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Norman H. McNeil

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*Evidence*THE SCOPE OF REVIEW
AND THE RECEPTION OF ADDITIONAL
EVIDENCE BY THE APPELLATE COURT*Introduction*

The problem of broaching a new idea or new facts which may change the entire course of the case at the appellate level is not new. It has been suggested that the fundamental problem concerning appeals is to try to avoid them entirely by making the trial so efficient that the appeal will be unnecessary.¹ While this may be the goal of every attorney, the fact remains that in any given case it may be extremely difficult to appraise the totality of grounds for complaint or defense. Counsel may extract what he believes to be the real issue in a case and then marshal his evidence around that issue at the trial only to find that the trial judge is not convinced. This usually happens at final judgment and the trial attorney then realizes that, perhaps, there were other procedural or substantive matters which would have given him a more adequate case. Is it now too late to bring these matters to light?

The traditional answer to the question just posed is perhaps best answered by the opinion of the Supreme Court of New Mexico where the court was asked on appeal to reverse a conviction of voluntary manslaughter in the case of *State v. Garcia*.² The record conclusively showed that the defendant was unconscious at the time of the killing and this fact being pointed out to the court on appeal moved the court to say:³

. . . 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, speculated upon the result before the jury, and afterwards complained of an adverse result. Nor did counsel call the attention of the court to this proposition in the motion for a new trial. Under

¹ Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3 (1940).

² 19 N. M. 414, 143 Pac. 1012 (1914).

³ *Id.*, 143 Pac. at 1013, 1014.

such circumstances, no relief can be granted here. No question is here for decision; the court below never having decided the point. The proposition, as presented, amounts to an appeal to this court for the first time to award a new trial to a defendant on the ground of the absence of evidence to convict him, when the lower court has never been asked to so decide. This is not available.

While this language in the *Garcia* case, *supra*, may otherwise seem startling,⁴ the usual holding when a proffer of new evidence or re-evaluation of the record evidence is urged upon the appellate tribunal is that the court is bound by constitutional limits to answer questions of law alone.⁵ More practical reasons, such as lending finality to the judgment and settling litigation, or realizing the appellate court has no trial facilities, serve as well.⁶

Remedies at Common Law

In order that some explanation may be made for the reluctance of our courts to vary the settled method of procedure, a certain grasp of the varied paths available both to the verdict and judgment below and on appeal is necessary. Since we trace almost everything to the English common law at some time or another, the available common law remedies form a foundation for the present discussion.

In the beginning a basic distinction must be taken as between equity appeals and the use of the writ of error at law. On an appeal from an action in equity, an appeal in the original sense of the word, it was the usual practice to review the facts in the record.⁷ It is not unusual to see the equity appeal termed a trial

⁴ Upon rehearing the court awarded a new trial to appellant on the theory that it was within the court's guarded discretion to award a new trial to prevent an injustice. *Id.*, 140 Pac. at 1014.

⁵ *People v. Carmen*, 273 P.2d 521, 525 (Cal. 1954).

⁶ *Dolcin Corp. v. Federal Trade Comm'n.*, 219 F.2d 742 (D.C. Cir. 1955). One learned authority puts it this way: "Where there are intermediate appellate courts . . . there is a general tendency to limit the ultimate reviewing tribunals to questions of law, with an idea that the chief function of that court is to preserve uniformity in the decisions of the intermediate courts and beyond that to deal with great questions of public law and new questions of private law of exceptional importance." POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 371 (1941). See objections and criticism thereto in Note, 56 HARV. L. REV. 1313, 1317 (1943).

⁷ This review of facts, according to one authority, was limited to the record only and no new evidence was taken or could be taken. Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 9 (1940). But others call it a removal of the case; a continuation in the higher court where there was a re-trial of the facts as well as the law. SHIPMAN, *COMMON-LAW PLEADING* 537 (3d ed. 1923). See 3 DANIELL, *CHANCERY PLEADING AND PRACTICE* 1616 (2d ed. 1846), where it is said that the equity appeal covers grounds existing at the time, not *ex post facto*.

de novo on both the law and the facts.⁸ On the other hand, the appeal was unknown to the law courts and the principal method of obtaining review for erroneous judgments at common law is by writ of error.⁹ It appears that even before the writ of error was solidified as a remedy in itself there was a method sometimes used both to over-reach the verdict of the common law jury and the judge. This was termed the action of *attaint*.¹⁰ Because this action was directed to the judge of the trial court personally, rather than to the judgment the court issued, it has been said that in such a complaint the trial judge ought to be entitled to know the nature of the charges against him.¹¹ Hence, such is the basis for limiting the review on writ of error to the record of the trial below and the reluctance of the court to entertain new evidence or other evidence to impeach the decision of the court below.

The scope of the available remedies provided by the common law and still in general use in this country seem to offer plausible proof that a party may not be barred entirely from further action. It is generally recognized that although it presently is quite usual to call recourse to the appellate court an appeal, the real nature of the remedy is the common law writ of error under an erroneous equity title.¹² Unless specifically broadened by statute, the appeal today is limited strictly to the record below.¹³ In *People v. Loftus*,¹⁴ the court reiterated the general rule:

Therefore, when the review is had upon the common-law record,

⁸ See note 7 *supra*.

⁹ SHIPMAN, COMMON LAW PLEADING 537 (3d ed. 1923).

¹⁰ See 2 POLLOCK AND MATTLAND, THE HISTORY OF ENGLISH LAW 665-8 (2d ed. 1952). Herein decisions of the communal and signorial tribunals were reviewed by the action of *attaint*. The verdict of a 12-man jury could be reviewed by a 24-man jury. These jurors reviewed the facts and could overturn the verdict of the first jury, which was then known as the false verdict, by giving the true verdict. Likewise, a complaint against the judgment of the lord-judge, an accusation against him personally for error of law, could be taken. In both proceedings the action or complaint was directed at the judge or jury personally, not the verdict or judgment.

¹¹ Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7-8 (1940).

¹² SHIPMAN, COMMON LAW PLEADING 539 (3d ed. 1923). Other aspects of traditional procedure are covered in Note, 56 HARV. L. REV. 1313 (1943).

¹³ Union Trust Co. v. Harrison's Nurseries, Inc., 180 Md. 651, 26 A.2d 812, 814 (1942). Statutes may broaden the appeal court's powers, e.g., where the appeal is on a criminal conviction and the reviewing court can revalue the facts, search the record anew and draw new facts therefrom. See N.Y. CODE CRIM. PROC. §§ 528, 542; *People v. Strollo*, 191 N.Y. 42, 83 N.E. 573 (1908).

¹⁴ 400 Ill. 432, 81 N.E.2d 495, 497 (1948).

the sole matter only that may be considered by the court is error appearing upon the face of the record, and matters may not be added by argument, affidavit, or otherwise, to supply or expand the record. The case must stand or fall upon the errors appearing in the record.¹⁵

Since recourse to the appellate tribunal is thus limited, the immediate path to relief lies in appealing to the trial court itself. The traditional methods in both civil and criminal actions were either by immediate motion in arrest of judgment or the later filing of the writ of error *coram nobis*.¹⁶ The motion in arrest of judgment has generally fallen into disuse being supplanted by the motion for a new trial.¹⁷ To a great extent the motion for a new trial, where it is used to bring forth matters not appearing in the record and the time for bringing such a motion is lengthy, has also obviated the use of the writ of error *coram nobis*.¹⁸ Some states have specifically withdrawn *coram nobis* as a method of relief and supplanted motion practice in its stead,¹⁹ but the remedy has not lost its efficacy,²⁰ especially in

¹⁵ The record itself is or may be very lengthy. In a criminal case it includes bringing up all the records used at the trial besides the formal papers of the indictment, arraignment, pleas, judgment and the bill of exceptions. These elements of the trial record, except the bill of exceptions in a plea of guilty on a criminal charge, form the mandatory procedure in Illinois. *People v. Loftus*, 400 Ill. 432, 81 N.E.2d 495, 497 (1948).

¹⁶ See generally, ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 494, 522 (1947); Orfield, *The Writ of Error Coram Nobis in Civil Practice*, 20 VA. L. REV. 423 (1934).

¹⁷ Generally the motion in arrest of judgment was used to challenge the jurisdiction, legal sufficiency of the indictment, or the regularity of the proceedings after final judgment; the motion for a new trial now raises these objections in most jurisdictions and may be used before and after judgment. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 494, 498 (1947).

¹⁸ Error *coram nobis* for newly discovered evidence after the time for seeking or moving for a new trial to vacate the judgment is rarely used where the motion for a new trial on those grounds has an extended time. For example, Nebraska allows three years to make the motion for new trial on newly discovered evidence in a criminal case. NEB. REV. STAT. § 29-2103 (1943).

¹⁹ *E.g.*, NEB. REV. STAT. § 29-2103 (1943); Note, 19 NEB. L. REV. 150 (1940). See generally, *State v. Kubus*, 68 N.W.2d 217 (Minn. 1955).

²⁰ See generally, Orfield, *The Writ of Error Coram Nobis in Civil Practice*, 20 VA. L. REV. 423, 424 (1934), where the author defines and contrasts: "The writ of error *coram nobis* is a writ applied for at a subsequent term of the same court, in fact before the same judge, which rendered the judgment to have the judgment revoked for errors of fact not apparent on the record nor negligently withheld from the court by the applicant. The writ is to be sharply differentiated from the ordinary writ of error used in appellate practice. The ordinary writ of error is applied for in an appellate court, is brought for errors of law apparent on the record and brings up the case to the appellate court, which after passing on the alleged errors affirms or reverses the judgment."

criminal proceedings, where it has reached its greatest significance in this country.²¹ While the above remedies are designed to instigate review of the facts or newly discovered evidence, neither are of any assistance where the practitioner has been merely negligent in bringing the matters before the court in the first instance.²² It is imperative that the record itself be intact and contain the relevant features of the case.

Statutory Change in the Law

England made the first decisive change in appellate procedure, changing the scope of review and allowing the introduction of new evidence at the appellate level in 1883. This was done pursuant to rule 4 of Order 58, Rules of the Supreme Court of Judicature (1883), whereby it was provided that the court of appeal would have discretionary power to receive evidence omitted in the trial court. This subsequent evidence could relate to matters arising before or after the final judgment below, but where it was capable of being brought before the trial court, the appellate court had to be first asked for leave to bring in such evidence.²³ While not specifically providing for the introduction of new evidence, Canada also appears to be relaxing the aspect of finality of the judgment of the trial court.²⁴

²¹ Indiana has used the writ extensively in criminal cases, as seen in *Stephenson v. State*, 205 Ind. 141, 186 N.E. 293 (1933). There is no jury trial nor attendance by the petitioner at the hearing on the request for a new trial by means of the writ of error coram nobis. *Dillon v. State*, 231 Ind. 396, 108 N.E.2d 881 (1952).

²² Although it has been held in a federal case that there is no statute of limitations on coram nobis, *Strode v. Stafford Justices*, 23 Fed. Cas. 236, No. 13,537 (C.C. Va. 1810), the writ does not lie for issues which were settled at the trial or for those which a diligent attorney might have uncovered. It lies for errors of fact which never came before the court for decision and matters into which the court has not inquired. Orfield, *The Writ of Error Coram Nobis in Civil Practice*, 20 VA. L. REV. 423, 428 (1934). So it is said that perjury is not subject to review by coram nobis because the writ is unavailable as to litigated issues. *Coppock v. Reed*, 189 Iowa 581, 178 N.W. 382 (1920). In such case habeas corpus is the usual remedy. See note 63 *infra*.

²³ *Spencer v. Ancoats Vale Rubber Co.*, [1888] 58 L.T.R. 363 (C.A.) On the facts in this case the plaintiff was allowed to bring in new evidence, but the court saw fit to allow the defendant an opportunity to cross-examine if necessary. Such new evidence could be brought in orally, by affidavit or deposition and a hearing before a magistrate was provided. The court of appeals does not sit as a trial court. *Compare, Crawford v. Crawford*, 163 Kan. 126, 181 P.2d 526 (1947).

²⁴ The Canadian Supreme Court Act provides: "49. At any time during the pendency of an appeal before the Court, the Court may, upon the application of any of the parties, or without any such application, make all such amendments as are necessary for the purpose of determining the appeal, or the real question or controversy between the parties as disclosed by the pleadings, evidence or proceedings." CAN. REV. STAT. c. 259 (1952).

It is already evident that most American jurisdictions have made no great change in the status of their appellate procedure. As late as 1909 the American Bar Association complained of the inadequacy of reviewing powers and suggested that, within reasonable limits, an appellate court should be allowed to take new evidence to correct mere formal defects, to supply deficiencies where there is record evidence, and especially where the proffered evidence cannot admit of any doubt.²⁵ Following closely on the report of the A.B.A., a few jurisdictions passed statutes which attempted to liberalize appellate procedure by allowing the introduction of new evidence. The more usual provisions apply to cases where a jury trial has been waived or where a jury trial is not permissible, and these provisions allow the appellate court to make additional findings on the record and take additional evidence.²⁶ These statutes have variously suffered the extreme punishment of outright invalidity on constitutional grounds,²⁷ the failure to be re-enacted from limitation and dis-use,²⁸ and strict limitation to matters such as incontestable extraneous records.²⁹ Stressing the jurisdictional provisions of the Illinois constitution, the court, in *Atkins v. Atkins*,³⁰ refused a tender of additional evidence pursuant to statute:

The facts stated in the affidavits, if admitted in evidence, would be relevant to the question of appellant's good faith in the establish-

²⁵ 34 A.B.A. REP. 578, 598 (1909).

²⁶ CAL. CODE CIV. PROC. §§ 956a, 988i (1953); N.D. REV. CODE § 28-2732 (1943); WIS. STAT. § 251.09 (1953).

²⁷ ILL. REV. STAT. c. 110, § 216 (1) (d) (1947); Comment, 43 ILL. L. REV. 76, 86 (1948).

²⁸ The New Jersey law in 1912 and until 1937, N. J. STAT. ANN. § 2:27-362 (1937), provided that new evidence could be taken by affidavit where the evidence was capable of record proof and where it did not involve some jury question. Very few cases appear to have ever been decided under the law. One case, *Vailsburg Amusement Co. v. Criterion Inv. Co.*, 108 N.J.L. 442, 159 Atl. 147 (1932), limited the application to reversals on mere technical grounds because of oversight of some obvious fact at the trial, and no additional evidence was allowed. The provision was dropped from the 1951 re-enactment by the legislature.

²⁹ KAN. GEN. STAT. § 60-3316 (1949). See *Bankers' Mortgage Co. v. Dole*, 130 Kan. 647, 287 Pac. 906, 907 (1930), where the court said: "This section has often been unsuccessfully invoked by litigants attempting to supply evidence which was wanting to support the judgment of the trial court, or to overthrow the judgment, but this court has repeatedly held that it may serve a useful purpose in facilitating the discharge of this court's appellate functions where the supplemental evidence is of a character whose accuracy is beyond dispute." That such statute cannot constitutionally extend to merely cumulative evidence, nor evidence capable of dispute at the trial, see *Gibson v. Enright*, 135 Kan. 181, 9 P.2d 971 (1932).

³⁰ 393 Ill. 202, 65 N.E.2d 801 (1946).

ment of a domicile in Nevada. But the constitution of this State forbids this court exercising original jurisdiction in any cases except those relating to revenue, mandamus and habeas corpus. In all cases other than the three named, the jurisdiction is appellate, only

. . . If the affidavits should be considered as evidence, it would be assuming original jurisdiction³¹

The statute in California³² appears to have been the result of much time and study in this field of appellate powers. In the first place, the statute was not made merely pursuant to legislative power but came about through an unopposed constitutional amendment,³³ giving the legislature specific power to grant any court of appellate jurisdiction the power to make findings of fact contrary or in addition to those made by the trial court, as well as the power to take additional evidence concerning facts occurring after the judgment below and before the decision on appeal. It would seem that after such thorough preparation this statute could withstand the charges that the distinction between original and appellate jurisdiction cannot be violated. In the general view of these matters the lack of constitutional jurisdiction presented the basic problem. When the validity and efficacy of this provision reached the supreme court of the state in *Tupman v. Haberkern*,³⁴ the court did not concern itself with the validity of the provision, but it certainly limited the efficacy in at least two respects. Where the trial court has made findings contrary to the appellant on substantial evidence, the court held that the statute did not expressly allow the appellate tribunals to invade such findings. This holding, properly speaking, amounts to no more than an affirmance of the general rule that the appellate tribunal will not re-weigh the evidence.³⁵ Next the court held

³¹ *Id.*, 65 N.E.2d at 803. The same distinction is emphasized in *Garaventa v. Gardella*, 63 Nev. 304, 169 P.2d 540 (1946). The court here dwelled upon the essential difference in the province of trial and appellate tribunals. There was no statute involved in this case, but the appellant urged that an undertaking to review the evidence was not improper where the decision of the trial court was on a transcript of the evidence. While recognizing some support found in federal cases where depositions are used, the court refused to re-weigh the evidence for the reason that it had no constitutional power or jurisdiction to weigh evidence without regard to the trial court findings.

³² See note 26 *supra*.

³³ CAL. CONST. art. 6, § 4 ¾ (1951). The legislative history is thoroughly discussed in the case of *Tupman v. Haberkern*, 208 Cal. 256, 280 Pac. 970 (1929).

³⁴ 208 Cal. 256, 280 Pac. 970 (1929).

³⁵ California appellate tribunals have the power, however, upon reversal to direct a verdict in favor of the appellant where the record shows that the respondent could not successfully meet the contentions on a remand to the trial court. *Supra* note 33, 280 Pac. at page 975.

that pursuant to the statute it would receive new evidence but only in aid of affirmance; that it could not render a judgment not having the power to pronounce judgment.³⁶ The court did conclude, however, that if there were a reversal, such reversal might be fortified by a finding of facts in its support. This construction of the statute was deemed by the court to preserve the fundamental distinction between the functions of the trial and appellate tribunals while still providing some new area of relief as the new statute intended.³⁷

The North Dakota statute,³⁸ while providing for an immediate stay in proceedings to allow the trial court to take evidence it erroneously excluded, also made provision for the supreme court to try anew the entire case on motion of the appellant. This provision has been quite extensively relied upon, but it has been held to merely allow the appellate court to review the record as submitted from the trial court in search of any error of law or fact into which the court below might have fallen. No new evidence is brought into the appellate court, and the inquiry is not a trial de novo.³⁹ The Wisconsin statute generally has received the same limitations.⁴⁰

³⁶ The logic the court used is delicate. It started on the premise that the statute provided that the appellate court could render judgment for the appellant on new evidence. But if the reviewing court did so an impossible situation would result; that is, the trial court clerk would have a contrary judgment for the respondent to issue process upon in accordance with the trial court's judgment, and the clerk of the appellate court has no means to issue process in order to enforce the adverse appellate judgment. The court concluded, therefore, that it would have to remand for further proceedings, and it could not merely award a new judgment.

³⁷ The Tupman case, see note 33 *supra*, 280 Pac. at 974, shows the original scope of the statute: "It often happens that a litigant neglects to prove some simple fact in the trial court which is essential to his case in which, if he could prove it in the appellate court, would produce a result favorable to him."

³⁸ See note 26 *supra*.

³⁹ *State v. City of Williston*, 72 N.D. 486, 8 N.W.2d 564 (1943). Such a construction was necessary in order to preserve the statute from the threat of an unconstitutional exercise of original jurisdiction, if the statute meant a new trial could be had.

⁴⁰ *Braasch v. Bonde*, 191 Wis. 414, 211 N.W. 281 (1926). In this case the court received additional evidence, a chattel mortgage, on appeal and decided its validity pursuant to the statute because the question was one of law. See also *San Francisco Unified School Dist. v. Board of Nat. Missions*, 276 P.2d 829 (Cal. App. 1954), taking additional evidence of fact on whether or not a judge had complied with a stipulation to view the premises in question; *Lawrence Barker, Inc. v. Briggs*, 39 Cal.2d 654, 248 P.2d 897, 907 (1952) (dissenting opinion) as to the suggested use of the statute in order to bring book records up so that there would be no need for a re-trial.

In some jurisdictions the statutes concerning the appellate powers expressly provide for the taking of additional evidence where the action below is equitable as distinguished from an appeal at law. The procedure provides for a stay in order to allow the evidence to be taken.⁴¹ It may well be that such a procedure is a normal incident of equity jurisdiction, but the important fact to note is that such allowances apparently do not bring down the wrath of the appellate tribunal which, incidentally, sits to hear legal appeals as well.

*Exceptions to the General Rule
and Other Considerations*

The preceding material shows the prevailing view that new evidence may not be adduced at the appellate level unless it can be accepted pursuant to a statute. Relevant to these considerations is the leniency in some jurisdictions concerning the hearing of objections or the re-weighting of evidence where the proceeding below was a criminal or equitable cause.⁴² Certain matters have been admitted by appellate courts without the aid of a statute in aid of the best interest of justice. In *Burgess v. Lasby*,⁴³ the court listed varied cases where evidence dehors the record was used, *inter alia*, to show the question had become moot; that pending the appeal there had been a settlement; to show circumstances occurring after the appeal which had materially affected the rights involved; and where the jurisdiction of the trial court was in contest. Other cases stress the futility of sending a case back to the trial court where the record fails to contain an undisputed fact simply to have a record made of

⁴¹ Notably Iowa, IOWA CODE ANN. §§ 624.2, 624.3 (1946) and Maryland, MD. ANN. CODE GEN. LAWS art. 5, § 10, 42 (1951). Both statutes strictly limit appeals at law and allow further proceedings on remand or through the taking of depositions to augment the record. Therefore, unless the appellate tribunal has the contents of an offer of proof, it will not reverse, *James v. Fairall*, 168 Iowa 427, 148 N.W. 1029 (1914), but in equity there is a trial de novo. *Pazawich v. Johnson*, 241 Iowa 10, 39 N.W.2d 590 (1949).

⁴² Where the appellant acts in *propria persona*, it is not unusual to see the appellate court looking into the merits of his claims, no matter how well taken they appear, and deciding on the merits in the interest of justice. See *People v. Keeton*, 278 P.2d 961 (Cal. App. 1955); *State v. Kubus*, 68 N.W.2d 217 (Minn. 1955) *cert. denied*, 394 U.S. 959 (1955). See also notes 12, 24, 41 *supra*.

⁴³ 91 Mont. 482, 9 P.2d 164, 166 (1932).

it.⁴⁴ While it has been held that affidavits or stipulations admitting existing facts cannot confer power on the appellate tribunal to decide new questions,⁴⁵ even where the trial court submits a certificate as to the facts,⁴⁶ it has been admitted that there are certain cases where this procedure is the only appropriate method of acquainting the reviewing court with the facts.⁴⁷ At least one court has said that it would accept alleged facts as true on appeal providing the opponent admitted them as well,⁴⁸ and one reviewing court has allowed the prosecution to supply record evidence overlooked at the trial, but which defendant could not have overcome.⁴⁹

An analogous problem, related to the introduction of new evidence, and which is treated in much the same manner on appeal, is reluctance in allowing a shift of issue on appeal. The failure, sometimes referred to as negligence of counsel to elect the proper theory of action in the trial court, has been held to preclude him from asserting it on appeal regardless of the merits of the issue and whether or not the facts would substantiate the claim.⁵⁰ More liberal jurisdictions require only that sufficient facts be brought in, and the theory of the case or the law to be applied will be left to the appellate court.⁵¹

⁴⁴ *Union Central Life Ins. Co. v. Stevens*, 143 Kan. 757, 57 P.2d 57 (1936). This case involved failure of the record to contain the motion for a new trial. The motion appeared in counsel's brief and was considered on appeal. Where both parties considered a file, not marked in evidence, the court also considered it. *Ribero v. Callaway*, 87 Cal. App.2d 135, 196 P.2d 109 (1948).

⁴⁵ *People v. Carmen*, 273 P.2d 521 (Cal. 1954); *People v. Mooney*, 176 Cal. 105, 167 Pac. 696 (1917).

⁴⁶ *Adams v. State*, 44 Ga. App. 573, 162 S.E. 164 (1932); or a certificate of a secretary of state, *Stephens County v. J. N. McCammon, Inc.*, 122 Tex. 148, 52 S.W.2d 53 (1932).

⁴⁷ See *Maher v. Roisner*, 239 Minn. 115, 57 N.W.2d 810 (1953), where the court admitted an affidavit of opposing counsel's misconduct at the trial for the reason that the affidavit was the only means to bring such facts to the notice of the reviewing court. See *Commonwealth v. Jester*, 256 Pa. 441, 100 Atl. 993 (1917). Cf., *People v. Jackson*, 298 N.Y. 219, 82 N.E.2d 14, 18 (1948), on the availability of error coram nobis.

⁴⁸ *State v. Miller*, 187 S.C. 271, 197 S.E. 310, 311 (1938) (dictum).

⁴⁹ *People v. Travis*, 257 N.Y. 474, 178 N.E. 762 (1931) (evidence was of a statute). Compare, *People v. Luckman*, 248 App. Div. 233, 289 N.Y. Supp. 70 (2d Dep't 1936); *Flynn v. Brooks*, 105 F.2d 766 (D.C. Cir. 1939) (court allowed evidence concerning non-joinder of indispensable parties).

⁵⁰ *Lohman v. Edgewater Holding Co.*, 227 Minn. 40, 33 N.W.2d 842 (1948); criticized in 34 IOWA L. REV. 521 (1949), wherein the writer claims that the facts substantiated the new theory and the tendered argument went to the cause of action.

⁵¹ E.g., see *Eads v. Marks*, 39 C.2d 807, 249 P.2d 257 (1952), where the court allowed a change in the theory of action from contract to tort on facts well pleaded.

There remain two substantial areas of judicial power where the objection to an introduction of new evidence on appeal is of little or no avail. The first exception to the rule is that the appellate court may, by the exercise of judicial notice, take cognizance of facts and law outside of the record. Perhaps one of the oldest cases of note recognizing this rule is *United States v. The Schooner Peggy*,⁵² wherein it was said that:

It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . .⁵³

The other general exception, and perhaps the most important, is fraud or concealment of existing facts from the trial court which would have necessitated a different judgment if known. This must be distinguished from grounds supporting a motion for a new trial for newly discovered evidence since such concealment is of facts existing at or before trial, not otherwise known to the parties. One of the more recent cases on this point is *Linn v. Linn*,⁵⁴ where the court held that misconduct during the interlocutory period, which was kept from the trial court, amounted to a fraud on the court within the province of equity to relieve:

We cannot accept the theory that, . . . the court on which the fraud is practiced is powerless to set aside the decree after it has become final. The proper administration of justice is inconsistent with such a result.⁵⁵

Also it has been held that jurisdictional facts may be opened for the first time on appeal by the court's own motion,⁵⁶ or upon

⁵² 5 U.S. (1 Cranch) 103 (1801).

⁵³ *Id.* at 109-110. For more recent applications of this rule see *State v. Jacobson*, 348 Mo. 258, 152 S.W.2d 1061 (1941). In *Federal Deposit Ins. Corp. v. Vest*, 122 F.2d 765 (6th Cir. 1941), *cert. denied* 314 U.S. 696 (1941), the court took judicial notice of a statute urged by neither party. Likewise, in a conflicts case, unpleaded foreign law will be deemed the same as that of the forum. *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158 (1937).

⁵⁴ 69 N.W.2d 147 (Mich. 1955).

⁵⁵ *Id.* at 151. It was argued here that Michigan statutory procedure had precluded either a motion for a hearing on newly discovered evidence or a rehearing on such facts; that in effect the Supreme Court was deciding the case anew after final decree and time for subsequent motions had passed. Brief for Appellee, p. 8, *Linn v. Linn*, 69 N.W.2d 147 (Mich. 1955). The controlling case appeared to be *Allen v. Allen*, 341 Mich. 543, 67 N.W.2d 805 (1954), where, three years after a final determination, a motion to vacate on facts of misconduct concealed from the trial court, was held proper on the grounds of fraud.

⁵⁶ *United States Express Co. v. Hurlock*, 120 Md. 107, 87 Atl. 834 (1913).

collateral⁵⁷ or direct attack.⁵⁸

It would appear, therefore, that under certain circumstances, an appellate tribunal would accept a tender of additional evidence pursuant to the common law and in the best interests of justice. It may well be that such evidence is tendered to justify the denial of a new trial or rehearing directed to the trial court,⁵⁹ but essentially such consideration admits that the fear of clogging appellate procedure with trial work is not always pertinent. While some appellate courts may not have facilities for taking additional evidence in the manner of a trial court, many possess original jurisdiction over special matters so that taking evidence is nothing unusual.⁶⁰ Even in the Supreme Court, where it is the general rule that there will be no inquiry into the facts,⁶¹ the Court will make an independent examination of the facts when deciding whether or not a person has been deprived of a fundamental right.⁶² Such examples of liberality, it is submitted, shake the foundations of finality given to the decisions below and, though these tactics are in the interest of justice and the only proper procedure to follow on appeal, it would seem that any doubt concerning their propriety is purely traditional.

Another example of liberality is the present attitude of the federal courts concerning review of state court judgments on the writ of habeas corpus. Traditionally the scope of review was confined to the record of the trial court, and extrinsic evidence was not admissible; but pursuant to statutory change and court construction the petitioner "may have a judicial inquiry . . . into the very truth and substance of the causes of his detention, although it may become necessary to look behind and

⁵⁷ *Williams v. North Carolina*, 325 U.S. 226 (1945).

⁵⁸ *Burgess v. Lasby*, 91 Mont. 482, 9 P.2d 164 (1932); compare *People v. Carmen*, 273 P.2d 521 (Cal. 1954).

⁵⁹ See note 54 *supra*.

⁶⁰ While a jury trial has not been held in the Supreme Court since *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), and now a jury trial in an original action probably could not be had, it was understood for many years that such was available in the highest tribunal. STERN & GRESSMAN, *SUPREME COURT PRACTICE* 275 (2d ed. 1954). Compare *Dolcin Corp. v. Federal Trade Comm.*, 219 F.2d 742 (D.C. Cir. 1955).

⁶¹ STERN & GRESSMAN, *SUPREME COURT PRACTICE* 100 (2d ed. 1954). On the question whether the Supreme Court will hear new evidence, see Note, 56 *HARV. L. REV.* 1313, 1323 (1943); *Dakota County v. Glidden*, 113 U.S. 222, 225 (1885).

⁶² See *Norris v. Alabama*, 294 U.S. 587, 590 (1935); *Craig v. Harney*, 331 U.S. 367, 373 (1947); STERN & GRESSMAN, *op. cit. supra*, p. 101.

beyond the record of his conviction. . . ."⁶³

Conclusion

The basis for prohibiting the introduction of new evidence or refraining from an extensive inquiry into the facts of the case on appeal, as before stated, traces itself to the notion that the court below is presently being charged with error. This charge of error, being in the nature of a complaint, required that the trial judge be given fair and just treatment by the appellate tribunal. Likewise, where the jurisdictional powers of the various courts are codified, as many are, the notion that only questions of law may be presented on appeal stems from the distinction between original and appellate jurisdiction. This author seriously doubts that jurisdiction in these matters is purely a creature of the modern statutes, but rather, the notion of the difference between the province of the trial and appellate courts at common law. Determined on the common law, those cases which allow the reception of evidence or inquiry and re-interpretation of the facts do so in light of the demands of justice or the proper administration of justice. It would appear, then, that in each case the rationale must ultimately rest on whether or not justice demands a contrary course be followed.

It must be understood that even in the most pressing case a court may legitimately refuse a tender of additional evidence substantiating a claim by merely saying that: ". . . even assuming that additional evidence could be received . . . the facts stated . . . are insufficient. . . ."⁶⁴ While the tactic of answering tendered objections by way of dictum may satisfy the requisites of justice in a given case, a different result may be demanded when the facts present grounds for reversal. The question posed is: On which side does the greater weight of justice lean? If the answer is to be found by referring merely to the procedural techniques which arbitrarily preclude further proceedings on the appellate level in the interest of finality, such as the concept of appellate jurisdiction, the fact that the judge and jury below did not consider these additional facts, or that the appellate

⁶³ Frank v. Mangum, 237 U.S. 309, 331 (1915). The grounds for habeas corpus are now very broad, and cases may involve facts admittedly extraneous to the record, e.g., conviction obtained by perjured testimony; trial court under dominion of mob violence. See Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. Rev. 26 (1945). State procedure in habeas corpus may be more limited. *People v. Jackson*, 298 N.Y. 219, 82 N.E.2d 14 (1948).

⁶⁴ *People v. Carmen*, 273 P.2d 521, 525 (Cal. 1954) (dictum).

court has no trial facilities, then this is what justice demands. It would seem, however, that for each reason there exists a relatively simple answer and that there is no pressing need to sacrifice an unknowing party's claim merely because his attorney might have been trying to win on the key issue. If, in truth, certain omitted facts do exist and the opponents are willing to admit them by any means, (and should not there be a duty to disclose?) then it would appear that an answer could be given, if for no other reason than that they have waived objections. When the California Supreme Court understood that the statute would require them to hear additional evidence as a function of an appeal, they forthwith provided for means to have hearings on new questions of fact pursuant to the statute.⁶⁵ While there is always the possibility that a change might open appellate procedure to certain delays and that negligence of counsel may be rewarded, it is submitted that in the end each case of this kind could be settled on the merits of every claim. If a jury is required, then it is not impossible to provide the full measure of justice to the parties. The common law is not unused to change.

Norman H. Mc Neil

⁶⁵ See *Tupman v. Haberkern*, 208 Cal. 256, 280 Pac. 970 (1929), but note that the construction this court placed upon the statute rendered the use of such a procedure of little consequence.