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THE PROPER FUNCTION OF AN APPELLATE COURT†

EDSON R. SUnderLAND*

One of the most important and interesting of the fields of legal procedure is that which deals with appellate review. No part of the law is more deeply incrusted with the relics of ancient customs and institutions. None has been more completely removed from the influence of lay opinion and consequently none has been more highly technical. It is a field which abounds in rationalized explanations for unnecessary processes and useless restrictions, and it is possibly for that reason that appellate practice is in so chaotic a condition in the United States. The subject of Appeal and Error occupies more space in Corpus Juris than any other except Corporations. It is to certain features of this most intricate and engaging subject that I want to devote the time that has been allotted to me to-day.

I

There was nothing known to the common law which was, or could properly be called, a true appeal from one court to another, and this was so in England until the judicature act of 1873.¹ There were, however, certain imperfect and restricted methods by which some sort of redress could be had for an unjust decision.

All questions of fact were decided by juries, and a review of the facts could be had by what was called the attaint. This was

† Read by Professor Sunderland before the Gary Bar Association.
* See p. 517 for biographical note.
¹ Pollock & Maitland, History of English Law (2nd Ed.) 664; 1 Holdsworth, History of English Law (3rd Ed.) 214.
the common law predecessor of the new trial, but it took place before a superior jury of twenty-four who reviewed the action of the twelve. It was like an appeal from a single judge to a bench of judges, and involved the idea of a superior grade of tribunal whose decision would, for that reason, be of higher quality. But it was primarily a proceeding against the jury rather than against the verdict. The attainted jury was punished by imprisonment and fine for its false verdict, although the false verdict was at the same time, and as a useful incident, replaced by the true verdict of the higher jury.²

Questions of law, on the other hand, were decided by the judges, and a proceeding very much like the attaint was developed to reach false judgments. In the 1200s complaints against judgments took the form of semi-criminal proceedings against the judges, and Holdsworth tells us that even to the present day the writ of error is deemed to commence a new suit for no better reason than because, six hundred years ago, it really was a new proceeding directed against the judge, and was based upon a new cause of action arising out of the wrongful act committed by him in rendering his false judgment. To this day, also, we employ formal assignments of error because six hundred years ago the judge was held to be entitled to know what were the charges against him,³ and the assignments of error are still regarded in many of our states as the appellants pleading in the court of errors, just as they were regarded six hundred years ago.

But while the same theory of review applied to both verdicts and judgments, and the jury, in the one case and the judge in the other, became defendants before a superior tribunal in a proceeding very much like an accusation of perjury, it is interesting to observe that the judges nevertheless enjoyed certain privileges which were denied to the jury. While attainted jurors were both fined and imprisoned, the judges got off with a fine; and while the jurors had to stand or fall on the merits of their verdict, the judges could defend their judgments by means of a duel. But lest this give too great an advantage to brawny appellants, and encourage too free a recourse to proceedings in error, penalties were provided for unsuccessful applicants. The Assizes of Jerusalem which were typical of the time, required

² Pollock & Maitland, History of English Law (2nd Ed.) 665.
³ 1 Holdsworth, History English Law (3rd Ed.) 214.
the party seeking to falsify the judgment to fight the whole court, including the judges and the witnesses. Under such conditions losing parties were inclined to let matters drop, particularly in view of the fact that the county often kept a doughty champion in its employ to represent the court in such emergencies.

It was not until the days of Edward I, who reigned from 1272 to 1307 and in whose reign our present bill of exceptions was first invented and authorized, that the idea arose of a complaint against a judgment which was not an accusation against the judge.

Now, the interesting thing about the common law proceeding in error was that it did not operate as a review of the merits of the judgment. The question never arose as to whether the judgment was just or unjust, nor did the proceeding ever involve an inquiry as to what the true judgment ought to be. The sole question was, Did the judge commit an error? Such error might be great or small, its consequences might be serious or trifling, but an error was an error and the judgment must fall. Here again there is a clear survival of the idea of a criminal accusation against the judge. A civil complaint and criminal complaint are of a wholly different character. "In civil justice," says Salmond, "the complaint amounts to a claim of right; in criminal justice it amounts merely to an accusation of wrong. Civil justice is concerned primarily with the plaintiff and his rights; criminal justice with the defendant and his offences."

The proceeding in error attacks the false judgment which has been wrongly rendered; it does not demand or obtain the true judgment to which the appellant was right entitled.

The accusatory nature of the common law proceeding in error was not a feature peculiar to England, but was even more strikingly developed in France, where the appellant was required on the same day, to kill or conquer all the judges who concurred in the judgment or lose his own head. From the contemporary existence of this proceeding in both England and France during the 1200s one might expect to find a similar subsequent development in the two countries, but such was not the case. France

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4 Glanville VIII, 9.
5 2 Pollock & Maitland, History of English Law (2nd Ed.) 667.
6 2 Pollock & Maitland, History of English Law (2nd Ed.) 668.
succeeded in throwing off the paralyzing restrictions of this barbaric procedure, and developed a rational and effective system of true appellate review, but in England the strangle hold of the common law tradition never relaxed until long after the American colonies had set up an independent government of their own, and had taken over, as heirs of the common law, the medieval theory of a judicial proceeding in error.

II

The real explanation of the persistence with which the scope of judicial review in common law actions was confined to the identification of errors, is undoubtedly to be found in the institution of trial by jury.

Prior to the invention of the bill of exceptions, in 1285, no review could be had except for errors apparent on the face of the record, and it might therefore be said, with sufficient accuracy, that so far as the knowledge of the reviewing court was permitted to extend, no errors could be deemed to have legal existence except those which appeared on the fact of the record itself. The problem before the court of errors was in that case very simple, for if any alleged error was found to exist, the judgment was merely reversed and the case normally remanded, and that was the end of the whole controversy in that court.

When, however, bills of exceptions were authorized, a wholly new problem arose. The errors brought up by that device did not immediately control the judgment, as did the errors in the judgment roll, but only affected the minds of the jury. But the extent and character of that influence could not be shown to the reviewing court. They could tell if any error had been made in admitting or excluding evidence, or in any other matter involved in the trial before the jury, but they could not tell what effect it had upon the verdict. In such a situation there was nothing to do but send the case back for a new trial, so that another verdict could be obtained free from the error which had vitiated the first one.

The remand of cases for new trials was therefore a necessary incident in the use of juries. So long as the jury had the exclusive right to weigh the evidence and find the facts, no error which was related in any material respect to either of those functions could be cured in any other way. The judges of the higher court could not undertake to adjust the verdict so as to
eliminate the error, without depriving the parties of their right to trial by jury.

But in spite of the use of new trials, there was one part of the case which could never be reviewed at all, and that was the part which dealt with questions of fact. The very essence of a proceeding in error involved the conception of wrong judicial conduct on the part of the judge. He had no control over the conclusions which the jury might draw from the evidence, and if they went wrong it was sufficient to say that it was no fault of his. Therefore no error could be assigned upon any matter of fact.

Summarizing the scope of this common law system of review, it may be said that it deals best with the least important class of questions, namely, controlling errors of law which appear upon the judgment roll, that it deals very clumsily and crudely, by means of new trials, with those incidental errors of law which affect the course of the trial and influence the conduct of the jury; and that it deals not at all with pure errors of fact.

The utter inadequacy of such a proceeding as a means of relief against unjust judgments, might possibly have reacted unfavorably upon the institution of the civil jury, had it not been for the simultaneous rise of the court of chancery, which offered remedies where the rigid rules of the common law were unequal to the task.

Continental Europe had had a very different experience from that of England. There, both law and fact were determined by the same persons, and the theory of a divided tribunal, one part to try the facts and the other to declare the law, had never become established. Under such a system there was no serious obstacle to a full review of a judgment by other judges, who could be as free to reconsider the facts as they were to pass on the law. This enabled the appellate tribunal to dispose of the whole controversy, and render the judgment which ought to have been rendered, and there was no occasion whatever for ignoring questions of fact or for sending back cases for new trials. The accusatory character of the primitive proceeding in errors, which directed attention to the conduct of the judge rather than to the rights of the parties, and destroyed a wrong judgment without at the same time substituting a true one, could not maintain itself in the face of a trial procedure which made it possible to have a full review of the whole case. Therefore the proceeding in error died out, and the appeal took its place as
the almost universal means of reviewing judicial decisions.

The continental notion of a unified tribunal, capable of dealing at the same time with the law and the facts, was adopted in England in the courts of chancery, so that in reviewing equity cases there was no need for resorting to the clumsy and ineffective procedure in error. If the upper court had the power to determine the merits of the case, it became less important to know whether an error had been committed than to know how it could be rectified. In a proceeding in error the entire aim of the review was to affirm or deny the existence of the error; in a true appeal that problem became merely preliminary to the really basic question of what the right decree should be.

Accordingly, there grew up and flourished side by side, in England, two entirely different methods and theories of review. One was a relic of the barbaric times of the Plantagenets, which, sheltered by England's island isolation and fortuitously grounded upon the institution of the civil jury, long outlived the stage of civilization which brought it into existence. The other was a practical mechanism, developed under the stimulus of the renaissance out of the vast storehouse of the Roman law, whose sole purpose was to furnish an adequate and convenient corrective for all the faults of trial courts.

The two methods were bound to influence each other.

On the one hand the obvious superiority of the appeal exerted a slight tendency to liberalize the manner of dealing with proceedings in error, at least to the extent of permitting new trials to be had for glaring errors of fact, under the convenient disguise of the familiar fiction that such errors were errors of law. But so long as the jury had theoretical jurisdiction over questions of fact, there was not much to be hoped for in enlarging the scope of review in law cases. To grant new trials with greater readiness was a doubtful benefit to suitors, for it resulted only in destroying a verdict which had cost a great deal to get, and the parties were back again where they were before with practically nothing to show for their pains.

On the other hand, the great latitude of the continental appeal and the freedom with which continental courts re-examined the case as it existed, rather than merely the case as it was tried, permitting new evidence to be introduced when it would serve the ends of justice,9 set a pace which English judges, trained in

the technical logic of the common law, were unable to follow. Consequently the appeal in equity fell just short of becoming a true rehearing. New questions could not be considered. New evidence was never admitted in the House of Lords in a chancery appeal, and if evidence offered below was rejected and therefore not passed upon by the trial court, the House would not receive it, but would remit the case to be reheard below.\(^{10}\)

The situation so produced was unsatisfactory in every way. The equity appeal was not as good as it ought to have been, and the proceeding in error was much worse than a civilized nation ought to have been asked to put up with.

We are here dealing with two distinct restrictions on the scope of the review, one excluding the presentation of new evidence or of new points not raised below, which applied both to appeals in equity and to proceedings in error at law; the other prohibiting the review of facts, which applied only to proceedings in error.

So far as the rules of practice, both at law and in equity, excluded new evidence or the raising of new points in the appellate court, this was a mere survival of the ancient common law theory of an accusation against the judge. It was an inherited tradition and nothing more. It was often defended on the ground that it would be unfair to the trial judge to reverse his judgment on a point which had never been brought to his attention. This was based on the medieval theory that the judge was interested in the review as the real defendant in the accusation of error. It entirely overlooked the immensely greater interest which the appellant had in obtaining a correct judgment, and it ignored the interest of the state in the just and effective operation of its courts. The rule was often defended on the ground that it would be unfair to the appellee to raise new points against him in the appellate court, but this was obviously an excuse and not a reason, for the restriction was administered as an inflexible rule of jurisdiction and not as a rule of convenience subject to special circumstances.

So far, on the other hand, as the rules of practice in law cases prohibited the review of matters of fact, and prevented the adjustment of the judgment on account of errors which might have affected the opinions of the jury, they rested, not

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\(^{10}\) 2 Daniell, *Chan. Prac.* (5th Ed.) 1432.
on traditional practice merely, but upon the institution of the civil jury.

In the course of the struggle for procedural reform which the people of England carried on throughout the nineteenth century, one of the palliatives which the legal profession offered to the public was the right to waive a jury in civil cases. In 1853 the Commissioners for Inquiring into the Practice of the Courts of Common Law made a report in which they admitted that the excellence of the jury as a judicial institution had been lately much questioned, that the experience of the inferior courts in dispensing with juries had been very successful, and they concluded to recommend that while trial by jury should continue to be the rule, the parties should be allowed, if they both so desired, to leave the decision of the issues of fact to the judge.11

Parliament approved of this recommendation, and the Common Law Procedure Act of 1854,12 for the first time in English history, made it possible to try a law case in a superior court without a jury.

This should have opened the way at once for a review of the facts in law cases tried without a jury, and to the abolition of the new trial as the normal corrective of errors other than those apparent upon the face of the judgment roll, but the insidious power of inherited tradition, which operates so powerfully through group suggestion on a closely organized profession like that of the bar, so restricted the effect of the reform that it was impossible to escape the proceeding in error even when a jury was waived, for the act provided that the verdict or finding of the judge should be of the same effect as the verdict of a jury. This absolutely prevented the use of an appeal in law actions. No higher court could either review the facts themselves, or adjust the findings in order to remove the prejudicial effects of errors committed by the court in the course of the trial, so that the burdensome consequences of remand for new trial still pursued the unfortunate litigant in spite of his waiver of the jury. With so little to be gained by substituting a judge for a jury, the act was seldom availed of, and the profession settled down once more in its old rut, trying law cases before juries and reviewing them by writs of error, while they tried equity cases before the judges and reviewed them by appeal.

12 17 & 18 Vict., Ch. 125, Sec. 1.
Twenty years later the Judicature Acts removed forever this irrational limitation upon the effectiveness of a review in law actions, and the finding of a judge sitting in such a case without a jury was given no different effect from the decision of a judge in equity. At the same time the restriction against raising new points in the court of appeal was also removed, and for the first time Englishmen enjoyed the protection of an appellate court authorized to use every convenient means for giving litigants the relief to which they were justly entitled.

Under the present English practice all appeals to the court of appeal are by way of rehearing, and are brought up by notice in a summary way, without any petition, case or formal proceeding of any kind. Appeals in equity and at law follow the same procedure and present identical problems.

The court of appeal is given all the powers and duties as to amending and otherwise of the trial court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination before the court or by affidavit or deposition. Such new evidence may be given as of right and without leave when it relates to any matters which have happened since the trial, in order that the court of appeal may be able to render the final judgment or decree which the trial court would and should have rendered if it had tried the case on a full showing of the merits as of the date when it is reheard in the court of appeal.

The court of appeal is expressly given power to draw inferences of fact and to give any judgment and to make any order which ought to be made, and to make such further or other order as the case may require. Such powers may be exercised in favor of all or any of the parties, although such parties may not have appealed from or complained of the decision.\(^\text{13}\)

If, upon hearing an appeal, the court is of opinion that a new trial ought to be had, it may so order, and the new trial may be limited to such parties or issues as the court of appeal may direct.\(^\text{14}\)

But the legal profession found it hard to escape from the habits of six hundred years. The conception of the scope of a law appeal as a mere proceeding in error, which permeated the entire literature of the law and confronted every lawyer in his

\(^{13}\) Order 58.

\(^{14}\) Order 39.
daily reading, maintained a tenacious hold on the bar and called forth many explanations and admonitions from the enlightened and able judges who have ornamented the English appellate bench in recent times.

In *Coghlan v. Cumberland*, (1898) 1 Ch. 704, Lord Lindley, M. R., made the following observations regarding the theory upon which the court of appeal reviewed questions of fact: "This action is brought on the ground that the plaintiff was induced to buy the business by misrepresentation. . . . The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanor, the court of appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

In *Rickmann v. Thierry*, (1896) 14 R. P. C. 105, Lord Halsbury, with whom concurred Lord Macnaughten and Lord Davey, said: "But, my Lords, I must add that I am entirely unable to yield to the argument which has been, not unnaturally, pressed upon us by counsel. I say not unnaturally, since more than one of the learned judges have given countenance to it by observations made in the course of their judgments. I mean the argu-
ment that there is a presumption that we ought not to interfere with what the judge of first instance has done. I absolutely refuse to acquiesce in any such argument. The hearing upon appeal is a rehearing, and I do not think there is any presumption that the judgment in the court below is right. That one's mind may be, and ought to be, affected so as to lead one to distrust one's own judgment, if the appeal is from a very able or learned judge, for whose judgment one may have great respect, is true. But upon appeal from a judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision. For these reasons, I have thought it right to protest against the motion that when the judge of first instance has decided a question he has done something which is binding upon the court of appeal, and that unless they think it very wrong, according to the language of the learned judges, they must acquiesce in the judgment.”

The House of Lords has very recently deemed it necessary to repeat and emphasize this doctrine as to the right and duty of the court of appeal to review questions of fact in cases tried without a jury. In *Mersey Docks and Harbour Board v. Proctor*, (1923) A. C. 253, an action at law for damages was brought by the widow of a deceased laborer for negligently causing his death, and the negligence alleged was the failure to properly fence at the point where he fell into the water and was drowned. The case was tried by Branson, J., without a jury, and the court of appeal set aside his judgment. On a further appeal to the House of Lords, Lord Chancellor Cave said: “It is contended on behalf of the appellants that the finding of Branson, J., being a finding of a trial judge on a question of fact, should not have been disturbed by the court of appeal. In my opinion there is no ground for such a contention. The duty of a court hearing an appeal from the decision of a judge without a jury is no longer in doubt. In such a case it is the duty of the court of appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of wit-
nesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly."

The emancipation of English judicial administration from the burdensome limitations of the proceeding in error in law cases tried without a jury, has resulted in a similar development in the self-governing dominions of the British Empire. Similar statutes are found in Canada, and the Canadian Supreme Court, in *Annable v. Coventry*, (1912) 46 Can. Sup. Ct. 573, followed the English doctrine in declaring that "It is within the province of an appellate court and it is its duty, 'even where, as in this case, the appeal turns upon a question of fact . . . to rehear the case . . . , not shrinking from overruling it if, on full consideration, the court comes to the conclusion that the judgment is wrong.'" But even in the new world the medieval common law tradition dies hard, and so recently as 1924, in *Douglas v. Peacock*, (1924) 4 D. L. R. 1037, 1044, that court felt called upon to issue a warning to provincial courts of appeal against giving too much effect to the findings of the trial judge on matters of fact.

So in Australia, in *Dearman v. Dearman*, (1908) 7 C. L. R. 549, the high court of that commonwealth said that the English rule, as stated by Lord Lindley in *Coghan v. Cumberland*, supra, had been adopted as a governing authority, and that "any court of appeal which does not so weigh the matter out for itself, and assign its relative importance to the advantage possessed by the primary tribunal would so far abdicate its functions and deprive the suitor of the right which the law gives him."

III

The United States is the unfortunate heir of the dual system of error and appeal, as it came down from the Middle Ages. We have not always kept the old names, but names mean nothing in themselves. What we call an appeal may be an appeal or it may be a proceeding in error or it may be both. Statutory language must be interpreted according to its context. Certain it is, however, that we have two kinds of review, the limited review of errors of law and the full review of the merits, and these two methods, in their essence, are error and appeal.

In the first place, we inherited the accusatory tradition of the proceeding in error, which prohibited the raising of new points on review. It has produced some curious situations.
In the State of New Mexico, not long ago, one Francisco Garcia and his brother were indicted for murder and both were found guilty of manslaughter. In its opinion on review, the Supreme Court of New Mexico says: "A curious fact appears in this case. Francisco Garcia, one of the defendants, became engaged in an altercation with the deceased, whereupon deceased shot Garcia and he fell to the floor, and remained there, unconscious, during the whole of the remainder of the difficulty. Cipriano Garcia, his brother, was at the time at the back of the saloon where the difficulty occurred, and took no part in the same up to that time. Upon hearing the shot and seeing his brother fall to the floor, he rushed to his rescue, encountered the deceased and killed him. No proof of concerted action on the part of the brother is shown. It thus appears that it was physically impossible for Francisco Garcia to be guilty of any crime in this connection, and he was entitled to an instruction to the jury to acquit him. Had the matter been called to the attention of the court before instructing the jury, no doubt he would have so directed them. But counsel sat quiet. Nor did counsel call the attention of the court to this proposition in the motion for a new trial. Under such circumstances, no relief can be granted here. No question is here for decision, the court below never having decided the point. . . . The remedy of the defendant, Francisco, is an application to the Governor for pardon. . . . The judgment of the lower court is affirmed, and it is so ordered."

Now, why should the highest court in the state be unable to protect a defendant from punishment when the record before that court shows conclusively, as the court itself admits, that it is physically impossible for him to be guilty of any crime whatever? Because we are dealing with the proceeding in error. Six hundred years ago this proceeding was an accusation against the judge, and the judge could not be accused of wrongdoing unless he committed an error, and he could not have committed an error unless he made a ruling. Hence there can be no relief from an unjust judgment, unless the injustice of that judgment was due to the erroneous ruling of the judge. If a ruling was not obtained there is nothing to present to the court of error, and no matter what outrage may have been committed, the judgment must stand.

15 State v. Garcia, 19 N. M. 414.
It is interesting to observe, however, that, in the case referred to, the court eventually found itself unable to live up to the traditional definition of a proceeding in error, and upon a rehearing, which it subsequently granted, it refused to be bound by that theory where a man's fundamental rights were involved, asserting the doctrine that a court of last resort must be presumed to have inherent power to protect the innocent in such cases. Did it therefore discharge this innocent defendant? Not at all. Although the record before it conclusively proved his innocence, the common law tradition was still too strong, and the court could only see its way to order a new trial. It could get over one hurdle, the want of a formal error or law, to save a man from prison, but it could not get over the other and save him from the absurd and useless ordeal of a new trial. It is hoped that the district attorney was more resourceful.

In the Garcia case the point *might* have been made below, but it was not. In the case of *Tari v. State of Ohio*, (1927) 159 N. E. 594, decided within the last few months, the point was not made below because it did not have legal existence at the time, but the failure to make it was equally fatal to the proceeding in error. This was one of the notorious cases in Ohio prosecuted under the statute which provided that the village mayor or justice should be paid for his services as judge out of the costs he collected from the defendants whom he convicted. This statute has been attacked in the Supreme Court of Ohio in the case of *Tumey v. State*, (1926) 115 Ohio St. 701, as a denial of due process, but the court had held that it was valid, and it was after this decision that Tari was arrested, tried and convicted under that statute. In view of the decision of the Supreme Court of Ohio that the statute was valid, no point was made at the trial against its validity. But after his conviction, the Supreme Court of the United States reversed the judgment of the Supreme Court of Ohio, *Tumey v. State*, (1927) 273 U. S. 510, and unanimously held that the statute was void as a denial of due process of law. Tari thereupon promptly applied for a writ of error to reverse his judgment of conviction, but the Supreme Court of Ohio, although admitting there was no other remedy, refused it, on the ground that since the point had not been raised below it could not be availed of in a court of error. In effect the court said that, even though, under their own decision, the objection had no valid existence at the time of the trial, nevertheless the failure to raise it when there was in legal effect
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nothing to raise, was a waiver of the point on review. Such an argument might have been made with equal propriety and success before any English court of errors at any time during the six hundred years preceding the Judicature Act of 1873. Neither the justice of the judgment nor the rights of the defendant were under review. It was a matter of no legal importance whether or not he remained in jail under a void statute. It was enough that the point had not been passed upon below. This narrow conception of the function of a court of review in an action at law, has frequently been held to have the compulsory sanction of those constitutions which grant only appellate power to their highest courts. It is said that such power can be exercised only as to matters which have already been passed upon, and if new points were to be considered, that would be the exercise of original jurisdiction.

But the argument begs the question. What, it may be asked, is being reviewed? The judgment, or the rulings which became merged in it? Obviously it is the judgment with which the appellant is dissatisfied, and the correctness of that judgment is equally under review whether new points or old points are being considered. The argument confuses appellate power with the manner of its exercise, and would place upon modern courts a constitutional restriction against using any data for testing the justice of a judgment which was not available to courts of error in the Middle Ages.

If this ancient characteristic of a proceeding in error can be winked at in desperate cases, to save a man from conviction for manslaughter, as was done with Garcia, or to reverse judgments based on claims contrary to public policy as is frequently done, then the doctrine is not jurisdictional at all, but only customary, and can be made to yield to the demands of justice as far as either the legislature or the court itself may deem expedient.

IV

In the second place, we inherited the common law jury, which carried with it the impossibility of a review of the facts and a final disposition of the case by the appellate court. Generally speaking, we were less subservient than the people of England to the sacred institution, and in at least one jurisdiction, the colony of Massachusetts, its waiver in civil cases was authorized

16 Crichfield v. Paving Co., 174 Ill. 466.
as early as 1641,\(^\text{17}\) thereby anticipating the reform of the English Common Law Procedure Act by more than two hundred years; and indeed most of our states had provided for the trial of law cases by the judges before England did so.

But, as the experience of England showed, the waiver of a jury is not sufficient in itself to open an avenue of escape from a review by proceedings in error. It is the exclusive and conclusive character of the verdict which makes a true appeal impossible, and if a finding by the court is merely substituted for the verdict of the jury, we have done nothing to enlarge our appellate remedies.

Now American statutes authorizing the waiver of a civil jury are of two types. One, like the English Common Law Procedure Act, expressly declares that findings shall be made and shall have the same force and effect as the verdict of a jury. This was the case with the federal statute,\(^\text{18}\) and with those of a few states, such as New York\(^\text{19}\) and Kentucky,\(^\text{20}\) and in some instances, as in North Carolina,\(^\text{21}\) the preservation of this medieval obstacle to the correction of errors was secured by the constitution. In the face of such express legislation, the courts were, of course, quite helpless to effect any radical improvement in the character of the review, even if they had been so inclined.

But many statutes stopped short of this, and if they provided at all for findings or conclusions of fact, they did not prescribe what force and effect they should have.

Here was an opportunity for the profession to take a broad view of the possibilities of enlarging the usefulness and efficiency of appellate review. The appeal in equity was perfectly familiar. The trial judge considered both the facts and the law, and the whole case went up on appeal for a complete review and a final decree. Findings of fact, if required in law cases, might serve very effectively to aid the court on appeal as an analysis of the evidence, without being any more binding than recitals in chancery decrees. There was no historic sanctity in the decision of the judge upon the facts, as there was in the verdict of a jury, and no inherent reason, for example, why the judge's views on the facts in an action at law for damages for the breach of a

\(^{17}\) Body of Liberties, Sec. 29, See Comm. v. Rowe, 257 Mass. 177.
\(^{18}\) Judicial Code, Sec. 649.
\(^{19}\) L. 1847, Sec. 80.
\(^{20}\) Code Sec. 332, (1876).
\(^{21}\) Art, IV, Sec. 13.
contract, should have any more weight than the views of the same judge on the same facts when the case was brought in equity to enforce the performance of the same contract.

But the law tradition was too strong, and the courts, by judicial construction, supplied a limitation which the legislature failed to incorporate in the statute. The arguments in support of the conclusive effect of the findings are typical examples of instinctive opposition to change. Courts had never been required or permitted on appeal to review the facts in law cases, and they were alarmed by the prospect.

"On principle," said the Supreme Court of Arkansas in an exhaustive and learned opinion in an early case, "there can be no more just ground of exception to the finding of the court upon the evidence, than to the verdict of a jury. . . . A bill of exceptions, undertaking to go behind the facts found, by setting out the evidence, is of necessity unfair, because it conveys to the mind of the appellate court no adequate impression of the weight of the testimony. If the Supreme Court could thus be forced to review the determination of facts, we would not shrink from the duty, however onerous; but we must refuse to exercise such a jurisdiction, because it is unwarranted by law, is foreign to the organization of this court, and a dangerous assumption of power."\(^{22}\) It is difficult to see how the assumption of power to review facts in law cases could be any more "dangerous" than the exercise of that same power in equity cases, but expressions of this kind show very clearly a strong opposition to such an extension of the scope of review.

The United States Supreme Court was for many years embarrassed to know what to do with cases which came up from federal courts sitting in Louisiana, which were authorized by act of Congress to follow the local practice. Louisiana used the civil law, employed no juries, and the cases were taken up like appeals in equity. It was held that law cases tried in accordance with Louisiana practice could not be reviewed at all, because Congress could not constitutionally require the Supreme Court to review law cases on the facts, and the records as made up in Louisiana contained no bills of exceptions.\(^{23}\) For that court to re-examine facts in cases which were legal rather than equitable, would, it declared, "be dangerous to the trial by jury and at times subversive of the public liberties."\(^{24}\)

\(^{22}\) State Bank v. Conway, 13 Ark. 344.
\(^{23}\) Minor v. Tillotson, 2 How. 392.
\(^{24}\) Phillips v. Preston, 5 How. 278, 289.
The public, however, was not universally impressed with the difficulties and dangers which so seriously alarmed the profession, and, in a considerable number of states, statutes were passed which expressly authorized a full appeal, on both the law and the facts, where juries had been waived.

But even here the resources of the profession were summoned in defense of the familiar doctrine of the proceeding in error.

In Connecticut the legislature passed an act providing that in any case tried without a jury, any party might appeal from any finding of facts and the Supreme Court should review all questions of fact so presented. But the majority of the court said that it had no constitutional power to review questions of fact, because it was, by the express language of the Constitution, a “Court of Errors,” and the use of this phrase was interpreted to express “the conviction of the people that a jurisdiction of mixed law and fact vested in any court of last resort, exercising a supreme and uncontrolled power, was inconsistent with a sound system of jurisprudence and was dangerous to the administration of justice.”

In South Carolina a similar legislative attempt to provide for the review of facts was met by a similar constitutional argument. In Indiana the legislature required the Supreme Court to go no farther than to determine whether the judgment appealed from was against the clear weight of the evidence, but the court said that it was so obviously impossible for an appellate court to decide questions of fact, or even to determine whether the finding was clearly or overwhelmingly or conclusively against the evidence, that they would not assume that the legislature intended to put upon them the absurd task of attempting to weigh conflicting oral testimony.

In Wisconsin the legislature, in 1860, undertook to amplify the scope of review in law actions tried without a jury by authorizing the same procedure as in equity suits. In the first review sought under this act, in Snyder v. Wright, (1861) 13 Wis. 689, the distinguished Chief Justice Dixon did not hesitate to attack the soundness of its legislative policy. Speaking for the court, he said:

“This is the first case in which we have been asked, under the provisions of Chapter 264 of the Laws of 1860, to review

25 Styles v. Tyler, 64 Conn. 432, 451.
26 Land Mortgage Co. v. Faulkner, 45 S. C. 508, 506.
27 Hudelson v. Hudelson, 164 Ind. 694.
questions of fact in a common law action, when the trial below was had before the court without a jury. The 13th section of that act provides, that when any issue of fact is tried by the court, either party, for purposes of an appeal, may, within ten days after written notice of the entry of judgment, or without such notice, file with the clerk written exceptions to the facts found by the judge who tried the cause, or to his conclusions of law thereon, or both, or to any of them; and may, in case of appeal or writ of error brought upon the judgment rendered upon such decision, incorporate such written exceptions into the bill of exceptions in the case. The 14th section contains similar regulations as to excepting to facts found in cases tried before a referee. The 16th section provides, that upon appeals to this court from judgments in such cases, this court may review any question of fact as well as of law, decided by the court or referee, where exceptions have been taken to the findings upon matters of fact. The method here prescribed for the settlement of doubtful and disputed questions of fact in actions at law, is certainly novel and extraordinary. Its wisdom and propriety remain to be tested, provided the law is to continue upon our statute book. For ourselves we may say that we doubt them, and were we permitted to give advice upon the subject, we should counsel its immediate repeal. The disadvantages of such a mode for the ascertainment and final determination of facts, in cases where, for the most part, the witnesses are required to appear and give their evidence personally before the court or tribunal having original cognizance of the cause, are so obvious that they will readily suggest themselves to every professional, and even non-professional person, of ordinary experience and intelligence. By it the court of last resort is, in a great measure, deprived of the opportunity of scrutinizing the interest, motives, inclination and prejudices of the witnesses, their means of obtaining correct information, and the use they have made of them, their powers of perceiving facts, the attention which they gave, and their capacity for remembering and stating them. The opportunity of observing their manner and deportment, the effect of a cross-examination, and many other circumstances which are often of quite as much importance in ascertaining the truth as the answers themselves, are wholly lost. Denied these advantages, the court is compelled to decide upon the answers alone, and give its opinion against that of a court possessing them. Will any one say that such a mode of trying facts is the best and
most satisfactory, or that it will not unavoidably lead to many erroneous and unjust conclusions? We think not. It seems to us that all must concede that such will be the result. Yet, as we understand the language of the statute—and it is neither doubtful nor ambiguous—such is the mode which the legislature meant to establish. In view of these disadvantages, and the increased and almost intolerable burden which it will impose upon the members of this court, of examining the details of long and complicated statements of fact, which are only proper for the consideration of a court or jury before whom the witnesses personally appear, we regret that there are no legal or constitutional means by which we can restrict such investigations to courts of original jurisdiction. As we know of no such means, we must, however reluctantly, perform the duty thus imposed, to the best of our ability."

In Oregon the court construed the language of the constitution to be merely permissive as to the review of facts, and it expressed grave apprehension lest a liberal attitude toward such reviews would encourage trial courts to disregard their duties and make mere pro forma decisions, “imposing on the appellate court the task of deciding questions of fact on mere paper recitals of testimony reported in the record.”

Here and there the extension of the power of review over findings of fact was accepted by the courts and successfully acted upon.

In Washington, for example, such a statute has been in force for thirty years, and it seems to be administered on essentially the same principles as those adopted by the English courts. Equity actions and law actions are treated exactly alike, and a finding in either case will be reversed if there is a preponderance of evidence against it.

After many years’ experience with an appellate procedure which conformed to the requirements of the common law proceeding in error with the utmost fidelity, the people of California in 1926 amended their constitution so far as to permit a review of the facts in cases tried without a jury. It was there provided that the legislature might grant appellate courts power to make findings of fact contrary to those found below, with or without the taking of additional evidence by the appellate court, and to

28 Frederick & Nelson v. Bard, 66 Ore. —.
make any judgment or order that the case might require.\textsuperscript{30} The legislature, in 1927, promptly passed an act in conformity thereto, directing that the act should be liberally construed with the purpose of enabling causes to be finally disposed of without further proceedings in the trial court.\textsuperscript{31} It will be interesting to see how this latest attempt to escape from the proceeding in error will be dealt with by the courts.

In a considerable number of jurisdictions, the conclusive character of findings in law cases has reacted in a most startling way upon the practice in equity, causing appeals in chancery cases to be treated in all respects like common law proceedings in error, in which the court will under no circumstances, in any case, consider the weight of the evidence.\textsuperscript{32}

This, of course, is a reversal of the immemorial theory of the equity appeal, and abandons all the advantages which English jurisprudence derived from the Roman law of appellate review as it was employed in continental practice.

On the whole, the United States has not given an impressive exhibition of ingenuity and openmindedness in dealing with the opportunities for an enlarged and liberalized system of review produced by the waiver of juries, nor even of ability to make full use of the enlightened theory of an equity appeal.

The explanation of this apparent inability to abandon the common law idea that facts must be exclusively determined in the trial court and that cases must be remanded for new trials as the sole means of correcting errors inhering in such determination, is probably to be found in the power of group suggestion, which played so great a part in retarding the reform of English procedure in the nineteenth century. The professional mind had become so accustomed to a record in law cases which contained the separate, formal, and conclusive judgment of the triers of facts, that not only was it found difficult to imagine a practice which did not include it, but even the lack of a similar element in equity cases was sometimes looked upon as a detriment rather than a benefit.

Mr. Trotter, in his interesting book on Instincts of the Herd, has pointed out that among people belonging to the same social

\[30\text{Art. VI, Sec. 4%.}\]
\[31\text{Stat. 1927, Ch. 352.}\]
\[32\text{Reay v. Butler, 95 Cal. 206, 213; Lake Erie etc. R. R. Co. v. Griffin, 107 Ind. 464; Wagener v. Kirven, 47 S. C. 347, 352.}\]
group, certain conceptions tend to acquire the quality of instinctive truth, because of the accumulated suggestions to which they have been exposed, and elaborately rationalized explanations are ingeniously devised for their justification, even in the face of quite obvious evidence to the contrary. Mr. Martin, writing on "Behavior of Crowds," says that "a crowd is essentially a psychological phenomenon, people behaving differently in a crowd from the way they behave when isolated." "Any class may behave and think as a crowd—in fact it usually does so in so far as its class interest is concerned." Crowd ideas, he says, are platitudinous. "They possess finality and universality. They are fixed. They do not develop. They are ends in themselves. Every crowd has its peculiar illusions." The literature of the law is full of professional illusions as to the usefulness or the necessity of various rules of procedure which have come down to us from the past, and nowhere is the platitudinous wisdom of group psychology expressed with more finality than in connection with the problems of appellate review. It is a habit of mind which keeps lawyers satisfied with current methods of practice long after the public has ceased to have any confidence in their efficiency. This trait has often been identified and recognized by the public in dealing with the legal profession. When the English struggle for reform was at its height in 1850, the London Times said in a leading editorial: "If the minds of legal men are to be forever perversely directed to the past, if they will not divest themselves of old prejudices, and accept new views and ideas suited to the exigencies of the present times, the public must be content with the attempts made by laymen to improve a system which cannot longer be permitted to remain in its old and mischievous condition. The law and its administration constitute the crying evil of the day. . . . The patience of society is at length exhausted and desperate remedies will be attempted in the hope of getting rid of the burden, if well-considered and rational plans are not proposed by those who have made the science of law and that of legislation the subject of their special study." It would probably not be an exaggeration to say that the United States as a whole has the least efficient system of judicial

33 Instincts of the Herd in Peace and War, 38, 39.
34 Pp. 16, 17, 31.
review to be found among civilized people in the world today. The English system of reviewing law and facts, and thereby enabling appellate courts to render the maximum service to litigating parties, which has spread over the English speaking portions of the empire, has been already discussed. The nations of continental Europe have never restricted the full review of law and facts which was characteristic of the Roman law, and they have always maintained a system of appeals competent to render final and complete justice. And their facilities for adequate appellate review have always been far superior to anything found even in modern England. In France, Belgium, Austria and Germany, the trial is not only held before a bench of three judges, but there is a full and unrestricted review of the whole case on the law and the facts, with the possibility of raising new points and introducing new evidence, before an appellate court of five judges.36

With the rest of the world committed to an adequate theory and an efficient practice of appellate review, the position of the United States is something like that of the rookie who complained that all the rest of the company were out of step. It is hard for the people accustomed to the extraordinary efficiency of modern industry and to the scientific attitude of the other professions, to understand why the bar cannot do better than it does.

If an adequate method of review will entail upon appellate courts more labor than they are equipped to do, then we must strengthen, enlarge or supplement those courts. The extent of the service to be rendered by the judicial department of the government should hardly be limited to the measure of the physical endurance of a single group of men. The English court of appeal sits in as many divisions as the amount of business requires, and experiences no difficulty in keeping its various divisions in harmonious and consistent cooperation. If the proper review of facts requires new and better methods of preparing or presenting the evidence to appellate courts, such, for example, as the English method of placing less emphasis upon briefs and allowing a fuller opportunity for the oral argument and for an immediate consideration and decision by the court upon the close of such argument, while everything is fresh in the minds of the judges, we should devote our attention to the

36 See Englemann's Hist. of Cont. Proc. (Millar's Trans.)
task. Certainly for the bench and bar to meet the public demand for more service with the argument that the present facilities are operating to capacity, without making every effort to improve the efficiency of our methods or to enlarge our plant equipment, is a confession of the bankruptcy of the profession as a social force.