1933

Power of Federal Appellate Court to Review Ruling on Motion for New Trial

Edward W. Hinton

The main divisions of the magazine will constitute a carefully considered adaptation of the arrangements generally prevailing in law reviews. The leading articles will be by outstanding members of law school faculties and of the bench and bar. The range of topics discussed will, it is hoped, be broad. They will always be of general interest; many of them will also be of particular local interest.

The prominence given to the department of Legislation and Administration is but a proper recognition of the growing importance of these divisions of our legal systems. This department will treat in these fields both general problems and specific measures, actual and proposed.

The Comment department will be a medium for the publication of a wide variety of shorter articles by teachers, members of the bar, and students, in recognition of a need for which little provision has hitherto been made.

The sections devoted to case discussions will deal in varying fashions with the more important current decisions as they appear. This detailed analysis of particular recent cases with a careful consideration of the relation between the individual case and the body of related decisions will, it is believed, prove to be for the practicing lawyer one of the most valuable parts of the Review.

The Book Review department will provide impartial, adequate reviews of the more important legal publications as they appear.

The Review is primarily and essentially a product of the student body. It, of course, has and will continue to have the whole-hearted endorsement and assistance of the Faculty, but the responsibility of the Review and the credit for it will belong to the students of the Law School.

After a careful consideration of all the factors involved, it has been decided to begin publication of the magazine on a quarterly basis. The value of a professional publication of any sort is not in its quantity but in its quality. The issuance of the magazine on a quarterly basis will permit a careful editing of material and a thoroughness in preparation and in details of publication that will enable the Review to make definite contributions in the field of legal literature.

HARRY A. BIGELOW, *Dean*

THE UNIVERSITY OF CHICAGO LAW SCHOOL

POWER OF FEDERAL APPELLATE COURT TO REVIEW RULING ON MOTION FOR NEW TRIAL

In the latest case[1] dealing with the power of a Federal Appellate court to review the action of the trial court in overruling a motion for a new trial, the Supreme Court was apparently unable to escape the "dead hand" of the common law, though the rule invoked may work grave injustices under our judicial organization for which it was never designed.

[1] Fairmount Glass Works v. Cub Fork Coal Co., 53 Sup. Ct. 252 (1933).

The facts involved were these:

The plaintiff brought a suit in the United States District Court for the breach of a contract to buy a large amount of coal. The jury returned a verdict in favor of the plaintiff for one dollar damages. The trial court overruled plaintiff's motion for a new trial and entered judgment on the verdict. On appeal, the Circuit Court of Appeals found that under the most favorable view of the evidence for the defendant the plaintiff was entitled to recover at least $18,250, if it was entitled to recover at all. It treated the verdict for the plaintiff as settling its right to recover and remanded the case for a trial of the amount of damages only. On certiorari the Supreme Court, Mr. Justice Stone and Mr. Justice Cardozo dissenting, reversed the judgment of the Court of Appeals on the ground that the ruling of the trial court in refusing to set aside the verdict was not reviewable.

There is nothing new in the general rule that the refusal of a new trial by a federal court is not ordinarily the subject of exception and appellate review. From a very early period the English courts, sitting in banc, exercised the power to grant new trials for misconduct of the jury.[2]

As long as the doctrine prevailed that a jury might properly decide on their own knowledge, it was impossible to obtain a new trial because a verdict was against the evidence or not supported by the evidence.[3]

For a false verdict the writ of attaint was the exclusive remedy.[4]

In 1655 a new trial was granted for excessive damages on the assumption that the jury must have been prejudiced.[5]

In 1683 a new trial was apparently granted because the jury found "contrary to the direction of the court."[6]

By the middle of the seventeen hundreds the power of the court in banc to grant new trials for all sorts of errors and mistakes on the part of the jury was firmly established.[7]

[2] Anon. 14 H. VII, 1 (3) (1499) (motion for a venire de novo sustained because the jury ate and drank during their deliberations).

Metcalf v. Dean, Cro. Eliz. 189 (1590) (venire de novo awarded because the jury examined a witness privately).

Apparently at this time the distinction taken in Witham v. Lewis, 1 Wilson 48 (1744), that an application for a venire de novo was based on error on the face of the record and a motion for a new trial on extrinsic matters, had not been recognized.

[3] Slade's Case, Style, 138 (1648).

[4] Slade's Case, *supra;* Bushell's Case, Vaughan, 135 (1670).

[5] Wood v. Gunston, Style, 466 (1655). This appears to be the earliest reported case of a new trial without some specific act of misconduct on the part of the jury. The statement in the opinion that "It is frequent in our books for the court to take notice of *miscarriages* of juries, and to grant new trials upon them" probably refers to the misconduct cases.

[6] Kaines v. Knightly, Skinner, 54 (1683).

[7] Woodford v. Eades, 1 Strange 425 (1721); Berks v. Mason, Sayer, 456 (1756); Bright v. Eynon, 1 Burr. 390 (1757); in this latter case, Lord Mansfield observed: "Trials by jury, in civil cases, could not now subsist without a power somewhere to grant new trials."

From a very early period new trials were granted for errors[8] of law on the part of the trial judge, but there was no occasion for appellate review of a refusal of a new trial on such grounds, because the party always had an adequate remedy by exception to the original ruling at the trial.

Obviously a motion for a new trial was the exclusive method of calling attention to misconduct or mistake on the part of the jury, since rulings by the judge were the only subjects of exception. But under the English practice there was little, if any, need for appellate review of the refusal of a new trial on these grounds, because the application was heard by a bench of four judges who were quite as competent to handle the matter as any reviewing court. In fact a very small percentage of the English cases ever were carried to an appellate court at all. This seems to indicate that the work of the court in banc was in the main satisfactory[9] to the legal profession and their clients.

When the Judiciary Act of 1789 was adopted by Congress there were no English precedents for appellate review of an order refusing a new trial, and it was accordingly held that such orders were not reviewable, for which holding a long line of cases is cited in an exhaustive note to the opinion. It should be noted that the Congressional scheme for something in the nature of a court in banc soon failed in practice, with the result that in the federal courts, as in nearly all of the state courts, a motion for a new trial is passed on by a single judge, and hence the litigant has no remedy for his errors in this particular unless the Circuit Court of Appeals has some power of review.

Doubtless, legislation would be necessary to give the Circuit Court of Appeals the same power of appellate review that is today exercised by most of the state appellate courts.

Under the implied adoption of the common law by the Judiciary Act, where the question is one of fact, such as the ordinary question of excessive or inadequate damages, depending on different views of the evidence, the decision of the trial judge doubtless is conclusive.

But the Supreme Court has recognized that the trial judge does not have an absolutely free hand in dealing with a motion for a new trial. He may not exclude competent evidence bearing on a question raised by the motion, and his action in this regard is reviewable.[10] When a state supreme court, dealing with a case under the Federal Employers' Liability Act, found that a verdict was excessive because of prejudice on the part of the jury, but allowed a remittitur instead of a new trial, the Supreme Court found no difficulty in reviewing this ac-

[8] Reg. v. Corporation of Helston, 10 Mod. 202 (1714), and innumerable later cases where new trials were granted for misdirection, errors in rulings on evidence, *etc.*

[9] At a much later date the common law Procedure Act (1854) provided for appellate review of rulings on motions for new trials not involving matters of discretion. Under the Judicature Act and the present rules of court the English Court of Appeals seems to have the powers of a trial court in dealing with new trials, and its decisions are reviewable by the House of Lords. Jones v. Spencer, 77 L.T.R. 536 (1898).

[10] Mattox v. United States, 146 U.S. 140 (1892).

tion, and reversing it as an error of law.[11] It may be taken, then, that the district court may commit errors of law in refusing a new trial, and of necessity the Court of Appeals must have the power to determine whether such an error has been committed. It was urged in this case that it was such an error to refuse to set aside a verdict for nominal damages where the evidence conclusively established substantial damages, but the majority opinion takes the position that the trial judge was not bound to treat the verdict for nominal damages as settling the right to recover, because the jury *may* have returned that verdict in order to saddle the costs on the defendant, without really finding the issues for the plaintiff. It is, of course, possible that the jury may have indulged in that misconduct, but it is a startling doctrine that the discretion of the single judge authorizes him to bind a party on the basis of a mere speculative possibility. Besides, there is nothing to indicate that the trial judge acted on such a theory.

There is a well known doctrine, applied in a number of tort cases cited in the opinion, that a court may properly refuse to grant the plaintiff a new trial for inadequate damages where under the evidence it was fairly clear that the plaintiff was not entitled to recover at all.[12] The case at bar apparently does not present that situation.

The opinion states:

"The plaintiffs were not entitled to a directed verdict; the evidence was voluminous; and on some issues at least conflicting. The instructions left the contested issues of liability to the jury. The verdict may have represented a finding for the defendant on those issues."

It is to be regretted that the majority opinion should strain the doctrine of discretion to limit the power of appellate review, when the absence of a court in banc has deprived the litigant of an important common law safeguard.

E. W. HINTON*

[11] M. & St. P. Ry. Co. v. Moquin, 283 U.S. 520 (1930). In a note appended to the opinion in the principal case the following reference to the Moquin case appears: "Compare Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin, 283 U.S. 520, 51 Sup. Ct. 501, 75 L. Ed. 1243, in which the *trial court*, expressing the opinion that the verdict was excessive because of passion and prejudice, nevertheless refused, on the filing of a remittitur, to grant a new trial." This appears to be a mistake. An examination of the printed record in the Moquin case fails to disclose any such opinion by the trial court. So far as the record shows, the defendant's original motion for judgment or for a new trial was overruled without an opinion. On appeal from this order the *Supreme Court* of Minnesota found that the verdict was excessive because of passion, *etc.*, but affirmed on condition of a remittitur by the plaintiff. When the case was remanded to the trial court, plaintiff filed a consent to a remittitur, and judgment was entered in accordance with the *mandate* for the reduced amount.

[12] Johnson v. Franklin, 112 Conn. 228, 152 Atl. 64 (1930).

* James Parker Hall Professor of Law, the University of Chicago Law School.