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PROBLEMS OF APPELLATE PROCEDURE

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I. THE RIGHT OF REVIEW

A right of appeal involves the existence of a hierarchy of courts, and a hierarchy of courts presupposes a somewhat highly developed political system. Hence in early times the court of first instance, as the immediate delegate of the judicial power of the government, heard and disposed of cases with absolute finality. Such was the situation in Rome in the simple days of the Republic, and it was only with the more elaborate organization of the Empire that a system of judicial appeals came into existence (Hunter on Roman Law (4th Ed.) 1044). The same situation was repeated in England. In the twelfth century there was no appeal from inferior courts to the king's court, but there were methods of removing cases before judgment. The ecclesiastical courts, however, deriving their organization from Roman sources, became a model which finally brought into existence a civil system of judicial review (2 Pollock and Maitland, Hist. of English Law (2nd Ed.) 664-66).

Once the principle of judicial appeal is established, a conflict arises as to how far it should be carried. The pressure for extension comes from defeated litigants because of their hope of faring better on a further hearing, and from the legal profession because it enlarges the scope of their business. Resistance comes from the public, who see no virtue in protracted litigation and no reason for maintaining courts at public expense for the benefit of stubborn and contentious parties who have already had as much consideration as they are entitled to.
There are really two questions involved. In what cases should appeals be permitted, and at what stages should those appeals take place? Assuming that a case falls within the class where appeals are advisable, should the review be postponed until final judgment and a single appeal be taken therefrom, or should appeals be allowed from interlocutory orders as they are made? On neither question is there any unanimity of views. In general it is better to restrict appeals to matters of sufficient importance to justify the expense to the public and to the parties, but there is absolutely no test for measuring the importance of cases which has ever met with general approval. A case involving $100 is considered important enough to go to the Supreme Court of Kansas (Gen. St. 1901, No. 5019), but nothing less than $4,500 will suffice for review by the Supreme Court of Missouri (Laws 1901, p. 107). In Michigan every case which can be tried in the circuit court can be reviewed in the Supreme Court (Pub. Acts 1919, No. 14), while in Texas the disagreement of the judges of the Court of Civil Appeals makes the case worthy of review by the Supreme Court (Comp. St. 1920, Art. 1521). It is very common to allow appeals in all cases involving taxation, or title to land, or franchises, or the validity of legislation.

There is one thing to be said in favor of no restrictions at all—it will save an immense amount of useless litigation over the question whether parties may or may not appeal particular cases. Every restriction to ward off appeals creates litigation over the force and effect of the restriction itself. Machinery to save labor may become so complex as to waste more labor than it saves.

On the other question, whether the appeal should wait for the final judgment, there is a better chance for intelligent experimentation. The problem here is primarily one of conservation of effort. If the interlocutory order is reviewed at once it may render subsequent proceedings unnecessary, as in the case of an order granting a new trial, or an order bringing in a new party or a new cause of action, or an order which in effect determines or involves the merits; in all of which cases there will be a definite advantage of convenience in proceeding immediately with the appeal. Such an appeal may sometimes prevent ir-
reparable injury, as in cases of granting, refusing or dissolving injunctions, or ordering the sale of property. On the other hand, courts would be utterly paralyzed if there were no restriction upon the right to take an appeal upon every order or ruling which either party wished to challenge. Where is the line to be drawn? It is a question to be solved by experience alone, and as experience furnishes very complex, incomplete, and unintelligible data, there is no reasonable hope of ever settling the problem finally. It will doubtless continue to be treated experimentally, with frequent alterations to meet the shifting opinions of those in a position to influence legislation.

One aspect of the problem has been too little considered in the United States, and that is the economic as well as political value of better trial procedure and more capable trial judges. If the efficiency of the trial court were improved, in both the inferior and superior grades, litigants might be more willing to accept the decision and forego any appeal. It might be that the immense volume of appeals which we suffer from is an indication of a want of confidence in our courts of first instance. The direct cost of appeals to the parties and to the state, and the indirect cost to society and industry of the delays resulting therefrom, represent the saving ideally possible if trial courts could function to the entire satisfaction of litigants. Courts never do and never can satisfy all parties, but there is certainly a marked difference between the number of appeals from judges who are felt to be unusually capable and from those whose ability is not respected. In the absence of statistics one can only speculate as to the extent of this difference. It is worthy of note, however, that England, whose judicial system works very much better than ours, spares no pains to obtain the very highest grade of judges in her trial courts. English county court judges have a jurisdiction practically equivalent to our justices of the peace. They must be barristers of at least seven years standing, are appointed for life by the Lord Chancellor, are paid a salary of $7,500.00 a year, and are entitled to an annual disability pension of $5,000.00 (County Courts Acts of 1888 and 1903, Secs. 8, 23, 24). The judges of the King's Bench and Chancery Divisions have a jurisdiction equivalent to our circuit or district courts. They must be barristers of at least ten years standing, are ap-
pointed for life, are paid a salary of $25,000.00, and are entitled to a pension after fifteen years service, or upon disability of $17,000.00 a year. The Lord Chief Justice is not an appellate judge, but a trial court judge; his salary is $40,000.00, and his pension is $20,000.00. The judges of the Court of Appeal receive no higher salaries than the judges of the trial courts. The English instinct for judicial administration has always recognized the trial, rather than the appeal, as the primary field of court operation. Until 1907 no review for errors committed during the course of the trial was provided for in criminal cases (1 Holdsworth, Hist. of Eng. Law, 217). A high class trial bench has been the very corner stone of English judicial policy. The Judicature Act. of 1873 abolished the appellate jurisdiction of the House of Lords, but before it became operative a conservative reaction of feeling came to the rescue of that historic appellate tribunal, largely on sentimental grounds. With trial judges fully equal in ability and professional standing to the judges of appeal, there is far less inclination to question their decisions. Correcting errors on review is a clumsy and unsatisfactory substitute for trying the case properly in the first place. If Mr. Henry Ford ran his factory on the theory which we adopt in our courts, allowing his cars to be built under the direction of low salaried shop superintendents and only using his high salaried engineers to inspect for errors after the work was done, and to send back all imperfected cars to be rebuilt, he would have been bankrupt long ago. An ounce of prevention is worth a pound of cure. The real problem of appeals is to avoid appeals,—to make our trial so efficient that appeals will seldom be asked for.

II. METHODS OF REVIEW

When we pass to the consideration of methods of review, we enter a field where much more definite conclusions are possible. We are here concerned with mechanical problems which are peculiarly within the knowledge of the legal profession. Every appeal is conducted by lawyers, who are required to decide upon the method to be selected and to carry out every procedural step involved in that method, and the advantages and disadvantages can be readily appraised.

It is a matter of familiar knowledge that one of the most serious objections to the common law system of pleading was
the variety of forms of action and the technical distinctions to be observed in their use, and it is probable that this was the primary cause for the abandonment of common law pleading and the adoption of the code in the majority of American States. Forms of actions were a product of historical causes which had long ceased to have any practical significance. Their use entailed both the risk of a wrong choice and familiarity with a large body of technical rules which would otherwise have had no reason for existence. The typical American Code begins with the legislative announcement that forms of action are hereby abolished and hereafter there shall be in this state but one form of action to be known as a civil action.

Now the situation is practically identical in regard to forms of appeal. The writ of error, the writ of certiorari, the writ of prohibition, and the writ of mandamus, were developed by the common law of England in exactly the same way as the forms of action, and equity developed another form of review by appeal to meet its own peculiar requirements. Every form has its own special use and its own special procedure. Each has its strong points and its weak points, but the bad has to be taken with the good, so that whatever form one uses it is necessary to sacrifice something in order to gain something else.

If you choose the wrong form you will entirely fail in your effort to review the case, for no form can by amendment be changed to another. When you have chosen you must strictly follow the technique which for some reason, probably historical, belongs to that form of review, whether there is any present advantage in it or not.

The choice bristles with perplexing dilemmas. The writ of error should be used to review proceedings following the course of the common law, but there is no authoritative test to determine what is the course of the common law. It lies only to courts of record and only errors apparent upon the record, but until the practice has become established it is not always clear whether or to what extent a newly created court is of record and what the record consists of. A proceeding may be started in a court not of record and not proceeding according to the course of the common law and after removal into a different court for trial de novo may or may not become sufficiently a common law
proceeding to justify the use of a writ of error. And finally, if the appellant wishes to review the facts he can not use a writ of error, because it is limited to a review of the law.

The writ of certiorari is available only if a writ of error or an appeal, or some other remedy, is not available, or, if available, is not adequate, and it is employed to review the acts of inferior courts and of tribunals, commissions, magistrates, boards or officers acting in a judicial capacity not according to the course of the common law, but there is no authentic test as to what public bodies or proceedings the writ is applicable and no safe rule as to when the other methods of review are sufficiently inadequate to justify resort to this one. It is commonly said that certiorari will lie only to review acts in excess of jurisdiction, and not mere errors committed on the trial; but when is an error jurisdictional in character? Furthermore, the remedy is discretionary, and there is always uncertainty as to whether it will be allowed.

The writ of mandamus is an extraordinary remedy and is granted only when no other adequate relief can be granted. This refers us back to all the other remedies. Ex parte Harding, 219 U. S. 363, is an amazing discussion by the Supreme Court of the United States of two inconsistent lines of cases in which the writ was granted or refused, showing the extreme difficulty in drawing the line between its proper and improper use.

Prohibition is said to be means of keeping inferior courts of every description within their proper jurisdictional limits, but not to prevent an erroneous exercise of their jurisdictional power. (High on Extraordinary Legal Remedies (3rd Ed.) Sec. 772.) But where is the line between these shadowy concepts?

As for appeals, they are statutory proceedings adopted from equity, and are subject to a multitude of statutory limitations, express and implied. When authorized, are they additional remedies, or are they deemed to be exclusive of all others? If employed in legal actions do they operate only as writs of error under another name, or do they convert proceedings in error into rehearsings on the facts as well as the law?

The volume of litigation which has involved the scope, purpose and proper limitations of these various appellate remedies
has been appalling. I venture to say that the forms of action at common law never approached these forms of appeal in their burdensome consequences. Our appellate practice has become such a perpetual source of litigation in practically all our States that *Corpus Juris* devotes more space to Appeal and Error than to any other subject in the law. The hopeless confusion which baffles the ingenuity of counsel could not be better demonstrated than by the admission of the appellate courts themselves that in case of doubt between two methods of appeal it would be prudent to use both. “The practice,” says the United States Circuit Court of Appeals, by Sanborn, J., “of taking an appeal and a writ of error to review the same adjudications is not only permissible, but commendable, in cases in which counsel have just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court. In such cases the reviewing court will consider both proceedings, will dismiss the one which is ineffective, and will review the ruling of the court below in accordance with the rules of the method applicable to the nature of the case before it.” *(Lockman v. Lang, 132 Fed. 1, 65 C. C. A. 621.)*

The first step toward a rational appellate procedure should be the total abolition of all these forms, and the substitution of a single form for appeal, consisting of a simple notice. The problem of obtaining the various kinds of appellate relief on a single form of notice would be the same sort of problem as obtaining various kinds of trial court relief on a single form of complaint. In the ordinary jury case the appellant would give notice of a demand for a reversal or a new trial, in whole or in part, and the form should be identically the same whether it is an appeal from an inferior court or from a superior court of record. In a law case without a jury, or an equity case, or any other proceeding where the judge or other tribunal tries the facts, notice of request for a rehearing on the law, or the facts, or both, would be given. Where an order to the lower court or tribunal directing it to act or desist from acting is desired, corresponding to the command of the writ of mandamus or prohibition, the notice would specify it. As in the case of a pleading such relief ought to be given by the appellate court as the case presented calls for, whether asked for or not, and no appeal should ever fail because of any mistake or error on the part of
the appellant as to what relief he is entitled to, if he is entitled to any relief. The analogy between a case of review and a case of first instance is complete, and both are capable of reduction to the same degree of simplicity according to identical principles.

III. REVIEWING TRIBUNALS

Analogous to the mechanical problem of method is the administrative problem of appellate court organization. The great number of appeals makes it necessary to provide a large number of appellate judges. How should they be organized for maximum efficiency?

Inferior court appeals have usually been carried to the superior courts of general jurisdiction, which have taken care of such appellate business in addition to their work as courts of first instance. Such appeals involve small values, require prompt decision, and can not carry a heavy expense to the parties, and the commonly employed system of a local rehearing before a judge of higher grade seems to meet the situation well enough.

The chief difficulty arises in appeals from superior courts. Should appellate jurisdiction be divided, some cases going to one court and some to another, with a possible second appeal? The federal judiciary is so organized, and many States have adopted the same plan. It is a logically attractive theory, but American experience has uncovered many serious defects.

In the first place there is a complete lack of any sound basis upon which the jurisdiction can be divided. This is evident from the diversity and confusion in the distribution of appeals between intermediate and highest courts. It can be fairly said that there is not a single question or field of the law, and not a single case, which would not fall within the jurisdiction of an inferior appellate court in some States and of the highest court in others.

And not only is there no principle upon which a workable division of appellate business can be made, but the very lack of such a principle fosters perpetual amendments of the provisions regulating appeals. In 1906 Georgia, by a constitutional amendment, provided for a distribution of appeals between the Supreme Court and the Court of Appeals, and in 1916 it again amended the constitution, completely changing the basis for the
distribution. Illinois has never had any rest on this subject, and after establishing a system in 1877 (L., p. 75), remodeled it in 1879 (L., p. 169), again in 1887 (L., p. 136), again in 1907 (L., p. 467), and again in 1909 (L., p. 304). Indiana has enacted no less than six complete and different schedules for appeals to the two courts, in 1891 (Acts, Ch. 37), 1893 (Acts, p. 29), 1901 (Acts, Ch. 247), 1907 (Acts, Ch. 148), 1911 (Acts, Ch. 117), and 1914 (Acts, Ch. 76), besides minor changes. No State has succeeded in finding a plan for distributing appeals which seems to remain in operation very long. And this will doubtless continue to be so, because every system of apportionment is only an arbitrary and capricious arrangement, without any principle of logic or convenience to support and sustain it.

Furthermore, litigation constantly goes on over the interpretation of statutes which apportion the appeals, so that the same problem of jurisdiction emerges in the appellate procedure which we meet in connection with the existence of more than one trial court.

A no less serious difficulty growing out of the use of more than one appellate court is the question of finality of decision in the lower court, so as to allow or prevent successive appeals. There is every conceivable degree of finality or lack of finality, in these intermediate appeals, found among the American states which employ such courts.

Double appeals are an economic waste and a menace to public confidence in the courts. Reversals of one appellate court by another appellate court tend to discredit the whole judicial establishment in popular esteem. This is a serious thing under present conditions. The cost and uncertainty of litigation have always been two chief complaints against the administration of justice, and double appeals certainly increase the first and emphasize the second. They often result in a final decision by a minority of all the judges who have passed upon the case. In the famous case of Allen v. Flood (1898), A. C. L., which involved a double appeal, out of 21 judges of substantially equal ability, who participated in the decisions, 13 were for the plaintiff, but the defendant won. A close majority decision for reversal on a second appeal will usually mean a decision by a minority of the judges involved. This constantly occurs in all states which
have intermediate courts.

The recognized evil of double appeals has undoubtedly had a great influence in shaping the jurisdictional provisions of appellate court statutes, but the varying degrees of success with which they have met the problem are very striking. Many devices have been employed. Some are relatively efficient, others are not. There is probably no state where any civil action may not, under some circumstances, be carried through the intermediate court for a second appeal, so that no litigant can be sure in advance that he may not have to fight his case through two appellate courts.

Very few states have attempted to make the decisions of the lower appellate court absolutely final, for the reason, no doubt, that the highest court would thereby lose the supervisory power over the decisions of inferior courts which the constitution gives it or which it seems desirable that it should have.

To fully retain such supervisory power the Supreme Court should have authority to bring up any case from the inferior appellate court which it believes merits its attention, and most States recognize this practice either through express constitutional or statutory provisions or by implication from the constitutional nature of the court of last resort.

Another method of maintaining the final authority of the Supreme Court, which is less direct and obviously less effective, is by authorizing the inferior appellate court to certify cases or questions to the Supreme Court for decision. This method is frequently used in connection with the proceedings by certiorari, so that a case may be sent up by the inferior court or called up by the higher court, as either court may be induced or required.

Now it is obvious that if the final authority of the Supreme Court is to be fully protected, an intermediate appellate court necessarily implies either a second appeal, or an application for a second appeal, as a possible incident in every case. This is burdensome alike to the parties and to the courts, and the mere right to apply for a second appeal produces substantially the same burden upon both court and parties as the unrestricted right to appeal.

The weight of this burden was strikingly brought out by
Chief Justice Hiscock, of the New York Court of Appeals, in discussing means for relieving that Court, at the meeting of the New York State Bar Association in 1919. He said:

“During the last year, out of practically 400 contested motions submitted to the Court, 215 or 216 were applications for leave to appeal. Of those applications, 40, or about 20 per cent, were granted. I think very likely that some members of the Bar feel that they are being denied their proper and just rights by this limitation upon the right to appeal. My judgment is that between 90 and 99 per cent—I won’t try to specify the exact percentum—are getting, through the application to the Court for leave to appeal, precisely the same consideration and the same result that they would get if at the end of two years their appeal was regularly considered on the calendar. Every application for leave to appeal takes precisely the same course as a regular appeal. It is assigned in regular order to a member of the Court; it is considered by all the members of the Court, and it is brought up in consultation and is there disposed of.” (Report of the New York State Bar Association, 1919, pp. 408-9.)

Denials of applications for certiorari or orders allowing an appeal are usually not published, but there is some data available. Thus, in Illinois, where double appeals had become such an intolerable burden that an act was passed in 1909, commonly called the Certiorari Act, absolutely prohibiting appeals from the appellate court to the Supreme Court unless the lower court certified the case up or the Supreme Court itself brought up the case for further review, but the persistence of counsel in seeking leave to appeal has gone far to nullify the act. In Volume 216 of the Reports of the Illinois Appellate Courts, pp. xii-li, there is a list of all the cases from the Appellate Courts reviewed by the Supreme Court during a period of a little less than three years, from 1917 to 1920, together with applications for certiorari which were denied by the Supreme Court. There are about 329 cases in this list, and just one half of them were denials of petitions for certiorari. In 1923 the situation had become even worse, and out of 578 appeals from the Appellate Court, 309, or nearly 54 per cent, were denials of petitions for certiorari. (See 231 Ill. App., pp.
The list of cases from the Court of Civil Appeals reviewed by the Supreme Court of Texas in 1923 shows 113 applications for writ of error refused as against 132 cases retained for decisions on the merits of the appeal (114 Tex., pp. 585-605).

It is plain that the use of intermediate appellate courts has been attended with many drawbacks. Two states, Colorado and Kansas, totally abandoned their use after trying them. Such a court was established in Colorado in 1891, and was abolished in 1905. Then in 1911 a new Court of Appeals was created for a period of four years, for the sole purpose of clearing up the Supreme Court docket, thereby making it practically a temporary division of the Supreme Court, and in 1915 it finished its work and ceased to exist. The Kansas Courts of Appeals were established in 1895, to continue four years. Their jurisdiction was similar to that of other such courts. At the end of the four-year period there was not enough interest in them to continue their life and they expired by limitation, after publishing ten volumes of reports.

The two chief defects in the intermediate appellate court system are uncertainty of jurisdiction and double appeals. They can be removed only by removing the cause and establishing a single appellate court to which all appeals go for final disposition. Such a court could sit in as many divisions as were necessary, and the divisions could be located wherever convenience directed. Three judges are enough to pass on any appeal if they agree. A disagreement might be sufficient to authorize a rehearing before the division with one or two judges added, or before the full court. A considerable number of States have authorized the divisional organization of their courts of last report. California, 1879 (Const., Art. 6, Sec. 2), Missouri, 1890 (Constl, Art. 6, Amend. of 1890), Georgia, 1896 (Const., Art. 6, Sec. 2; L. 1896, No. 51), Kansas, 1900 (Const., Art. 3, Sec. 2), Florida, 1902 (Const., Art. 5, Sec. 2), Alabama, 1903 (Code of 1907, Sec. 5949), Colorado, 1904 (Const., Art. 6, Sec. 5), Washington, 1909 (Const., Art. 4, Sec. 2; L. 1909, Ch. 24), Oregon, 1913 (Gen. L. of 1920, Sec. 3045), Iowa, 1913 (35 Gen. A., Ch. 22), Mississippi, 1914 (L. 1916, Ch. 152), Oklahoma, 1919 (L. 1919, Ch. 127).
There is in every one of these constitutional or legislative enactments suitable provision for bringing such cases before a larger number of judges, or before the entire court, as should receive such additional attention. Some provide that if there is a dissent in any division the case shall go to the whole court; others authorize the chief justice or a specified number of associate justices to make such an order; some require all constitutional questions to go to the full court, and others prohibit any former adjudication to be overruled or modified except by the full court; some leave it to the court itself to decide how cases shall be assigned or referred to the full court or to divisions.

- The apparent objections which readily suggest themselves do not seem to be meritorious. One is the possibility of inconsistencies between the different divisions. This cannot be greater than the possibility of inconsistencies between an intermediate and a supreme court, or between different divisions of an intermediate court, or between different cases decided by the same court at different times. But the danger of inconsistencies is very small. In any event the judges can not personally remember prior decisions of the court and must rely upon their own study of the reports and the diligence of counsel, and it will make very little difference whether the prior decisions happen to be made by an undivided or a divisional court.

IV. SCOPE AND PURPOSE OF REVIEW

With a very few statutory exceptions, proceedings in the United States, brought to review judgments at law, are proceedings in error. That is to say the appellate court does not pass upon the merits of the decision, nor does it determine what the true decision ought to be, but it is confined to an examination of the alleged errors committed below. The question presented is only whether error of law was actually committed. If it was, the judgment may be reversed, if not the judgment should be affirmed. The essence of the proceeding on a writ of error is the assignments of error, which specify the errors complained of and constitute what is in effect the pleading in the court of errors. (Williston v. Fisher, 28 Ill. 43.) The same thing is accomplished in
certiorari by specifying the alleged errors in the petition for the writ. (4 Encyc. Pl. & Pr. 145.) But the appellate court does no more than determine the existence of error, and whether such error, if it exists, is prejudicial or harmless; and if there is reversible error the case is sent back to the lower court to be proceeded with according to law or as the appellate court shall direct.

It follows from these principles that no matter can be passed upon in review that was not previously passed upon below, for there can be no error without an adjudication. New questions can never be raised. Thus Chancellor Kent observed in Gelston v. Hoyt, 13 Johns. 561, that "Lord Eldon said it was well known as an established rule, that no point not made in the court below, could be made on appeal to the house of lords. This is a just and wise rule; for the very theory and constitution of a court of appellate jurisdiction only, is the correction of errors which a court below may have committed; and a court below can not be said to have committed an error when its judgment was never called into exercise, and the point of law was never taken into consideration. . . . . . To assume the discussion and consideration of a matter of law, which the party would not discuss in the Supreme Court, and which that court, therefore, did not consider, is to assume in effect original jurisdiction." And with true judicial loyalty to established practice, the learned chancellor exclaims: "It is impossible to calculate all the mischief to which such a course of proceeding would lead."

But the mischiefs caused by the traditional practice may also be extremely serious. In State v. Garcia, 19 N. Mex. 414, Francisco Garcia and another were indicted for murder, and both were found guilty of manslaughter. In its opinion on review the Supreme Court says: "A curious fact appears in the 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 will be affirmed, and it is so ordered."

This monstrous sacrifice of justice on the altar of a common law procedural tradition was too much for the court, however, and on a rehearing which the court subsequently granted it held that there was inherent power in every court to see that a man's fundamental rights are protected in every case, and that the necessity of an assignment of error upon a ruling of the trial court was a restriction upon the parties, not upon the court. But the court still was unable to see its way to order a judgment for this innocent defendant, and only ordered a new trial. The case is a *reductio ad absurdum* of the common law proceeding in error.

As distinguished from the proceedings in error employed by the common law courts, equity used an appeal, which was a complete rehearing of the case, or so much of it as was questioned, as to both the law and the facts. On this rehearing the appellate court had power to consider the entire merits of the case in the light of the decision below, but it was not bound by the decision below even upon matters of fact. The appellate court was supplied with a full transcript of all the proceedings, so far as they were relevant to the questions raised on review, so that it was as well qualified to make a final disposition of the case as the trial court would be, in consequence of which cases were not usually sent back, as at law, but were finally disposed of by this reviewing court.

It is to be noted that equity never adopted from the law courts the idea that part of the proceedings should be recorded
and part should not. It never gave a higher value, for example, to the pleadings than to the proof, nor developed an appellate system which was founded on anything less than the entire case as tried below. On a review in equity the question was not as to the commission or non-commission of error, but whether the case had been rightly or wrongly decided on the merits. (Flaherty v. McCormick, 123 Ill. 525.) But the case was not tried de novo upon appeal. The appeal rather "involved the idea of a review of the proceedings in a trial which has already been had, and not a new trial of the case." (State v. Williams, 40 S. C. 373.)

In review both at law and in equity, the secondary character of the proceeding was strictly observed. No new questions could 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 re-heard below. (2 Daniel Chan. Prac. *1504.) In cases at law new evidence could not ordinarily be received and passed upon without interfering with the jurisdiction of the jury over questions of fact, and this was the ground upon which it was often rejected. But the real basis for rejecting all evidence was that it was inconsistent with the position of the reviewing court.

But there is nothing legally impossible or inherently difficult in enlarging the scope of appellate action in law cases beyond the exceptions taken and the errors assigned, and in making the review a re-examination of the entire case upon the merits, as in equity, except in so far as it would interfere with findings properly made by a jury. If this were to be done, the importance of the technical record, as distinguished from the proceedings had upon the trial, would lose even its theoretical foundation, and appellate records at law might be made up exactly like those in equity. Actions at law tried by the court without a jury could be treated on appeal exactly like actions in equity, and where issues were left to a jury, which should not have been so left, such issues could be dealt with by the appellate court exactly as though the matter had been decided by the trial court. And we can go a step further. There is nothing about an appellate tribunal which should render it incapable of exercising such powers of
a trial court as are convenient in connection with the review and final disposition of cases, such as passing on the features of the case omitted by the trial court, or considering new matters not involved in the case as tried. Such changes would place the appellate court in a position to render the maximum service in the administration of justice.

Some of these features have been adopted in whole or in part in some of the American States. All of them were adopted in England under the Judicature Acts. A single method of review was devised for all cases, and the archaic nomenclature which carried with it so much of formality and tradition, was completely discarded. Every case was to be entirely re-examined, so far as the parties found any fault with it, both on the law and on the facts, subject only to issues properly found by the jury; and it was to be finally disposed of in such a way as justice and convenience required.

In order to make it certain that the ancient limitations upon appellate power should not hamper the courts in disposing of any appeal, it was provided that "all appeals to the Court of Appeal shall be by way of rehearing," (Order 58, rule 1), and that "the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by disposition taken before an examiner or commissioner. Such further evidence may be given with special leave upon interlocutory application, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought... The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.... Such powers may also be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have appealed or complained of the decision." (Order 58, rule 4). And in further pursuance of the same principle, order 40, rule 10, authorizes the Court of Appeal on a motion for a new trial to give final judgment if it believes all the necessary
information is before it, or to order the motion to stand over until such further issues or questions shall be tried or determined, and such accounts and inquiries taken, as it may deem necessary.

These provisions effectually destroy the doctrine that assignments of error, or their equivalents in equity, are necessary for the exercise of appellate power, for a rehearing has been defined to mean an appeal which is not confined to the points mentioned in the notice of appeal. (Purnell v. Great Western Ry., I. Q. B. D. 636, 640.)

V. THE APPELLATE RECORD

Since an appeal or proceeding in error is primarily a review of a case which has already been tried, the appellate record should consist primarily of a copy of what has already been submitted in the trial court. No alterations are necessary, and if required their preparation becomes a burdensome load on the profession. This was the trouble with the common law bills of exceptions. Equity, less hampered by tradition, substituted for them a simple transcript of the entire proceedings below.

When a case is to be reviewed upon any matter involving the testimony, a stenographer's transcript is almost always needed, and it is ordered almost as a matter of course. This primary record of the trial or hearing, having once been prepared, ought to pass directly into the record on appeal, without any attempt to reduce its scope or change its form, for the labor involved in eliminating irrelevant portions and in substituting a narrative form for questions and answers, is out of all proportion to the advantages sought. Briefs or abstracts of counsel can properly be employed to summarize the facts and point out the material portions of the testimony, with such references to the pages of the transcript as may be necessary, for the convenience of the court, but the copy as originally obtained from the stenographer is the simplest, cheapest and most authentic record that can be prepared for review.

Bills of exception came to us from England, as a part of our common law, but they have become as extinct as the Dodo
in the land of their origin. The theory of an English appeal involves no technical difficulties whatever. The appellate record is merely a copy of existing documents, and can be prepared mechanically by any competent clerk. To perfect the appeal the appellant serves a notice upon the respondents that he will move the Court of Appeal in fourteen days to reverse the judgment, and files with the clerk of that court three typewritten copies of the notice of appeal and of the pleadings, evidence and opinion below. That is absolutely all. No exceptions are noted and no errors are assigned.

There is no reason why the court stenographer could not make as many carbon copies of his transcript as will be needed by a small appellate court, so that the expense of any further copying will be entirely avoided. If the court is too large or the parties are too numerous, the stenographer could make his original transcription upon a mimeograph stencil and then, at a merely nominal cost, run off as many copies as might be wanted. The cost of recopying and of printing records is largely a pure waste, and adds enormously to the expense of litigation. A system which would bring to the appellate court the materials necessary for its review and at the same time eliminate every useless expenditure, would be an unmixed economic blessing. People are not obliged to litigate their differences, and not many of them will do so unless they believe that the benefits are worth the cost. The constant effort of modern business is to eliminate waste and thereby reduce costs, and the legal profession may well take to heart the example of its business clients.

The simplification of the mechanism of review has reached its climax in the English Court of Criminal Appeal. The whole process there becomes an administrative official function, with which counsel are not required to concern themselves at all. Blank forms of application for leave to appeal are placed in all the prisons and it is the duty of the governor of every prison to furnish prisoners with the blanks and instructions for filling them out. They are short, simple, and non-technical, and are easily understood. When completed, the forms are sent to the clerk of the court where the conviction took place, and it is his
official duty to perfect the appeal, prepare the entire record, and take the proper steps to bring it on for hearing. No matter of form and no mistake in any procedural step is permitted to have any effect upon the prisoner's right to a hearing on the merits, and the worst that can happen is that correction may be called for.

Appellate procedure in the United States is more desperately in need of reform than any other branch of procedural law. It is full of useless forms, unnecessary distinction and outgrown traditions. It is largely mechanical in its aim and purpose, and yet in an industrial age, among a people which leads the world in labor saving devices, we are still fumbling with the crude machinery which England discarded more than half a century ago. We should follow the lead of modern American business and have the whole system reorganized under the advice of capable efficiency experts.