Michigan Law Review

Volume 32 | Issue 3

1934

FEDERAL PRACTICE -APPEAL AND ERROR - REVIEW OF DENIAL OF MOTION FOR NEW TRIAL

FEDERAL PRACTICE — APPEAL AND ERROR — REVIEW OF DENIAL OF MOTION FOR NEW TRIAL — The federal appellate courts have, in a great many decisions, refused to review the denial of a motion for a new trial made in a lower federal court.[1] The very recent case of *Fair-*

[1] Henderson v. Moore, 5 Cranch (9 U. S.) 11, 3 L. ed. 22 (1809); Marine Ins. Co. v. Young, 5 Cranch (9 U. S.) 186, 3 L. ed. 74 (1809); Chesapeake & Ohio Ry.

mount Glass Works v. Cub Fork Coal Co.[2] once again presents the problem, and Justice Brandeis, writing the majority opinion, follows the prior holdings. In this very excellent opinion the learned Justice presents the reasons for the result generally reached, and enumerates some of the exceptions in a manner which should tend to clarify much of the doubt which has existed in this field of appellate jurisdiction.

I.

Grounds for Denying Review

There appear to be at least four distinct grounds on which the appellate courts have based their refusal to review: (a) the historical limitation of the writ of error to matters within the record, (b) the provisions of the Judiciary Act of 1789, (c) the terms of the Seventh Amendment to the federal Constitution, (d) the fact that the refusal of the motion is within the discretion of the trial court. Let us now consider these grounds.

(a) It is clear that the common law writ of error searched only the record.[3] This appears to have been made up of the process, the pleadings, the minutes of the clerk, the verdict, the judgment entered thereon, and the bill of exceptions. It will be observed that the motion for a new trial, being made after the verdict, could not be made a part of the bill of exceptions.[4] When the new trial practice was developed, in the latter part of the 17th century, a motion for a new trial was allowed as an alternative remedy, a writ of error and a bill of exceptions being also available. These remedies were, however, mutually exclusive, and if a motion for a new trial was denied, all right to question the decision was gone.[5] There appears to have been little legislation on the subject in England until the Common Law Procedure Act of 1854.[6] Under

v. Proffitt, (C. C. A. 4th, 1914) 218 Fed. 23. See also WILLIAMS, FEDERAL PRACTICE, 2d ed., 537 (1927) and cases there cited.

[2] 287 U. S. 474, 53 Sup. Ct. 252, 77 L. ed. 360 (1933). See also comment on this case by E. W. Hinton, 1 UNIV. CHICAGO L. REV. 111 (1933).

[3] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 3d ed., 215 (1922).

[4] Campbell v. Boyreau, 21 Howard (62 U. S.) 223, 16 L. ed. 96 (1858).

[5] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 3d. ed., 226 (1922). Roscoe Pound, in "Principles of Practice Reform," 71 CENTRAL L. J. 221 at 228 (1910), said:

> "At common law, after trial at *nisi prius*, the cause was heard by the court in banc upon rule for a new trial or motion in arrest or for judgment *non obstante*. In that simple proceeding and not in the writ of error, an independent proceeding of a formal and technical character, is the true analogy for appellate procedure. Unhappily, the other has been followed."

[6] 17, 18 Vict., c. 125, sec. 35 (1854). This section reads, "In all Cases of Motions for a new Trial upon the Ground that the Judge has not ruled according to Law, if the Rule to show Cause be refused, or if granted be then discharged or made absolute, the Party decided against may appeal, provided any One of the Judges dissent from the

this Act an appeal was allowed from a decision on a motion for a new trial, except where the decision was discretionary, if one judge dissented from the denial of the motion. A radical change is found in the Judiciary Acts of 1875,[7] which abolished proceedings in error and substituted appeal. Since that time the procedure has been dependent upon Rules of Court, and today the motion for a new trial is made in the appellate court.[8]

In the United States it was held as late as 1921 that the proceedings on a motion for a new trial are not a part of the bill of exceptions because this motion is made after the trial is ended.[9] In the more recent case of *Harrison v. United States*[10] Judge Learned Hand pointed out that this motion is not a part of the record, as obviously it was not at common law. The opinion states, however, that "we have no alternative but to deny any relief or to allow it [the motion] to be incorporated into the bill of exceptions, as has here been done. We regard section 269 of the Judicial Code as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246),[11] as intended to extend our review in just such respects as this. The phrase there used, 'record before the court,' is certainly broader than any 'record' known to the common law." This interpretation would seem to be sound in the light of Rule 14 of the Circuit Court of Appeals Rules,[12] which is substantially the same

Rule being refused, or, when granted, being discharged or made absolute, as the Case may be, or, provided the Court in its Discretion think fit that an Appeal should be allowed; provided that where the Application for a new Trial is upon Matter of Discretion only, as on the Ground that the Verdict was against the Weight of Evidence or otherwise, no such Appeal shall be allowed."

[7] 38, 39 Vict., c. 77, order 58 (1) (1875).

[8] BALL & WATMOUGH, ANNUAL PRACTICE, 1933, order 39, Rules 1 and 2.

[9] Ford Motor Co. v. Hotel Woodward Co., (C. C. A. 2d, 1921) 271 Fed. 625. This case was decided under 14 Stat. 386 (1867), U. S. C. tit. 28, § 862 (1926); Rule 14 of the Circuit Court of Appeals, 2d Circuit, and 235 Fed. vi (1917); New York Code of Civil Procedure (Bliss 1912) § 1237.

[10] (C. C. A. 2d, 1925) 7 F. (2d) 259.

[11] This section reads, "The court shall give judgment after an examination of the entire record before the court." It is submitted that the statute could have been a great deal clearer in its language, but in view of the liberality of the state courts in reviewing the refusal of a motion for a new trial, the conclusion would seem to be in accord with the present tendency.

[12] Rule 14 of the Circuit Court of Appeals rules reads: "1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and *all proceedings in the case* [italics ours], under his hand and the seal of the court." Under this section it would appear that the motion for a new trial and the ruling of the lower federal court thereon could be brought before the court of appeals, for surely it would come within the class of "all proceedings in the case." Paragraph 3, however, reads, "No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, *which are necessary to the hearing in this court* [italics ours], shall be filed." Whether the record of the

for all circuits. If this conclusion is sound it would seem that an age-old barrier in the path of judicial review by the federal appellate courts has been overthrown. As is stated by Justice Brandeis in the *Fairmount Glass Works* case, "the denial of review can no longer rest upon this ground [that the record does not include the motion for a new trial], since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new trial, made either before or after judgment." [13]

(b) It is suggested by Justice Brandeis that doubtless the Judiciary Act of 1789 has influenced the courts in their refusal to review the ruling on a motion for a new tral.[14] The statute reads, "There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact." This language does not seem to have constituted a very clear bar to review since no decisions seem to have been based on such error, though it is suggested in the case of *Marine Insurance Co. v. Young*.[15]

(c) Many cases place the denial of review on the ground that it is forbidden by the Seventh Amendment to the federal Constitution.[16] The Supreme Court, in the case of *Parsons v. Bedford*,[17] interpreted

motion for a new trial is necessary to the hearing in the court of appeals is more doubtful. The case of Ford Motor Co. v. Hotel Woodward Co. cites section 1 in support of denial of review. There would seem to be nothing in this section which would indicate that the refusal of a motion for a new trial might not be made a part of the bill of exceptions.

[13] Hughes, in his recent work, FEDERAL PRACTICE, JURISDICTION AND PROCEDURE (1931), states in sec. 5763 (vol. 8) that "A motion for a new trial comes after the trial is ended, and so is not a part of the bill of exceptions. It is not a part of the record for review, because it is discretionary, and the record consists of the pleading, verdict, and judgment." The author cites Ford Motor Co. v. Hotel Woodward Co., (C. C. A. 2d, 1921) 271 Fed. 625; no reference is made to the Harrison case.

[14] 1 Stat. 84-85 (1789), U. S. C. tit. 28, § 879 (1926).

[15] 5 Cranch (9 U. S.) 186, 3 L. ed. 22 (1809). A writer in a recent issue of the Columbia Law Review has raised a most interesting question as to the meaning of the phrase "error in fact," which is here used, as distinguished from "error of fact." 32 COL. L. REV. 860 (1932).

[16] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law." For cases relying on this provision see: Metropolitan R. R. v. Moore, 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. ed. 1022 (1887); Williamson v. Osenton, (C. C. A. 4th, 1915) 220 Fed. 653; Railroad Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531 (1879); George E. Keith Co. v. Abrams, (C. C. A. 3d, 1930) 43 F. (2d) 557.

[17] 3 Pet. (28 U. S.) 433, 7 L. ed. 732 (1830). An interesting dispute arose out of the Seventh Amendment in interpreting the phrase "in any suit at common law." In this case the majority held that the words "common law" are used in contradistinction to equity, admiralty, and maritime jurisprudence. There is a dissenting opinion

this Amendment as a prohibition to the courts of the United States to re-examine any facts tried by a jury, in a manner not warranted by common law; and refused to review the denial of a motion for a new trial because of its feeling that this would be reviewing facts found by a jury. Other well-reasoned opinions also seem to regard this as a bar to review. But in other cases, where the court feels sympathetic toward the granting of a new trial, this objection to review seems to present no difficulty and the court apparently completely overlooks it.[18] Under the Amendment a court can re-examine facts found by a jury only according to the rules of the common law. What, then, was the procedure at common law? As Justice Riddell of the Ontario Court of Appeals has pointed out in an excellent treatment of this subject,[19] "it seems clear that in criminal as in civil cases, the trial judge had not the power to grant a new trial, but that recourse must be had to 'the court above.' " This is the practice in England today, and it would seem that the courts of this country have completely departed from the common law system. If this is the common law to which the Constitution refers, there is no doubt as to the power of the higher courts to review the ruling of the lower court; indeed the higher court was the sole body which might grant a new trial at common law.

(d) The last reason for denying review, and incidentally the reason most often stated, is that the ruling on a motion for a new trial rests in the sound discretion of the trial court and is not, therefore, open to review.[20] This theory is predicated on the fact that the trial court, having heard all the testimony and observed the witnesses, is in a far better position to judge as to the fairness of the verdict than an appellate court would be which has nothing but the record at its disposal. That this reason should not be a prohibition of review is apparent from the mere statement of the rule itself since review is always necessary in order to determine whether the court has exercised its discretion. And

which reasons that since this case was a statutory proceeding (petition for attachment) it is not a suit at common law within the Seventh Amendment. The opinion recognizes that under this view Congress could abolish jury trial by creating new and special remedies, but hastens to add that it is certain that Congress would never do so. It is submitted that the framers of the Amendment never intended such an interpretation thereof. See Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. ed. 879 (1913).

[18] See Smith v. United States, (C. C. A. 4th, 1922) 281 Fed. 696.

[19] Riddell, "New Trial at the Common Law," 26 YALE L. J. 49 (1916).

[20] See Shepard v. United States, (C. C. A. 9th, 1916) 236 Fed. 73; Bernal v. United States, (C. C. A. 5th, 1917) 241 Fed. 339; Yeates v. United States, (C. C. A. 5th, 1918) 254 Fed. 60; Reeves v. United States, (C. C. A. 5th, 1920) 263 Fed. 690; Laurie v. United States, (C. C. A. 6th, 1922) 278 Fed. 934; Baird v. United States, (C. C. A. 6th, 1922) 279 Fed. 509; Southern Ry. v. Walters, (C. C. A. 8th, 1931) 47 F. (2d) 3. See also 8 HUGHES, FEDERAL PRACTICE, JURISDICTION AND PROCEDURE, sec. 5469 (1931).

there are at least two situations in which the higher federal courts do reverse the refusal of a trial court to grant a new trial: first, where the trial court fails to exercise its discretion, and second, where the trial court abuses its discretion. Both these instances of control over the trial court's discretion are difficult, if not impossible, to square with the oft-asserted lack of power in the appellate court to review the trial court's action.

2.

Failure of Trial Court to Exercise Discretion

There are at least three important instances in which the trial court may fail (or refuse) to exercise its discretion to grant a new trial. First, it may have failed because of a mistaken view that it had no jurisdiction. In the case of *Felton v. Spiro*,[21] an action was brought to recover damages for the negligence of the defendant in causing the death of the plaintiff's intestate. The defense was that the deceased had been contributorily negligent, and the supporting evidence was most convincing. Nevertheless the jury found for the plaintiff, and the defendant moved for a new trial on the ground that the verdict was against the weight of the evidence. The court, being of the opinion that it had no power to set aside a verdict on this ground, refused to consider or act upon the motion. This was properly held to be reversible error by the federal appellate court. A few years later a similar problem was presented in the case of *Dwyer v. United States*.[22] Here the court was of the opinion that, since the motion was presented in chambers, it had no power to grant a new trial. The court of appeals very properly held that this was reversible error. In the case of *Paine v. St. Paul Union Stockyards Co.*[23] the court refused to entertain a motion for a new trial because of its belief that the evidence offered at the time of the motion was within the knowledge of the defendant at the time of the trial. As a matter of fact the court had admitted certain evidence at the trial over the objection of the defendant who was given no adequate opportunity to present the evidence now offered in rebuttal thereof. The appellate court rightly reversed the action of the trial court on the ground that it had failed to exercise its discretion. What the decision of the trial court on the motion should have been the appellate court would not say, but the defendant was entitled to a hearing on his motion.

Second, the trial court has frequently failed to exercise its discretion to grant a new trial because of the erroneous rejection of admissible evidence. The much-quoted case of *Mattox v. United States*[24] involved

[21] (C. C. A. 6th, 1897) 78 Fed. 576.
[22] (C. C. A. 9th, 1909) 170 Fed. 160.
[23] (C. C. A. 8th, 1929) 35 F. (2d) 624.
[24] 146 U. S. 140, 13 Sup. Ct. 50, 36 L. ed. 917 (1892).

the review of a motion based on this ground. The defendant in this case was convicted of murder and the district court, on a motion for a new trial, excluded affidavits of jurors to the effect that a newspaper account of the trial, prejudicial to the defendant, had been introduced into the jury room during its deliberations.[25] Other affidavits were offered with regard to certain remarks of the bailiff made in the presence of the jury. These also were rejected by the court. The Supreme Court reversed the refusal of the motion for a new trial. There is little doubt but that the right to move for a new trial is one of the fundamental and necessary rights of a party to any action.[26] Such being the case it is justly required that the trial court exercise its discretion, and the refusal so to do, no matter on what grounds, should be reversible error. It is clear that if the court excludes affidavits which are admissible it has refused to exercise its discreton with regard thereto, and unless the moving party is allowed a review by a higher court he is denied a fundamental right. In the case of *Ogden v. United States*[27] the defendant was convicted of selling oleomargarine without sufficient stamps thereon. In his motion for a new trial he set out certain reasons which the court refused to consider. The appellate court was of the opinion that this was a refusal to exercise the discretion which was lodged in the trial court and was therefore ground for reversal.[28]

Third, the trial court has frequently failed to exercise its discretion because of a misinterpretation which it placed upon the facts of the case. In *Smith v. United States*[29] the court, misunderstanding the facts, took an erroneous view of the purpose and effect of the affidavits offered by the defendant on his motion for a new trial. Believing that the facts were immaterial, it failed to consider the affidavits. The appellate court pointed out that a motion for a new trial is addressed to the sound discretion of the trial court and that the refusal or granting of the same is not subject to review, but the court added that the immunity from review is "predicated upon the court's having reached a correct conclusion as to the facts, and of its having given proper consideration to the affidavits offered in support of the new trial." It is apparent that if the court misunderstands the facts of the case it is not in a proper position to pass upon the affidavits offered in support of a motion for a new trial;

[25] A question is raised whether a juror will be allowed to impeach his own verdict, but we are not now concerned with that problem.

[26] "The right to move for a new trial, and to have that motion considered upon the reasons presented for it, is an absolute one, and the granting or refusal thereof does not rest in the discretion of the court." Ogden v. United States, (C. C. A. 3d, 1902) 112 Fed. 523.

[27] (C. C. A. 3d, 1902) 112 Fed. 523.

[28] For a similar case see Harrison v. United States, (C. C. A. 2d, 1925) 7 F. (2d) 259.

[29] (C. C. A. 4th, 1922) 281 Fed. 696.

the refusal of the court to consider the affidavits is the denial of a fundamental right of the defendant, and reversal is properly ordered.

3.

Trial Courts' Abuse of Discretion

Many cases in the state courts are reversed on the ground that the trial judge abused his discretion in refusing a new trial. In the federal courts a few reversals have been put on this ground, though countless cases sought to be brought within this class have failed to find favor with the appellate court. The case of *Pugh v. Bluff City Excursion Co.*[30] presented this problem to the court of appeals in a clear and concise manner. The plaintiff sued for the negligent killing of her son by the defendant, and the jury found damages for the plaintiff in the sum of $1.00. The trial court refused a motion for a new trial even though it was clear that the damages suffered were far greater than the sum awarded. The appellate court held that this was an "abuse" of discretion; that the granting of the motion became an absolute duty, since the verdict was inconsistent on its face. Was a reversal justified in this case? It must be admitted at the outset that this is a more doubtful case than those which we have just been considering. It is submitted that where the question of damages is left to the jury, their finding thereon constitutes a finding of fact and as such might not, under the Seventh Amendment, be open to review by the appellate court. Before discussing this further let us return to the facts of the principal case—the *Fairmount Glass Works* case.[31] This was an action to recover damages for breach of a contract to purchase coal. The defendant pleaded in bar several defenses and set up a counterclaim of $2,000 for failure to deliver according to the contract. The jury found for the plaintiff in the sum of $1.00. The circuit court of appeals reversed the refusal of the district court to grant a new trial upon the ground that, computing the plaintiff's damages upon the basis most favorable to the defendant and the defendant's damages on the counterclaim also on the basis most favorable to it, plaintiff was clearly entitled to some $18,000. The majority of the Supreme Court, speaking through Justice Brandeis, reversed the circuit court of appeals and affirmed the refusal of the district court to grant a new trial.

At first glance this case would seem to present a far greater abuse of discretion than the *Pugh* case, but the two cases are distinguishable on the ground that in the *Fairmount Glass Works* case *several* defenses and a counterclaim were pleaded. Justice Brandeis, in the majority opinion, points out that for this very reason the trial judge was not obliged to regard the verdict as inconsistent on its face. His opinion is

[30] (C. C. A. 6th, 1910) 177 Fed. 399.
[31] 287 U. S. 474, 53 Sup. Ct. 252, 77 L. ed. 360 (1933).

further justified by the learned Justice on the ground that the verdict may have represented a finding for the defendant on some of the conflicting issues, or a desire on the part of the jury that costs be taxed against the defendant. While the opinions of the dissenting Justices and of the circuit court of appeals seem reasonable and logical, it cannot be said that the majority were in error. There was clear ground for disagreement. The fact of diversity of opinion on the same fact situation tends only to accentuate the uncertainty which exists in this field of appellate jurisdiction. It is important to note that the majority opinion leaves open the question as to whether, in some cases, the refusal to set aside a verdict for failure to award substantial damages may not be reviewed as an abuse of discretion, thus intimating, at least, that review is possible in spite of the Seventh Amendment.[32]

R. W. F.

---

[32] In the case of Glenwood Irrigation Co. v. Vallery, (C. C. A. 8th, 1918) 248 Fed. 483, it was held that the amount of damages as fixed by the jury was not a "fact tried by jury" within the meaning of the Seventh Amendment for the reason that the only duty of the jury was to determine whether or not the defendant was liable for the negligent burning of the plaintiff's bridge. There was no controversy as to the amount of liability in case the jury found the defendant liable, hence the finding of the jury for the plaintiff in a lesser sum was held not to be a finding of fact. Such a result would appear to be justified since the case was not complicated by counterclaims and numerous defenses as was the Fairmount Glass Works case, and it clearly appeared that the verdict was inconsistent on its face. The same result was reached in the case of United Press Associations v. National Newspaper Association, where the damages awarded by the jury were far less than the undisputed evidence showed had been suffered by the plaintiff. United Press Ass'ns v. National Newspapers Ass'ns, (C. C. A. 8th, 1918) 254 Fed. 284. *Contra*: Sun Printing & Publishing Ass'n v. Schenck, (C. C. A. 2d, 1900) 98 Fed. 925; Illinois Cent. R. R. v. Davies, (C. C. A. 8th, 1906) 146 Fed. 247; Metropolitan St. Ry. v. Beattie, (C. C. A. 2d, 1901) 111 Fed. 945.