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APPEAL AND ERROR - REVIEWABILITY OF AN ORDER GRANTING A NEW TRIAL

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COMMENTS

APPEAL AND ERROR — REVIEWABILITY OF AN ORDER GRANTING A NEW TRIAL — When a trial court sets aside a verdict and grants a new trial, the order may or may not be reviewable depending on the jurisdiction. In some jurisdictions which permit a review, the aggrieved party must save an exception to the order and assign this ruling as error when an appeal is ultimately taken from a subsequent appealable decision. In other jurisdictions, he may take an appeal directly from the order.

This comment will discuss (1) the common-law practice which permitted no review of an order granting a new trial; (2) the practice allowing the aggrieved party to save an exception to the order and assign it as error on a subsequent appeal; (3) the procedure of direct appeal; and (4) the desirability of allowing a direct appeal.

I.

At common law, the decision on a motion for new trial could not be assigned as error for purposes of appellate review.[1] The writ of error searched only the record, and a motion for new trial was never a part of the record. Furthermore, the decision on such a motion did not constitute a part of the bill of exceptions.[2] In addition to this, interlocutory orders were never appealable at common law. The common-law theory underlying the motion for new trial was that it provided a method of reviewing the proceedings at the trial, separate and distinct from the review by a proceeding in error.

Under common-law practice the party aggrieved by the order was deprived of the benefit of the verdict which had been rendered in his favor and compelled to submit to a retrial of the case. But this practice was not objectionable because, under the original English procedure, the motion for new trial was made at the central courts in London, rather than in the trial courts. In this way, the highest judges in England made a review of the trial proceedings, and the fact that their decision on the motion was final involved little hardship. However, as the common-law procedure developed in the United States, it became the general practice to make the motion for new trial in the trial court, before the trial judge; and the review of the trial proceedings made by him, precedent to his order, is not comparable to the type of review which the central courts of England made under the original common-law scheme. In the United States, the common-law procedure whereby the decision of the trial judge granting a motion for new trial is conclusive creates possibilities of hardship, because there is no method by which erroneous orders can be reversed.

Although most jurisdictions have varied this practice by statutes, it is still given some application. For example, in Massachusetts, the decision on motion for new trial cannot be reviewed on exceptions if the decision involves a matter of discretion as contrasted with a matter of law.[3] The common-law practice is also applied, to a certain extent, in the federal courts. Both the Supreme Court[4] and Circuit Courts of

[1] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 3d ed., 222-226 (1922). Judge Learned Hand discusses the common-law procedure in Miller v. Maryland Casualty Co., (C. C. A. 2d, 1930) 40 F. (2d) 463.

[2] Ford Motor Co. v. Hotel Woodward Co., (C. C. A. 2d, 1921) 271 F. 625 at 630.

[3] Goodyear Park Co. v. City of Holyoke, (Mass. 1937) 11 N. E. (2d) 439; Murray v. Liebmann, 231 Mass. 7, 120 N. E. 79 (1918); Welsh v. Milton Water Co., 200 Mass. 409, 86 N. E. 779 (1909).

[4] "We have uniformly held that, as a motion for new trial in the courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion cannot be assigned for error here." Railway Co. v. Heck, 102 U. S. 120 (1880). Schuchardt v. Allens, 1 Wall.

Appeals[5] have declared that the decision on motion for new trial cannot be assigned as error. But it is said that an exception to this general rule exists in the case of new trial orders made as a result of an abuse of discretion.[6] There can be no direct appeal from the order granting a new trial in the federal courts.[7]

2.

Under modern practice many states allow the party aggrieved by a new trial order to save an exception to the ruling and assign it as error upon an appeal from a subsequent appealable decision. In this way the appellate court will review the correctness of the order when an appeal is taken from a final judgment in a subsequent trial.[8]

There are advantages in this method over the practice at common law. In the first place, it provides a method for testing the correctness of the new trial order. Secondly, the results of setting aside a verdict are not so drastic. If the appellate court finds that the order is erroneous, it can remand the case so that a judgment can be rendered in accordance with the verdict that was first returned. But this method is open to the objection that it fails to provide a means of testing the correctness of the new trial order in advance of the expense and delay attendant upon trying the case over again. Since the opportunity to have the new trial order reviewed must await a final judgment, there can be no review until there has been at least one retrial.

3.

The third possible procedure is the direct appeal from the new trial order independent of an appeal from a final judgment. In twenty-

(68 U. S.) 359 (1864), stating at 371 "to grant or refuse it [new trial] cannot be made the subject of exception"; Insurance Co. v. Barton, 13 Wall. (80 U. S.) 603 (1872); Newcomb v. Wood, 97 U. S. 581 (1878); Clune v. United States, 159 U. S. 590, 16 S. Ct. 125 (1895).

[5] Alexander v. United States, 6 C. C. A. (9th) 602, 57 F. 828 (1893); Ford Motor Co. v. Hotel Woodward Co., (C. C. A. 2d, 1921) 271 F. 625; Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., (C. C. A. 6th, 1922) 285 F. 214; Turner v. United States, (C. C. A. 8th, 1926) 14 F. (2d) 360; Ward v. Morrow, (C. C. A. 8th, 1926) 15 F. (2d) 660; Miller v. Maryland Casualty Co., (C. C. A. 2d, 1930) 40 F. (2d) 463.

[6] Stetson v. Stindt, (C. C. A. 3d, 1922) 279 F. 209; Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., (C. C. A. 10th, 1931) 49 F. (2d) 146; McPherson v. Cement Gun Co., (C. C. A. 10th, 1932) 59 F. (2d) 889.

[7] An order setting aside a verdict and granting a new trial is not a final decision and an appeal does not lie therefrom. Hunt v. United States, (C. C. A. 10th, 1931) 53 F. (2d) 333; Florini v. Stegner, (C. C. A. 3rd, 1936) 82 F. (2d) 708; East Erie Commercial R. R. v. Denial, (C. C. A. 3rd, 1933) 66 F. (2d) 555.

[8] This procedure is provided for by statutes. See, for example, Fla. Comp. Gen. Laws (1927), § 4608; Tenn. Code (1938), § 8985; Utah Rev. Stat. (1933), § 104-41-5.

two states, statutes provide for a direct appeal from this order.[9] But this right to appeal is not in all cases an absolute right. It is often limited both as to the nature of the action in which the order was made and as to the kind of order made. For example, in Alabama appeals from rulings on motions for new trial are limited to cases at law;[10] in California appeals may be had only in actions or proceedings where a trial by jury is a matter of right;[11] and in South Carolina an appeal may be had only when the order for new trial is based on a question of law.[12] Some states require that the order granting a new trial be an unconditional order, before an appeal will be allowed.[13] Thus, the appeal will be denied if, for example, the order granting the new trial is conditioned upon a remittitur. The Minnesota statute has been interpreted to allow appeals only when the new trial is granted exclusively for errors occurring at the trial, provided the reasons for granting the new trial are stated in the trial court's order or memorandum.[14] The right to appeal is often conditioned upon stringent stipulations by the appellant. For example, in Arkansas the statute[15] requires the appellant to consent to a judgment absolute being ren-

[9] Ala. Code (1928), § 6088; Ariz. Rev. Code (1928), § 3659; Ark. Stat. Dig. (Pope, 1937), § 2735 (Civ. Code, § 15); Cal. Code Civ. Proc. (Deering, 1937), § 963; Conn. Gen. Stat. (Supp. 1935), § 1663c; Fla. Comp. Gen. Laws (1927), § 4615; Idaho Code Ann. (1932), § 11-201; Ill. Stat. (1935), c. 110, § 201; Iowa Code (1935), § 12823 (3); Kan. Gen. Stat. Ann. (1935), § 60-3302; Minn. Stat. (Mason 1927), § 9498 (4); Mo. Rev. Stat. (1929), § 1018; Mont. Rev. Code (1935), § 9731; Nev. Comp. Laws (1929), § 8375; N. Y. Civ. Prac. Act (Cahill, 1931), §§ 588, 609; Okla. Stat. (1931), § 528 (2); Ore. Code (1930), § 7-501; S. C. Code (1932), § 26 (D); S. D. Comp. Laws (1929), § 3168; Wash. Rev. Stat. (Rem. 1932), § 1716 (6); W. Va. Code (1931), § 58-5-1(i); Wis. Stat. (1937), § 274.33. A recent Ohio statute designed to provide for an appeal from new trial orders was held unconstitutional in Hoffman v. Knollman, 135 Ohio St. 170, 20 N. E. (2d) 221 (1939).

[10] Appeal was denied in a divorce suit. Ford v. Ford, 218 Ala. 15, 117 So. 462 (1928).

[11] Appeal was denied where the issues set forth by the pleadings were "equitable in nature." Wight v. Rohlffs, 137 Cal. App. 730, 31 P. (2d) 419 (1934).

[12] The appeal will be denied when the order for new trial is based upon a question of fact or of law and fact. O'Barr v. Pioneer Life Ins. Co., 172 S. C. 72, 172 S. E. 769 (1934); and King v. Western Union Telegraph Co., 167 S. C. 500, 166 S. E. 629 (1932).

[13] Baker v. Onsrud, 227 Wis. 450, 278 N. W. 870 (1938); and Orr v. Stewart, 17 Ala. App. 297, 84 So. 555 (1919).

[14] See Spicer v. Stebbins, 184 Minn. 77, 237 N. W. 844 (1931). The appeals were denied, because these conditions were not met in Roelofs v. Baber, 194 Minn. 166, 259 N. W. 808 (1935); Karnofsky v. Wells-Dickey Co., 183 Minn. 563, 237 N. W. 425 (1931); and Barwald v. Thuet, 149 Minn. 495, 182 N. W. 719 (1921).

[15] Ark. Stat. Dig. (Pope, 1937) § 2735(2).

dered against him in case the order is affirmed, and an appeal will be dismissed unless such consent is included in the notice of appeal.[16]

A direct appeal from the order may be had in Colorado under the following practice developed by court decision:[17] if the party aggrieved by the order files an election declaring that he is unable to prove any better case than has already been made, the appellate court will treat the action of the trial court, in setting aside the verdict and granting a new trial, as though the court had dismissed the action or granted a nonsuit.

4.

As a result of the new trial order the proceedings at the first trial are cast aside and a retrial is required. This entails additional expense to the parties and to the taxpayers and impairs the efficient administration of justice. Furthermore, the party aggrieved by such an order is put in a difficult position. Not only has he lost the benefit of the verdict, but, absent direct appeal, his only alternative is to bear the added expense and delay of an entire retrial of the case. During the delay his evidence may get cold and his witnesses become unavailable. There is also the possibility that a second trial may bring the same result as the first, namely, that a second verdict will be rendered in his favor only to be set aside and a third trial ordered. Unless direct appeal of the new trial order is available, there is nothing to prevent such a situation resulting in continued retrial of the case, until there is found a jury which will bring in a verdict which the judge deems acceptable as a basis for a final judgment.[18] In one of the earliest American cases denying an appeal from such an order, the dissenting justice said:

> "if the error is reviewed, after the determination of the action at law, how inequitable and ruinous the delay! Years may elapse before this event takes place, and in the meantime the action may run the whole round of litigation until it is exhausted to the dregs, and the party is deprived of property in this unnecessary conflict much beyond the whole value of the matter in question."[19]

[16] St. Louis, I. M. & S. Ry. v. Hix, 101 Ark. 90, 141 S. W. 492 (1911); Yowell v. Ft. Smith Pure Milk Co., 118 Ark. 448, 177 S. W. 4 (1915); and Matyski v. Buczkowski, 152 Ark. 89, 237 S. W. 694 (1922).

[17] Wadsworth v. Union Pac. Ry., 18 Colo. 600, 33 P. 515 (1893); Ward v. Teller Reservoir & Irrigation Co., 60 Colo. 47, 153 P. 219 (1915); Warshauer Sheep & Wool Co. v. Rio Grande State Bank, 81 Colo. 463, 256 P. 21 (1927). And see Folsom, "Necessity for Writs of Error and Motions for New Trial in Colorado," 2 ROCKY MT. L. REV. 98 at 104 (1929).

[18] However, the number of new trials which may be ordered on the ground that the verdict is contrary to the weight of the evidence is commonly limited by statute. For example, Ohio Gen. Code (Page, 1938), § 11577 and Tenn. Code (1938), § 8984.

[19] Hosmer, C. J., dissenting in Magill v. Lyman, 6 Conn. 59 at 67 (1825).

The following examples show how inability to appeal the new trial order may result in injustice: (1) Cases in which the trial judge sets the verdict aside and grants a new trial, because he believes, or is persuaded to believe, that he has delivered an erroneous instruction. Yet the instruction is later found to have been correct.[20] (2) Cases in which the order setting aside the verdict and granting a new trial is void due to lack of jurisdiction to make such an order.[21] (3) Cases in which the trial judge arbitrarily sets the verdict aside, because he disagrees with the result, or because he refuses to enforce the law of the jurisdiction.[22] In any of these cases, if appeal is unavailable, the parties are needlessly put to the expense and uncertainties of another trial. But if the order requiring a retrial of the case can be appealed from, then erroneous orders can be reversed and unnecessary retrials will be prevented.

The problem presented on the motion for new trial is a problem anterior to any further proceedings. It presents the question: Should another trial be had? This question, like the analogous questions raised in connection with jurisdiction and venue, are preliminary matters which should be definitely decided before any further proceedings are had in order to avoid wasted effort. For example, if a motion to change the venue is refused and the trial is had in county X when the proper place for trial is county Y, the erroneous refusal to change the venue results in a complete waste of the first trial. The same applies to new trial orders. If the new trial order is erroneous, any retrial is a complete waste, and there is no justification for the additional expense and delay which the order imposes upon the litigants and the state. Statutes

[20] In both Loftus v. Metropolitan Street Ry., 220 Mo. 470, 119 S. W. 942 (1909), and Hurt v. Nelson, 85 Colo. 471, 276 P. 982 (1929), a new trial was granted due to a supposed error in instruction, and in both cases the appellate courts found that the law had been correctly set forth in the trial judge's instruction. In the former case the court said:—"Defendant seems to have impressed the learned trial judge with the alleged error in this instruction. . . ." 220 Mo. at 478.

[21] In Lingelbach v. Carriveau, 211 Wis. 653, 248 N. W. 117, 922 (1933), the order granting a new trial was made almost nine months after the verdict had been returned, though the statute, Wis. Stat. (1931), § 270.49 (1), provided that the order must be made within sixty days after the verdict was rendered. See also Wallace v. Middlebrook, 28 Conn. 464 (1859) and Quimbo Appo v. People, 20 N. Y. 531 (1860).

[22] In Crosby v. Canino, 89 Colo. 434, 3 P. (2d) 792 (1931), the trial judge set aside a verdict for the plaintiff, because of "an unwillingness to follow the law of the case" as it had been laid down in a prior appeal in the same case, 84 Colo. 225, 268 P. 1021 (1928). At 89 Colo. 439, the appellate court said: "Every reasonable presumption should be indulged that trial courts grant new trials in the exercise of wise discretion; but where, as here, the trial court clearly indicates that its ruling was based on respectful rebellion against this court's determination of the law of the case, and for no other reason grants a new trial, a situation is presented which merits a review at our hands."

which allow appeal of these orders provide a means whereby the validity of the order may be examined in advance of a retrial.[23]

A sample jurisdiction was selected in an attempt to determine what effect allowing appeal from new trial orders has upon the retrial of cases. Seventy-two Florida cases were examined in which an appeal of the new trial order was taken under Florida Comp. Gen. Laws (1927), sec. 4615. In twenty-two of these cases, the order granting a new trial was reversed and the case remanded for judgment, while in the remaining fifty cases, the order was affirmed, necessitating a retrial. Thus the effect of the statute allowing appeal was to obviate unnecessary retrials in 31 per cent of these cases.

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[23] "The object of the statute was obviously to permit the form and substance of what transpires on an earlier trial, to be reviewed by the appellate court in advance of the expense and delay attendant upon trying the case over again at a subsequent time, in order to see whether the new trial, if had, would avail anything to the one who had obtained it." Wolfe v. City of Miami, 114 Fla. 238 at 241, 154 So. 196 (1934).