 OHIO OP. 596 at 597 et seq. (1939). *Steiner v. Custer*, 63 Ohio App. 440, 27 N. E. (2d) 160 (1940), cited in the principal case, is the only direct authority for the abuse of discretion exception since the *Webster* case, and the holding was made without citation of authority or compelling reasons.

<sup>12</sup> In the case of *Levin v. Jacoby Bros.*, 55 Ohio App. 16 at 18 et seq., 8 N. E. (2d) 578 (1936), the court said its inquiry did not extend to a review of the record and that in the *Webster* case gross misconduct was labeled "abuse of discretion" out of charity to the judge.

<sup>13</sup> "Aside from the *Webster* case, the authority of which has been denied, only dicta support the rule." Baskin, "Granting Motion for New Trial as Final Order When Court Abused its Discretion," 15 OHIO OP. 596 at 599 (1939) and cases there cited.

the exception grew out of a confusion by the courts between what constitutes reversible error and what is necessary to confer appellate jurisdiction.<sup>14</sup> Although the abuse of discretion rule is stated as an exception to the established rule that an order granting a new trial is not a final order, it appears to be an exception as broad as the rule itself; the two rules cannot logically stand side by side.<sup>15</sup> In order to determine whether it has jurisdiction under the abuse of discretion rule, an appellate court must decide the very question which is the subject of the appeal, and thus it would appear that there is fully as complete a review as though the order itself were appealable.<sup>16</sup> It is submitted that the real basis for approving this "abuse of discretion" exception in the *Hoffman* case, even though it rested on doubtful authority, is to be found in the Ohio constitution, which allows an appeal to be made only from a "judgment."<sup>17</sup> Although the word "judgment" includes "final orders,"<sup>18</sup> yet for years Ohio has been committed to the general rule that an order granting a new trial is not a final order.<sup>19</sup> As a consequence, such an order cannot now be made appealable even by express statutory enactment,<sup>20</sup> as has been done in the majority of states,<sup>21</sup> and Ohio is forced to adopt spurious logic to achieve a desirable result.<sup>22</sup>

<sup>14</sup> *Id.* at 599.

<sup>15</sup> *Id.* at 600.

<sup>16</sup> *Id.* at 600. By the weight of authority, abuse of discretion by the trial court in granting a motion for a new trial is error. 4 C. J. 832 (1916).

<sup>17</sup> "The Courts of Appeals shall have . . . appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify or reverse the judgments. . . ." Ohio Const. (1851), Art. IV, § 6.

<sup>18</sup> *Chandler & Taylor Co. v. Southern Pacific Co.*, 104 Ohio St. 188 at 192 et seq., 135 N. E. 620 (1922); Ohio Gen. Code Ann. (Page, 1937), § 12223-27.

<sup>19</sup> *Supra*, note 8.

<sup>20</sup> In 1937 the definition of "final order" was amended by adding "or an order vacating or setting aside a general verdict of a jury and ordering a new trial." Ohio Gen. Code Ann. (Page, 1937), § 12223-2. The *Hoffman* case held this amendment unconstitutional under Art. IV, § 6, of the Ohio Constitution as quoted, *supra*, note 17. This narrow construction of the word "judgments" is criticized. 5 OHIO ST. UNIV. L. J. 369 at 371 (1939).

<sup>21</sup> *Supra*, note 4.

<sup>22</sup> That it is a desirable result is shown by the increasing tendency of the states specifically to allow the appeal of an order granting a new trial by statute. These acts, which are effective in a majority of the states, may be said to be "designed to promote justice, and to prevent a verdict, warranted by the record and justified by the evidence, from being set aside and lost to the party who was fairly entitled thereto, and such litigant forced to undergo the hazards of another trial with its further incidents of delay and expense. . . ." *G. F. Wettaw v. Retail Hardware Mutual Fire Ins. Co.*, 285 Ill. App. 394 at 396, 2 N. E. (2d) 162 (1936).