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Appellate Procedure

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APPELLATE PROCEDURE

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PART I

APPEALS, CERTIORARI AND LEGISLATIVES PROPOSED REVISED JUDICIARY ARTICLES

Right to Appeal

Prepayment of costs: Jurisdictional. The Circuit Court allowed the original plaintiff-appellant to pay costs more than a month after an appeal had been taken from the Civil Court of Record to the Circuit Court. The question presented was whether Section 59.09 of the Florida Statutes made the payment of costs, by an original plaintiff, a jurisdictional condition precedent to the taking of an appeal, when the costs were specifically taxed in an amount certain and the original plaintiff had not assigned the taxation of costs as error and superseded their taxation. The court held that the prepayment of costs was jurisdictional to the right to appeal and quashed the circuit court judgment.[1]

Prepayment of costs by appellant-plaintiff: Not jurisdictional. *Berg v. New York Life Insurance Company*,[2] modified the holding in *Walker-Skagseth*,[3] and held that the prepayment of accrued costs by an appellant-plaintiff was for the benefit of the defendants and, therefore, was not jurisdictional.

Only aggrieved party may appeal. In *Bessemer Properties v. City of Opa-Locka*,[4] a suit for a declaratory decree to test the validity of bonds was brought by the city-appellee against a prospective purchaser. The prospective purchaser prosecuted an appeal from a favorable decree. Since the appellant was not aggrieved by the decree, the appeal was dismissed. *Credit Industrial Co. v. Re-Mark Chemical Co.*[5] held that a party may not appeal from a final decree wholly favorable to him.

Only Final Judgments and Decrees Appealable

Orders denying motions, petitions and applications are interlocutory and not appealable . *Sarasota-Fruitville Drainage Dist. v. Certain Lands*,[6] involved an appeal from an order of the judge denying the appellant's application for the issuance of process pursuant to a statute relating to the enforcement of tax liens. The proceedings sounded in rem. The court held that neither an appeal nor certiorari would lie and, hence, the case

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1. Hale v. Martin, 76 So.2d 279 (Fla. 1954).
2. 81 So.2d 630 (Fla. 1955).
3. 148 Fla. 163, 3 So.2d 756 (1941).
4. 74 So.2d 296 (Fla. 1954).
5. 67 So.2d 540 (Fla. 1953).
6. 80 So.2d 335 (Fla. 1955).

was dismissed. Appellant might have obtained relief by mandamus. In *Huie v. Lewis*,[7] the court held that an order on a petition for a writ of mandamus which stated "accordingly the prayer of said petition is hereby denied" was neither reviewable by certiorari, nor, in the absence of words of dismissal, was it a final judgment from which an appeal would lie.

Wood v. Sinclair Refining Co.[8] held that an order that the defendant's motion to dismiss be and is "granted" was not a final judgment but only an interlocutory order and, therefore, not appealable.

Entry of Appeal

Sufficiency of notice. In *Seaboard Air Line R.R. v. Holt*,[9] the court held that the notice of appeal was sufficient even though it failed to follow the "form" suggested by Florida Supreme Court Rule 39. The notice specified that it was an appeal from the final judgment, but gave an erroneous date of entry. It is the substance of the notice and not form that is material.

Certiorari is not an appeal, but an appeal may be treated as petition for certiorari. A petition for review of a final decree by writ of certiorari was not treated as an "appeal." Under such circumstances, the court had no power of review except on duly prosecuted appeal. In the case of *Bartow Growers Processing Corp. v. Florida Growers Processing Cooperative*,[10] the court held that the motion to dismiss the certiorari proceeding was well founded and that the order sought to be reviewed was a final decree reviewable only by appeal. In the case of *Dustin v. Latzko*,[11] it was noted that an "order . . . dismissing [a] bill of complaint as to certain named defendants was a final judgment as to such defendants reviewable only by appeal . . . ." Similar holdings were reached in *Alerman v. Puritan Dairy*,[12] and *Spivey v. Huss*.[13] Although Section 59.45 of the Florida Statutes (1951) provided that an appeal improvidently taken could "be regarded and acted on as a petition for certiorari duly presented," it did not provide that a petition for certiorari, improvidently filed, could be treated as an appeal.

Habeas corpus: Time limitation. Section 924.09 of the Florida Statutes, relating to criminal appeals, allows 90 days for a defendant to appeal from a judgment or sentence. Section 924.07 (6) of the Florida Statutes makes a judgment, discharging a prisoner on habeas corpus, appealable by the state within 20 days as provided by Section 924.10 of the Florida Statutes.

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7. 71 So.2d 498 (Fla. 1954).
8. 73 So.2d 226 (Fla. 1954).
9. 80 So.2d 354 (Fla. 1955).
10. 71 So.2d 165 (Fla. 1954).
11. 155 Fla. 824, 21 So.2d 904 (1945).
12. 145 Fla. 292, 199 So. 44 (1940).
13. 147 Fla. 527, 3 So.2d 127 (1941).

In *Snell v. Mayo*,[14] the appeal was taken by petitioner in a habeas corpus proceeding more than 60 days and less than 90 days after the final judgment of dismissal. The appellee filed a motion to dismiss upon the ground that habeas corpus proceedings were civil, not criminal proceedings, and, as in the case of *State ex rel. Deeb v. Fabisinski*,[15] the 60 day limitation for taking an appeal had run. The court recognized this, but held that in that case the petitioner was not held on a charge or conviction of violating the criminal laws, as in the case at bar, and denied the motion to dismiss. Habeas corpus actions are usually treated as civil actions.

Calculation of time. Schneider v. Cohan,[16] held that the time for taking an appeal commenced to run from the day the judgment or decree was actually recorded by the clerk, and not from the date of order nor from the date of filing with the clerk.

Calculation of time for appeal when last day a Sunday. In the case of *In re McRae's Estate*,[17] the thirtieth day (of the 30 days allowed in Section 732.16 of the Florida Statutes for an appeal from the County Judge's Court in matters of probate) fell on Sunday and the appeal was entered on the following Monday. A motion to dismiss because the appeal was not timely was granted following the rule of a prior decision, *In re Warner's Estate*.[18] Under the court rules governing appeals from other courts, the rule is to the contrary.[19]

Limitation of time: Petition for rehearing does not toll. The court, in *Weisberg v. Perl*,[20] held that the limitation of time for taking an appeal from a summary final judgment in a common law action was not tolled by the filing of a petition for rehearing or for new trial.

Interlocutory Certiorari in Equity

Interlocutory statutory certiorari: Not certiorari but appeal. In *Wilson v. McCoy Mfg. Co.*,[21] Justice Thomas stated that an interlocutory certiorari under Supreme Court Rule 34 was not certiorari but an appeal and was not to be confused with the common law certiorari authorized by the Constitution. It was stated:

> This brings us to a consideration of the nature and scope of the writ of certiorari as it may be used in examining orders of the commission. At the outset we are moved to say that the writ of certiorari afforded by the constitution should not be confused with the so-called certiorari provided by Supreme Court Rule number 34, 30 F.S.A. We make this observation because some

14. 80 So.2d 330 (Fla. 1955).
15. 111 Fla. 454, 152 So. 207 (1933).
16. 73 So.2d 69 (Fla. 1954).
17. 73 So.2d 818 (Fla. 1954).
18. 160 Fla. 103, 33 So.2d 728,730 (1948).
19. See also Carlile v. Spofford, 65 So.2d 545 (Fla. 1953).
20. 73 So.2d 56 (Fla. 1954).
21. 69 So.2d 659 (Fla. 1954).

attorneys have mixed the two. Certiorari under the rule was designed simply as a streamlined method of bringing appeals authorized by law to be taken from interlocutory orders entered in chancery. True, the procedure in both kinds of certioraris, as is shown by the reference in rule 34 to rule 28, is similar but the elements differ entirely, one having all the qualities of an appeal, the other being severely restricted in its operation.

The statutory provisions and court rule governing interlocutory certiorari are as follows:

Section 59.01(5) Florida Statutes (1953) provides:

> All proceedings for review, from a lower Court to the proper appellate court, shall be by appeal except where certiorari lies, or where otherwise expressly provided by law.

Section 59.02(3) Florida Statutes (1953) authorizing the above mentioned Rule 34, as well as the statute authorizing the new Rule 14 (1) states:

> 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.

Rule 34(a) of the Florida Rules of Civil Procedure, referred to in the *Wilson* case, as well as at the time of the first decision on petition for certiorari in the *Hamel*[22] case was as follows:

> Interlocutory Appeals to be by Certiorari. All appeals from interlocutory decrees as authorized by statute including orders or decrees after final decree, shall be prosecuted to this court by certiorari in the manner provided by the rules relating to the constitutional writ of certiorari.

Even though the statute and the court rule treat review by an appeal as distinguishable from certiorari, the decisions have consistently held that review under Rule 34 is an appeal insofar as the "law of the case" is involved, and that "certiorari denied" means "decree affirmed."[23]

In *Hamel v. Danko*,[24] the appellee moved to strike three of appellant's assignments of error upon the ground that the court had previously "denied without opinion" a petition of certiorari filed by Hamel, which petition presented for review the same three orders.

The appellant, in opposition to appellee's motion, relied upon Section 59.021 Florida Statutes (1953), providing:

> 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

22. 82 So.2d 321 (Fla. 1955).
23. See 8 MIAMI L.Q. 444 (1954) for a collection of cases on this subject.
24. *Ibid.*

> 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.

The court granted appellee's motion to strike and reaffirmed *Hunter v. Tyner*,[25] as follows:

> We said, in Hunter v. Tyner, *supra*, in reference to the review of an interlocutory order in an equity suit, and now reiterate, "a writ of this kind being simply a method of procedure by which such appeals authorized by the statute can be brought to this court, its denial, we think, was an adjudication of the propriety of the order involved and it could not again be questioned in this appeal."

In reference to Section 59.021 of the Florida Statutes, the court further stated:

> The above statute, enacted subsequent to our decision in Hunter v. Tyner, *supra*, is a clear invasion upon functions exclusively vested in the judiciary. The legislature has no power to act in that area. The statute is a manifest and palpable violation on its face of the separation of powers doctrine which is imbedded in Article II of our Constitution and which is essential to the preservation of our American system of government. For that basic reason it is void, frustrate and of no effect.

The appellee's motion to strike required the court to pass directly on the question of whether the foregoing statute impaired the exercise of judicial powers, vested exclusively in the court by the constitution.

If the statute had been construed as declaratory of the law and the court had construed its previous action of "certiorari denied" as having no other meaning, then of course the act would not have in any way impaired the exercise of judicial power. Such a holding would have been supported by the court's previous holdings to the effect that "the law of the case is fixed by issues actually adjudicated on appeal and does not extend to such issues as might have properly been adjudicated."[26]

But if the court is to retrospectively enlarge and expand, by construction, a previous decision of "certiorari denied" to mean "decree affirmed," and that "decree affirmed" reaches all questions that *might* have been properly adjudicated, then, of course, the statute did impair the exercise of the judicial power.

Supersedeas

Allowance of supersedeas in civil cases: When discretionary. In *All Florida Surety Company v .Coker*,[27] the court held that upon an appeal from

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25. 151 Fla. 707, 10 So.2d 492 (1942).
26. Finston v. Finston, 37 So.2d 423, 425 (Fla. 1948); Ball v. Yates, 29 So.2d 729, 733 (Fla. 1946); *Accord*: McGregor v. Provident Trust Co. of Phila., 162 So. 323, 327 (Fla. 1935).
27. 79 So.2d 762 (Fla. 1955).

a final judgment or decree, not wholly for the payment of money, the granting or denial of supersedeas rested within the sound judicial discretion of the trial court and the appellant was not entitled to supersede such a final decree as a matter of right.[28]

Allowance of supersedeas in criminal cases: When discretionary. The court, in *Jones v. State*,[29] held that the granting *vel non* of a supersedeas bond in a criminal case appealed was within the sound judicial discretion which the trial judge must exercise upon a hearing of an application for supersedeas, and that the Supreme Court would deny an application for supersedeas pending the decision of the trial court.

Supersedeas bond: Attorneys' fees. In *Larson v. Higginbotham*,[30] the Supreme Court, upon motion to modify the conditions of an order granting supersedeas, held that it was improper to require a supersedeas bond to be conditioned to pay attorneys' fees in resisting an appeal from a final judgment or decree. This holding expressly overruled *Kahn v. American Surety Company of New York*,[31] *Tonnelier v. Tonnelier*,[32] and *City of Miami v. Huttoe*.[33]

Improper conditions: Collateral attack. In *Ritter v. Bently*,[34] the trial judge, in fixing the terms of a supersedeas bond, specified that it should be conditioned, *inter alia*, to pay attorneys' fees; supersedeas was obtained by giving a bond in compliance thereto and the validity of the order was not directly attacked by appeal, notice or petition, for certiorari. The court held that the validity of the order could not be collaterally attacked in a suit on the bond, and, liability attached according to its terms.

Review

Hypothetical points not considered. An appellate court will not answer a mere question nor pass upon a hypothetical point raised thereby which is not shown to be created by some judicial act assigned as error. In this respect the Supreme Court held, in *Lynn v. City of Fort Lauderdale*:[35]

> An appellant does not discharge this duty by merely posing a question with an accompanying assertion that it was improperly answered in the court below and then dumping the matter into the lap of the appellate court for decision. Under such circumstances it must be held, as we now hold here, that we are under no duty to answer the question.

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28. See also FLA. SUP. CT. Rule 19.
29. 81 So.2d 656 (Fla. 1955).
30. 66 So.2d 40 (Fla. 1953).
31. 120 Fla. 50, 162 So. 335 (1935).
32. 133 Fla. 691, 182 So. 900 (1938).
33. 40 So.2d 899 (Fla. 1949).
34. 78 So.2d 573 (Fla. 1955).
35. 81 So.2d 511 (Fla. 1955).

Record on appeal. In *Bryant v. Kuhn*,[36] it was held that an appellate court, in review on appeal, was governed by the formal record and would give no consideration to verbal rulings made by the trial judge which were not shown by the record.

Scope of review of order granting new trial. Leonette v. Boone[37] held that, upon an appeal from an order granting a new trial, the scope of the review extended only to the grounds specified in the order.

Decision by Industrial Commission res judicata. After a final adverse decision by the Industrial Commission in Workmen's Compensation, which was not appealed to a court, a contrary decision was rendered by the Supreme Court in the case of *Gray v. Employers Mutual Liability Insurance Company*.[38] A second petition was seasonably filed and the claim was allowed by reason of a holding by the Supreme Court contrary to the previous holding of the Commission. This latter holding of the Commission was reversed upon the doctrine of res judicata by the previous order of the Commission.[39]

Admissability of evidence: Only grounds of objection stated will be considered. An appellate court, in reviewing the admissability of evidence at trial, would not consider any grounds of objection except those made at trial.[40]

Statutory certiorari: Matter barred by 60 day limitation under Court Rule pursuant to statute. Upon review by "certiorari," of an interlocutory partial summary decree the court would not review an order entered more than 60 days previous to the interlocutory partial summary decree.[41]

Dismissal of Appeal

On summary motion when appeal frivolous. A motion to dismiss an appeal on the sole ground that the appeal was frivolous would be granted only when the assignment of errors, tested by a superficial examination of the record, lead to a reasonable conclusion that the appeal was clearly without merit.[42]

Common Law Certiorari

Limitations of time. The court, in *American Airmotive Corp. v. Stutz*,[43] held that the statutory time limitation of 30 days within which to seek review by a petition for a common law writ of certiorari as provided by Section 440.27 of the Florida Statutes was superseded by Court Rule 28

36. 73 So.2d 675 (Fla. 1954).
37. 74 So.2d 551 (Fla. 1954).
38. 64 So.2d 650 (Fla. 1952).
39. Plymouth Citrus Products Co-op v. Williamson, 71 So.2d 162 (Fla. 1954).
40. Lineberger v. Domino Canning Co. Falie, 68 So.2d 357 (Fla. 1953).
41. Lewis v. Lewis, 73 So.2d 72 (Fla. 1954).
42. *Ex parte* Sams, 67 So.2d 657 (Fla. 1953).
43. 72 So.2d 665 (Fla. 1954).

which allowed 60 days. It was emphasized that the court's rules limited the time within which a petition for a common law writ of certiorari might be presented, to 60 days, and not 30 days as provided by the Workmen's Compensation Act.[44]

Scope of review on common certiorari to boards and commissions. In *Wilson v. McCoy Manufacturing Co.*,[45] the Supreme Court reaffirmed the holding of *J. T. and K. W. Ry. v. Antone Boy*,[46] that, upon common law certiorari granted to review the decisions of boards exercising quasi judicial power, the court would examine the record "not only to see whether such officers or boards kept within their jurisdictional powers, but whether or not they have acted strictly according to law, and errors and irregularities committed by them will be corrected."

Mere administrative action not reviewable. The Supreme Court held that it did not have jurisdiction, on certiorari, under the constitutional provision authorizing the issuance of such writs, to review assessments of taxes by the Railroad Assessment Board.[47] The assessment was evidently not considered to be an exercise of judicial power under Section 1, Article V of the Constitution; if it had been, the ruling might have been otherwise.

Order dissolving writ of garnishment. In *Slatcoff v. Dezen*,[48] the Supreme Court held that an order that "The garnishee (be) discharged from this cause" was a final judgment and not subject to review by a common law writ of certiorari.

PART II

The Effect on Bench and Bar of the Jurisdictional and Procedural Changes of the Proposed Constitutional Amendment of Article V

Introduction

The Judicial Council presented for introduction in the 1955 Legislature a proposed revision of Article V of the Constitution of Florida which was introduced in the Senate as S.B. 571, and H.B. 810. The Council's draft was amended by the elimination of both the Missouri Plan relating to the election of judges and a provision requiring the Governor to fill vacancies from a pool selected by a commission. The proposal for the Revision of Article V will be numbered "No. 1" of the eleven proposed amendments to be submitted for ratification or rejection by the electorate in November 1956.

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44. Fla. Stat. § 450.29 (1953). See also Fla. Sup. Ct. Rule 16.
45. See Wilson v. McCoy Mfg. Co., 69 So.2d 659 (Fla. 1954).
46. 34 Fla. 389, 16 So. 290 (1894).
47. Seaboard Airline R.R. v. Gay, 68 So.2d 591 (Fla. 1953).
48. 72 So.2d 800 (Fla. 1954).

Supreme Court

Present Constitutional Provision. Article V, Section 5, of the present constitution specifies the appellate jurisdiction of the Supreme Court as follows:

> Section 5. The Supreme Court shall have appellate jurisdiction of all cases at law or in equity originating in circuit courts, and of appeals from Circuit Courts in *cases* arising before judges of the County Courts in matter pertaining to their probate jurisdiction and in the management of the estates of infants, and in *cases* of conviction of felony in the criminal courts, and in all criminal *cases* originating in the Circuit Courts. (emphasis supplied)[49]

Appeals to the Supreme Court: Now. The present constitution expressly specifies the appellate jurisdiction of the Supreme Court, either according to the character of the case or the court rendering judgment. The present simple, unambiguous standards have contributed little to frustrate the administration of justice as to what is appealable and as to what court an appeal may be taken, and there is no problem of split appeals.

Appeals to Supreme Court: As proposed. The proposed amendment, by Section 4(b), provides in reference to the appellate jurisdiction of the Supreme Court as follows:

—from trial courts

> (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. (emphasis supplied)

—from Courts of Appeal

> Appeals from district courts of appeal may be taken to the Supreme Court, *as a matter of right,* only from decisions initially passing the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. (emphasis supplied)

Proposed Standards. In other than capital cases and bond validations, the proposed criteria for exclusive appellate jurisdiction of the Supreme Court is neither the character of the case nor the class of the court rendering judgment; the criteria proposed is whether the judge of any court made conclusions on the validity of a statute or made conclusions concerning a governing provision of the constitution as hereinafter pointed out.

Appeals "from final judgments or decrees directly passing on validity" of a Statute. The language does not specify that the appeal shall be based upon the "validity" of a statute but specifies that the appeal "may be taken"

49. Section 5 of Article V.

from a final judgment or decree "directly passing on the validity" of a statute. The final judgment or decree may directly pass upon the validity of a statute but such validity may not be the basis of the appeal. If a party is satisfied with the decree as to the validity of the statute directly passed upon by the decree, but is aggrieved by the decree on non-constitutional grounds, then does he appeal to the Supreme Court or to the Court of Appeals? If one party is aggrieved on non-constitutional grounds, and another party is aggrieved on constitutional grounds as to the validity of the statute passed upon, then are both appeals to the Supreme Court or does one go the Supreme Court and another to the Court of Appeals—both appealing from the same decree?

The pleading may raise an issue as to the validity of a statute, but the final judgment or decree may appropriately be rendered adjudicating the merits of the controversy without mentioning the statute. The court may have impliedly passed on the validity of the statute, if it was necessary to the decision; or else the trial judge may have considered the validity of the statute not material, and given it no further consideration or mention. Does the Court of Appeals or the Supreme Court have appellate jurisdiction? Again, the pleadings may make no reference to a statute but the final judgment may pass on its validity; then to which court does the appeal lie? The validity of the statute may have been directly passed upon but be immaterial to the controversy on appeal. To which court does the appeal lie?

Appeals from judgments or decrees construing a controlling provision of the Florida or federal Constitution. As in "passing on the validity" of a statute, the final decree may impliedly or expressly construe a controlling provision of a constitution. If done impliedly, it may or may not have been raised by the pleadings. If raised by the pleadings, the trial judge may have considered it immaterial and given it no further consideration. One party to the decree may be aggrieved because of the implied construction and another party aggrieved because of non-constitutional questions. Does the Supreme Court have jurisdiction or the Court of Appeals? Will split appeals be required from the same final decree: one to the Supreme Court and another to the Court of Appeals?

The provisions of Section 4 of the proposal, relative to the appellate jurisdiction of the Supreme Court, are quite novel. Its appellate jurisdiction is conferred only by implication. This is proposed by providing that appeals from trial courts to the Supreme Court "may be taken as matter of right" only from final judgments or decrees imposing the death penalty, validating bonds, "directly passing on the validity" of a statute or "construing a controlling provision" of the Constitution.

Supreme Court: Heretofore and henceforth. Heretofore, the appellate jurisdiction of the Supreme Court extended to the review of all final

judgments or decrees of the Circuit Court, the Court of Record and of felony cases originating in the eight Criminal Courts of Record.

It is proposed that the Supreme Court retain its former appellate jurisdiction only in capital cases and bond validations, and such final judgments or decrees of the Circuit Court, the eight Criminal Courts of Record, or the Court of Record as may be within the specified constitutional areas. It is also proposed that there be *added* to this jurisdiction appeals from the 900 appeals in civil and criminal cases heretofore going to the circuit courts and such appeals from final judgments and decrees of all such courts as the Justice of the Peace, Small Claims, Courts of Crime, Municipal Courts, etc., "directly passing on the validity of a statute" or "construing a controlling provision of the constitution."

Certiorari Supreme Court. The proposal would permit the review in the Supreme Court by certiorari of some interlocutory orders and decrees in equity of the trial courts and of some decisions of the Courts of Appeal; also, a review of the decisions of commissions by certiorari would be permitted.

Relative to review by the Supreme Court the common law discretionary writ of certiorari, section 4(b) of the proposed amendment, provides:

> (b) . . . The Supreme Court may review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the Supreme Court.

It would seem that the Supreme Court would be authorized by this provision to grant the discretionary common law writ of certiorari in equity cases for the review of interlocutory orders and decrees which would be reviewable by the Supreme Court on appeal from final judgmnts and decrees. This means that the Supreme Court may grant certiorari to review interlocutory orders and decrees in equity when the interlocutory order or decree "passes on the validity of a statute" or "construes a controlling provision" of the Constitution.

Of course, the problems of whether the trial court has passed on the validity of the statute, whether it "construed" a provision of the Constitution and whether the provision was "controlling" will be the basis for controversy as to the jurisdiction, unrelated to the merits of the review. If the appeal has been taken to the wrong court it will doubtless be bounced to the court thought appropriate and may then be bounced back.

Courts of Appeals and Commissions, Certiorari. Instead of providing for the Supreme Court to have general jurisdiction in certiorari as at present, it is proposed by section 4(b) that its jurisdiction in certiorari be limited as follows:

> . . . 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 scope of review of the actions of the thirty odd commissions is without limitation, but not so as to the decisions of the Courts of Appeal. By the foregoing provisions the power to review by certiorari extends to decisions of the Courts of Appeal only as specified.

Great Public Interest. The Supreme Court is authorized to grant common law certiorari in decisions involving questions of "great public interest." The term "great public interest" doubtless means "great public importance," and might better have been so worded. In this instance, review is dependent upon the Court of Appeals certifying the question to be one of "great public interest" or importance. Whether the certificate must affirmatively show the question to be of great public importance, or whether that court's mere statement to that effect would be sufficient, is problematical.

Conflicting Decisions. Review by certiorari is also authorized when a decision of a Court of Appeals is in conflict with the decision of another Court of Appeals or a decision of the Supreme Court *"on the same point of law."* The granting of the writ would be discretionary; doubtless, in many instances, this ground would be the basis for a further review from the Courts of Appeal.

Courts of Appeal

Appeals. The proposed Amendment, by Section 5(c), provides for the appellate jurisdiction of the Courts of Appeal as follows:

> (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 appeals of such districts, *as a matter of right,* from all final judgments or decrees except those from which appeals may be taken direct to supreme court or to a circuit court. (emphasis supplied)

When, for the purposes of clarity and understanding, the clauses, phrases and words of paragraph (c), Section 5, are appropriately transposed, they are likely to be interpreted to read, in effect, as follows:

(c) Appeals as a matter of right may be taken to the court of appeals of the district (1) from all final judgments and decrees of trial courts and (2) from final orders and decrees of county judge's courts pertaining to probate matters, or to estates and interest of minors and incompetents; except those from which appeals may be taken directly to the Supreme Court or to a Circuit Court.

Certiorari. For review by the common law writ of certiorari in the Courts of Appeal, section 5(c) of the proposal provides:

> prohibition, and quo warranto. . . .
> A district court of appeal may issue writs mandamus, *certiorari,*

The foregoing provision vests the Courts of Appeal with general jurisdiction to grant certiorari as is now vested in the Supreme Court and the Circuit Courts.

Interlocutory Review in Law and Equity. It is proposed by section 5(b) that the Supreme Court may provide for review in the Courts of Appeal of interlocutory orders and decrees in matters reviewable by the Courts of Appeal by appeal, certiorari or motion as follows:

> The Supreme Court . . . may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district Courts of Appeal.

The Courts of Appeal will have no jurisdiction when the final decree of the trial court involves the constitutional questions specified in section 4(a) and the appeal involves such questions, and when the determination of the constitutional questions is essential to the decision, since, in such instances, only the Supreme Court would have appellate jurisdiction.

In the event that the Supreme Court should exercise the power conferred, and if none of the specified questions of which only the Supreme Court has jurisdiction have been raised and adjudged in the trial courts, doubtless, the Courts of Appeal would have jurisdiction to review in the manner to be specified by the Supreme Court. But, if after the proceedings in certiorari had been commenced, the trial court proceeded and, before the determination of the certiorari proceedings, passed on the validity of a statute or construed a controlling provision of a constitution, then, would the Court of Appeals be ousted of jurisdiction? Will the Court of Appeals have jurisdiction if the constitutional questions are raised and adjudicated interlocutorily, when adjudication is not essential to the final judgment—a decree in respect to the party aggrieved?

Provisions for review by appeal and by certiorari in the Supreme Court are limited, and it appears that no interlocutory review by certiorari by that court was intended to be permitted unless the specified constitutional questions were raised and adjudged. However, whether interlocutory orders and decrees in law or in equity will be reviewable in the Courts of Appeal before final judgment or decree, the question of policy is to be left to the discretion of the Supreme Court and not the legislature.

Unlimited time for appeal to Supreme Court or Courts of Appeal. To begin with, the constitution is paramount. What the constitution grants, neither the legislature nor the courts may abolish or impair. The proposed amendment, instead of expressly providing for the appellate jurisdiction of the Supreme Court provides that in the limited and specified circumstances appeals to the Supreme Court "may be taken as a matter of right," thereby conferring appellate jurisdiction only by implication. The words of the present constitution are: "The Supreme Court shall have appellate jurisdiction in all cases at law, etc." Regarding the juris-

diction of the Circuit Courts, the present constitution provides "The Circuit Courts shall have exclusive original jurisdiction in all cases in equity, etc.; original jurisdiction in actions of forcible entry, etc.; they shall have final appellate jurisdiction in, etc."[50] by such terms, only jurisdictional power is conferred, and the right of appeal and the time allowed for appeal is left to the legislature.

To confer judicial power by implication as proposed carries no evil consequences, but to confer, without limitation of time, the unqualified right to appeal under the constitution forbodes much that is not wholesome. When a constitution simply vests judicial power, then the legislature may limit the time within which appeals may be taken, as, in this state, to 60 days in civil cases and 90 days in criminal cases. This is in order that the parties may know when litigation is at an end.

The proposed amendment is addressed, not to jurisdiction of the Supreme Court, but to appeals "as a matter of right." For the legislature to attempt to limit the time for appeal to twenty days or twenty years would impair this proposed constitutional grant of appeal "as a matter of right" from the final judgments and decrees made appealable to the Supreme Court and to the Courts of Appeal, but not the Circuit Courts in which latter instance the language of the present constitution has been followed.

If the foregoing interpretation is correct it will require an appeal in every case which is appealable to the Supreme Court or the Courts of Appeal in order that the parties may know that the litigation is at an end.

Circuit Courts

Appeals. The appellate jurisdiction of the Circuit Courts in probate matters would be transferred to the Courts of Appeal. It is proposed that most of the appellate jurisdiction of the Circuit Courts be the same as at present with the few exceptions hereafter noted.

The proposed amendments, by Section 6(c), provides for the appellate jurisdiction of the Circuit Courts as follows:

> 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 foregoing provision makes no mention of appeals from the Civil Courts of Record, Courts of Crime, Traffic Courts and other courts which the legislature may establish. It appears that appeals of final judgments in misdemeanor cases and in civil actions from these courts would be appealable to the Courts of Appeals and not to the Circuit Courts, unless the legislature would have power to enlarge the appellate jurisdiction of the Circuit Court.

50. Section 11, Article V.