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THE DOUBTFUL OMNISCIENCE OF APPELLATE COURTS

CHARLES ALAN WRIGHT*

For a good many years my colleague, Leon Green, has been pointing out that:

Probably the strangest chapter in American legal history is how in the short period of the last fifty or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system.¹

In a recent statement of his views Dean Green has observed, with much justification

The trial judge is not much more than a trial examiner, while the jury simply satisfies the public and professional craving for ceremonial—the necessity for dealing with simple matters as though they were freighted with great significance.²

The principal means by which appellate courts have obtained such complete control of litigation has been the transmutation of specific circumstances into questions of law. Subtle rules about presumptions and burden of proof, elaborate concepts of causation and consideration and the rest, have been devised in such a way that unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court.

Dean Green’s analysis seems to me unanswerable. The purpose of the present article is to call attention to certain recent developments which add further support to his thesis. Within the last decade the appellate judges have become bolder. No longer do they hide their assumption of power beneath an elaborate doctrinal superstructure. Instead today’s appellate courts are inventing new procedural devices by which their mastery of the litigation process can be made direct rather than devious.

I propose here to discuss four such devices review by the appellate court of the size of verdicts, orders for a new trial where the verdict is thought to be contrary to the clear weight of the evidence; refusal to be bound by findings of fact of the trial judge based on documentary evidence, and expanded use of the extraordi-

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1. Green, Judge and Jury 380 (1930).
2. Green, Jury Trial and Mr. Justice Black, 65 Yale L. J. 482, 486 (1956).
nary writs of mandamus and prohibition to control the trial court in its discretionary actions as to the procedure by which a case is to be handled. After these four devices have been discussed, some evaluation of the wisdom and significance of this recent development in judicial administration will be attempted.

**Review of the Size of Verdicts**

There was a time when the law as to appellate review of the size of verdicts might have been simply stated. Of course the appellate court could reverse for legal error, as when the verdict exceeded a maximum fixed in the statute, or the jury was improperly instructed as to the measure of damages. And if the verdict was the product of passion and prejudice, the appellate court could intervene. But it was clearly established in federal court, and generally true also in state courts, that, in Holmes' phrase, "a case of mere excess upon the evidence is a matter to be dealt with by the trial court."

The day when the law could have been so simply stated is not really very long past. As recently as 1945 Judge Goodrich, speaking for the Third Circuit, could say

> The members of the Court think the verdict is too high. But they also feel very clear there is nothing the Court can do about it.

A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case.

Very few scholars would have disagreed with that statement when it was made. But the law has changed so completely in the last twelve years that today Judge Goodrich's statement seems no more than a legal museum piece—to be studied with the same awe for the de-

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3. This section of the article is based generally on DeParcq and Wright, *Damages under the Federal Employers' Liability Act*, 17 Ohio St. L. J. 430, 466-83 (1956).


parted past as one might give to trial by battle, or to a nicely drawn replication de injuria.

In the twelve years since Judge Goodrich spoke ten of the eleven federal courts of appeals have announced that when a verdict seems excessive to the appellate judges, there is something they can do about it. And even the Eighth Circuit, the only holdout to date, shows signs of wavering in its loyalty to the ancient faith. Supreme Court decisions stating squarely that a verdict may not be reviewed on the ground that it is excessive have been blithely cast aside as "an old procedural impediment" which "no longer bars judicial review." The Seventh Amendment might have been thought to give difficulty, for it provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the common law." And the Supreme Court long ago said that "motions for a new trial based on the ground that the damages allowed by the verdict are excessive" present "purely a question of fact, not determinable by any fixed and certain rule of law," and that such motions were submitted to the legal discretion of the trial court, which could not be reviewed. But these difficulties were readily surmounted. As Professor Moore, who supports review of the size of verdicts, concedes

Recently, the courts of appeals faced with the question of review have generally ignored the Seventh Amendment issue.

It may be worthwhile to note—since this paper is concerned with the methodology of appellate courts rather than with the specific question of whether the size of verdicts ought to be reviewable—that eight of the ten courts of appeals which have recently discovered a hitherto-unknown power to review the size of verdicts have an-


13. 6 Moore, Federal Practice 3827 (2d ed. 1953).
nounced this discovery by way of dicta in cases where they found the verdict before them not excessive. It is interesting to speculate why these courts did not defer resolution of this controversial and novel claim of appellate power until a case arose in which the point was necessary for decision.

Developments in state courts in the last decade have been less dramatic, perhaps because state appellate courts, not being confined by the Seventh Amendment, have always had more leeway to deal with verdicts that seemed to them “flagrantly outrageous.” The possibilities open to state courts are indicated by the practice in Missouri, where the appellate court overtly measures the verdict below, not against the evidence in the record as to the damages suffered, but against awards it has itself permitted in the past in what seem to it comparable cases.

The most striking state court development has come in two cases, decided one week apart in the spring of 1955, by the Minnesota Supreme Court. As recently as 1950, that court said

To warrant our overturning the verdict on appeal, the damages awarded must so greatly exceed what is adequate as to be accountable on no other basis than passion and prejudice.

And in 1954 the court had refused to set aside the verdicts in a case, though characterizing them as “liberal” and saying

we would have been better satisfied had the trial court reduced them.

But in 1955 the court was confronted with the case of Oscar Ahlstrom, a twenty-six year old man who had been awarded $275,000 for injuries causing a complete motor and sensory paralysis of the lower half of his body. The verdict was attacked as “grossly excessive and the result of passion and prejudice on the part of the jury.” The Supreme Court, after making its own extensive review of the facts, ordered a remittitur of $100,000.

14. Of the cases cited in Note 9 supra, the statements about the possibility of review of denial of a new trial because of excessive damages are dicta, in all except the decisions from the Fourth and Fifth Circuits.

15. E.g., Union Pac. Ry. v. Hadley, 246 U.S. 330 (1918) And see DeParcq and Wright, note 3 supra, at 473-76. The “flagrantly outrageous” gloss on Chancellor Kent’s rule will be found in, e.g., Bartlebaugh v. Pennsylvania R.R., 78 N.E.2d 410, 414 (Ohio App. 1948), and Allied Van Lines, Inc. v. Parsons, 80 Ariz. 88, 98, 293 P.2d 430, 436 (1956)


Certain elements in the *Ahlstrom* decision are worthy of comment. Most important is the court's express statement.

We find no passion or prejudice on the part of the jury in arriving at its verdict.\(^{20}\)

Instead the jury's error had been in accepting plaintiff's figures as to damages demanded

without appreciating that they were predicated upon an inadequate or improper factual foundation in each instance.\(^{21}\)

The sources to which the jury is to go in appraising the factual foundation for claims of damage are left unclear. Thus the court concedes that the only testimony in the record as to the future cost of a daily attendant for plaintiff is an expert opinion that this will amount to $10 a day. But the court, apparently on some theory of judicial notice, calls this figure "unrealistic" and says it is "unreasonable" to suppose competent attendants are not available in Thief River Falls for less than this sum.\(^{22}\)

Again, the court does not indicate the process of computation, or even the theory, on which it found that the verdict was excessive by a suspiciously-exact $100,000. The jury's verdict may have been based on an "inadequate or improper factual foundation," as the court claims, but the award which the court permits is based on no visible factual foundation whatever.

Finally, and most significant for purposes of the present discussion, the court's action, so far as can be told from the authorities it cites, is utterly unprecedented. If there has ever before been a case where the Supreme Court of Minnesota ordered a remittitur in the absence of passion and prejudice, it does not appear from the *Ahlstrom* opinion. Indeed in every case cited by the court to support its statement as to the proper scope of review of damages, the verdict in question was affirmed! Thus the remittitur here does not rest on the precedents but on the court's *ipse dixit* discovery that

we do not forfeit our recourse to common sense and social practicality in given cases

and that

judicial care must be exercised lest a fatal financial burden be placed upon the industry out of sympathy for the plaintiff.\(^{23}\)

\(^{20}\) *Id.* at 30, 68 N.W.2d at 891.

\(^{21}\) *Ibid.*

\(^{22}\) *Id.* at 28-29, 68 N.W.2d at 890.

\(^{23}\) *Id.* at 27, 68 N.W.2d at 889.
One week later the Minnesota Supreme Court took similar action. Plaintiff, who had recovered a verdict of $170,000 for the loss of an arm at the shoulder and a claimed back injury, was required to consent to a remittitur of $65,000, or else be faced with a new trial. In ordering the remittitur the court said

We find no evidence of passion and prejudice by the jury in arriving at its verdict. Apparently the excessive verdict resulted merely from reliance solely upon mathematical formulas without testing the reasonableness of the amount awarded from the standpoint of its over-all effect.

Thus it now seems clear that in Minnesota, passion and prejudice are not longer conditions to appellate action, and that old notions that it is for the trial judge to decide whether the verdict is excessive are gone. Instead the appellate court will apply the "test of reasonableness in the light of its over-all effect" to the verdict, and will order a remittitur if, in its judgment, this test is not met.

What accounts for this remarkable change of view in both state and federal courts as to the reviewability of damages which the last decade has seen? Many of the courts have relied on the final sentence of a United States Supreme Court opinion, otherwise devoted entirely to substantive issues, where the Court said

We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case.

This has been read by eager appellate judges as meaning that they can set aside verdicts if they are "monstrous." The conclusion is weakened, however, by the facts that (a) the court of appeals had said nothing about the verdict as being "monstrous" or otherwise excessive, (b) the railroad had not claimed in the Supreme Court that the damages were "monstrous" or otherwise excessive, and (c) a casual adjective in an opinion devoted to other issues seems an unusual way of overruling a long line of authorities.

24. Hallada v. Great Northern Ry., 244 Minn. 81, 69 N.W.2d 673, cert. denved, 350 U.S. 874 (1955).
25. Id. at 99, 69 N.W.2d at 687
28. See DeParcq and Wright, note 3 supra, at 471-72. In two recent cases the Court has reversed courts of appeals which found judgments below excessive, though without reaching the question of whether the appellate courts have power to set aside verdicts on this ground. Neese v. Southern Ry., 350 U.S. 77 (1955), Snyder v. United States, 350 U.S. 906 (1955) See DeParcq and Wright, note 3 supra, at 472–73
Others have read significance into the Judicial Code of 1948, which eliminated a provision which had stood for 159 years, that there should be no reversal in the appellate court "for any error in fact." But it is hard to believe that the elimination of these words was intended to alter the scope of review of damages. Indeed the Reviser's Notes say that the language has been changed

to avoid any construction that matters of fact are not reviewable in nonjury cases. It is hard to build on this foundation an argument that the altered language changes the scope of review in jury cases, particularly in view of the language of the Seventh Amendment.

But if the stated reasons for change in scope of review seem, on examination, unsubstantial, it is not difficult to guess what may have been the real reason for this change. Verdicts have gotten much larger. As one court lamented, shortly before discovering that it had power to deal with excessive verdicts

The way the amounts awarded in verdicts in personal injury cases have been rapidly increasing is a matter of concern to all who are interested in a fair and orderly administration of justice. If the amounts awarded in the next decade keep pace with the rate at which they increased in the last decade, in certain areas at least, verdicts of $150,000, $200,000, $250,00 or even greater sums may be expected. Even allowing for the decreased purchasing power of the dollar, many of the recent large awards for damages are not justified.

It matters not a bit for our present purposes whether the court is right or wrong in its supposition that many recent verdicts are not justified. The important fact is that, rightly or wrongly, many appellate courts think they see in the present size of verdicts a threat to the fair and orderly administration of justice. And when they see what they consider to be an evil, they, as appellate judges have done from time out of mind, take steps to correct that evil. That the size of the verdict has long been considered an issue of fact, to be resolved by the jury and subject to the approval of the trial court, is of little moment. In less time than it takes to tell

29. These words appeared in § 22 of the Judicial Code of 1789, 1 Stat. 85 (1789), and were carried forward into § 879 of the 1940 Code. They are replaced by §§ 2105 and 2106 of the present Code. See 6 Moore, Federal Practice 3826 (2d ed. 1953), Holmes, J., dissenting in Sunray Oil Corp. v. Allbritton, 188 F.2d 751, 756 (5th Cir. 1951).
30. Title 28, United States Code Judiciary and Judicial Procedure With Official Legislative History and Reviser's Notes 1900 (West 1948).
about it, this issue has been transformed into the trial court's clear abuse of discretion in refusing to order a new trial, this, in turn, is said to be an issue of law, and the size of verdicts has become a matter for appellate courts, rather than trial courts and juries, to decide.

**Setting Aside Verdicts as Against Weight of Evidence**

In the recent case of *Eastern Air Lines v. Union Trust Co.*, Eastern claimed it was entitled to a new trial on the ground, among others, that verdicts against it arising out of the disastrous 1949 crash over Washington's National Airport between an Eastern DC-4 and a P-38 owned by the Bolivian government were "against the clear weight of the evidence." After a review of the authorities (which will be analyzed later) the Court of Appeals for the District of Columbia, speaking through Judge Wilbur K. Miller, said

> We conclude, on the authorities and on reason as well, that the trial judge had the power and duty to grant a new trial if the verdicts were against the clear weight of the evidence, or if for any reason or combination of reasons justice would miscarry if they were allowed to stand, and that *this court has the power and duty to reverse and order a new trial if the trial judge abused his discretion in denying the motion therefor*.  

Judge Miller argued in detail his reasons for believing that the trial judge had abused his discretion in denying the motion for a new trial. But Judges Edgerton and Fahy, though agreeing that they had power to reverse if there had been an abuse of discretion, did not find such an abuse on the record before them. Thus the verdicts were allowed to stand.

The result of the case is of no significance for our purpose. But the claim of power to reverse and order a new trial is sufficiently novel to justify the closest scrutiny.

As to the first half of the quoted passage from the opinion, there can be no quarrel. The right of the trial judge to set aside the verdict as contrary to the clear weight of the evidence is universally acknowledged in the United States, and is supported by clear precedent at common law. And if the trial judge refuses to exercise his discretion at all on a motion for new trial, as where he mistakenly believes he lacks power to set aside a verdict, an

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33. *Id.* at 30.
appellate court will remand the case to him with instructions to exercise his discretion.\textsuperscript{35}

Thus the only questionable statement in the passage quoted is the part which has been italicized, the claim that where the trial court has exercised its discretion and has determined not to set aside the verdict, the appellate court has power to reverse and order a new trial. In the portion of its opinion immediately preceding the passage quoted here, the court of appeals cites or quotes from eleven cases.\textsuperscript{36} Many of these cases are completely silent as to appellate power, and are concerned exclusively with the power of the trial judge to set aside the verdict. In one case there is a dictum that the appellate court can reverse for abuse of discretion by a trial court in passing on a motion for a new trial on the ground that the verdict is against the clear weight of the evidence.\textsuperscript{37} Three of the cases cited contain dicta that the power to set aside a verdict on this ground "belongs exclusively to the trial judge,"\textsuperscript{38} that his action on such a motion "is not the subject of review,"\textsuperscript{39} and that the appellate court is "without power" to order a new trial on this ground.\textsuperscript{40} Among the eleven cases cited by the court of appeals, there is not even one in which an appellate court has reversed for abuse of discretion in denying such a motion for a new trial. From this review it may fairly be said that the statement of the court of appeals is not supported by the cases it chooses to cite.

There are other relevant authorities which the court of appeals did not cite. Thus as long ago as 1838 the Supreme Court had considered it

\begin{quote}
    a point too well settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error.\textsuperscript{41}
\end{quote}

And as recently as 1940 it had stated categorically:

\begin{quote}
    Certainly, denial of a motion for a new trial on the grounds
\end{quote}

\begin{itemize}
    \item Felton v. Spiro, 78 Fed. 576 (6th Cir. 1897), Marsh v. Illinois Cent. Ry., 175 F.2d 498 (5th Cir. 1949).
    \item 239 F.2d at 29-30.
    \item Virginian Ry. v. Armentrout, 166 F.2d 400, 408 (4th Cir. 1948).
    \item Southern Pac. Co. v. Guthrie, 186 F.2d 926, 932-33 (9th Cir.), cert. denied, 341 U.S. 904 (1951).
    \item 39. Felton v. Spiro, 78 F.2d 576, 581 (6th Cir. 1897).
    \item United States v. Laub, 37 U.S. (12 Pet.) 1, 4 (1838).
\end{itemize}
that the verdict was against the weight of the evidence would not be subject to review.\footnote{42}

A number of decisions from the courts of appeals are to the same effect. In one of the most recent, Judge Learned Hand put the matter this way:

[T]here may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence. [This rule] is too well established to justify discussion.\footnote{43}

It is true that there are casual phrases in some court of appeals decisions which imply a power to reverse for clear abuse of discretion. But it seems to me significant that, so far as I can find, there is not a single case in which a federal appellate court has ever reversed and ordered a new trial on the ground that the trial court did abuse its discretion in denying a motion of this type.\footnote{44}

I conclude that the authorities do not support the statement of the court of appeals in the case here being considered that it has power to reverse on this ground.

But the court of appeals grounded its statement "on reason as well." The appeal to reason requires consideration of the Seventh Amendment, and its application to this situation.

[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law

One possible escape from the apparent barrier which the amendment poses to appellate review of the weight of the evidence is that the appellate court, in considering whether the

\footnote{42. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 248 (1940)
44. Moore, who asserts in his text that there can be reversal for abuse of discretion, cites a great many cases with casual phrases to this effect, but cites only two cases as holdings supporting his text. 6 Moore, Federal Practice 3820 n.34 (2d ed. 1953), and id. 32 (1956 Cum. Supp.). In one of these cases, Charles v. Norfolk & W Ry., 188 F.2d 691 (7th Cir.), \textit{cert. denied}, 342 U.S. 831 (1951), there was also an erroneous instruction justifying reversal, and, more important, the trial judge had expressed his own disagreement with the verdict. Thus the case is similar to these cited in note 35 \textit{supra}, where the trial court mistakenly felt it lacked power to order a new trial. In Indamer Corp. v. Crandon, 217 F.2d 391 (5th Cir. 1954), the court said there could be reversal, not where the verdict is against the weight of the evidence, but only where "there has been no evidence introduced which could support the verdict on the point on which the new trial is sought." \textit{Id.} at 394. Thus it ordered a new trial in circumstances where judgment notwithstanding the verdict might have been justified.}
trial judge has abused his discretion, is passing on a question of law rather than a question of fact.45 A similar argument is used, as we have seen, to justify appellate control of the size of the verdict. But the argument is so purely verbal, and its implications for the Seventh Amendment so plainly devastating, that it has not attracted much support. If a jury finds defendant negligent, and the appellate court decides that the clear weight of the evidence shows him free from negligence, it is re-examining the jury's determination of a fact issue. Very few people are deceived into thinking the issue has been transmuted into an issue of law because the appellate court says it is finding only that the trial judge abused his discretion in not finding the clear weight of the evidence to be contrary to the verdict.

Professor Blume, who supports appellate review of these motions, admits that:

[I]t cannot be said that the question presented is a question of law. In deciding whether a jury found against the weight of evidence, the trial judge must weigh the evidence and decide the facts. In reviewing his decision the appellate court is reviewing the case on the facts.46

Professor Blume goes on to argue that it is not the jury's determination of facts which the appellate court is considering, but the trial judge's findings of fact in refusing to set the verdict aside. But the Supreme Court has rejected this argument:

[I]t is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence it should never do so where it does not clearly appear that the findings are not supported by any evidence.47

The most popular argument in support of appellate review in these circumstances is that the Seventh Amendment prohibits re-examination of facts found by juries only when such re-examination is contrary to "the rules of the common law." Everyone con-

45. See Virgin Ry. v. Armentrout, 166 F.2d 400, 408 (4th Cir. 1948).
47. United States v. Johnson, 327 U.S. 106, 111-12 (1946). The case cited is a criminal case, but federal courts do not seem ever to have distinguished between civil and criminal cases in considering appellate power to order a new trial. Indeed in the passage quoted the Court relies on a civil case, Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933).
cedes that the weight of the evidence could not be raised by writ of error and thus was not subject to appellate review at the time the Seventh Amendment was adopted. But it was the practice at common law prior to that date for the trial to be conducted by a single judge at nisi prius, and for motions for a new trial to be heard by the court sitting en banc at Westminster. It is argued that this review by the court en banc is more like present American appellate practice than it is like our motion for a new trial, addressed to the single judge who presided at the trial. Thus it is contended that the Seventh Amendment does not prevent modern appellate courts from exercising those powers which might have been exercised by the full court sitting at Westminster in 18th century England.

It is clear that English courts did grant new trials on the ground that the verdict was contrary to the clear weight of the evidence. And we can agree with the pronouncement of Lord Mansfield in one such case:

Trials by jury in civil causes could not subsist now without power somewhere to grant new trials.

But this does not settle the matter. In the first place, it oversimplifies the historical data. An exhaustive examination of the early English cases has led one writer to conclude there is not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court, or certified, that the verdict was against the evidence and that he was dissatisfied with the verdict. This important difference between early English practice and the procedure which it is now claimed to justify for the United States has been tossed off by one court as "not one of those essential attributes of jury trial which the constitution preserves." But the matter is hardly that easy. Assuming the accuracy of the


50. Weisbrod, Limitations on Trial by Jury in Illinois, 19 Chi.-Kent L. Rev. 91, 92 (1940). I do not find in the literature any disagreement with this conclusion, nor have I found any case contrary to the rule Weisbrod states.

51. Olson v. Chicago Transit Authority, 1 Ill.2d 83, 85, 115 N.E.2d 301, 303 (1953).
historical conclusion, the common law system was one in which the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified, and even then, only if he could persuade his brothers at Westminster to this view. Thus we have already liberalized the granting of new trials beyond that known at common law, since under the present American system, the trial judge can set aside the verdict on this ground without getting the approval of any other judge. To allow appellate review of his action would mean that the verdict could be set aside solely by judges who were not present at the trial even though the trial judge, by denying the motion for a new trial, has found that the verdict is not contrary to the clear weight of the evidence. This would be a complete reversal of the common law practice, and can hardly be said to meet the test of the Seventh Amendment.

But there is another argument not unworthy of consideration. Regardless of what the facts may have been as to procedure in England prior to the adoption of our bill of rights, it is abundantly clear, as the authorities cited earlier show, that for at least 150 years federal courts thought that the Seventh Amendment prohibited appellate review of denial of a motion to set aside the verdict as contrary to the weight of the evidence. It is true that a long history of interpretation of a provision one way is not as conclusive when it is the Constitution which is to be construed as it would be if a mere statute were involved. But surely the unanimous views of the judges of the past are entitled to respect, and should not be cast aside save on the clearest showing of "the unconstitutionality of the course pursued."

The Court of Appeals for the District of Columbia has not made a clear demonstration that it has the power to set aside verdicts as contrary to the weight of the evidence. Its claim of such power is not supported by the authorities it cites, nor by the cases it does not cite. It does not attempt a reasoned analysis of the problem, and we have seen that such an analysis would leave its conclusion, at best, very doubtful. The court's statement is, of course, merely a dictum, but as was shown in the section on review of size of verdicts, today's dictum claiming extended power for appellate courts is frequently the prelude to tomorrow's holding to that effect.

52. Douglas, Stare Decisis, 49 Colum. L. Rev. 735 (1949).
The Seventh Amendment applies only to facts found by a jury; it has no application to facts found by the court, in cases where jury trial has been waived or where there is no right to a jury. The scope of review in this class of cases may be regulated by legislation or by court rule.

Rule 52(a) of the Federal Rules of Civil Procedure, and the similar rules in other modern pleading systems, say:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Such a rule has been thought to leave a question, of considerable interest for our purposes, as to the scope of review of the trial court's findings in cases where the evidence was documentary, and where, therefore, the trial court had no special opportunity "to judge of the credibility of the witnesses." Some courts have said that in such a situation the appellate court, being in as good a position to judge the evidence as was the trial court, can more readily find the trial court's findings to be clearly erroneous. Though such a gloss on Rule 52(a) may be regarded as unnecessary, it has at least the merit of being a sound gloss. But then other courts, reasoning from the gloss on Rule 52 rather than from the rule itself, went on to say that the appellate court is not bound at all, and that review is de novo with no presumption in favor of the trial court's findings, where the evidence below was not oral.

This process was carried to its ultimate in a famous opinion by Judge Jerome N. Frank in which he set out some seven narrowly-defined classes, turning on the kind of case and the proportion of testimony that was oral, and asserted that the freedom of review is dependent upon the class in which a particular case

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55. "This was perhaps not harmful, though to add an additional measure of discretion to a rule calling for the exercise of discretion was, if not confusing, at least gilding the lily." Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 505 (1950).

56. Dollar v. Land, 184 F.2d 245 (D.C. Cir.), cert. den., 340 U.S. 884 (1950), Bertel v. Panama Transport Co., 202 F.2d 247, 249 (2d Cir. 1953), Panama Transport Co. v. The Maravi, 165 F.2d 719, 720 (2d Cir. 1948), Stokes v. United States, 144 F.2d 82, 85 (2d Cir. 1944), Carter Oil Co. v. McQuigg, 112 F.2d 275, 279 (7th Cir. 1940), see General Cas. Co. v. School District No. 5, 233 F.2d 526, 528 (9th Cir. 1956).
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falls. Judge Harrie B. Chase, dissenting, uttered a useful reminder in the course of explaining his unwillingness to reverse the trial court:

This is a typical instance for the application of Civil Rule 52(a). Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.

Though it is probably true that Judge Frank's view is the more popular among the federal courts of appeals, it has not won unanimous acceptance. There continues to be a substantial number of cases in which the courts hold that the "clearly erroneous" test applies to all nonjury cases, regardless of the nature of the evidence.

Appraisal of these competing views as to the weight to be given findings based on documentary evidence is made difficult because of the inconclusiveness of the historical data. The Advisory Committee Note to Federal Rule 52 said, in part:

The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.

Unfortunately "modern federal equity practice" sheds very little light on the scope of review in documentary evidence cases. It is clear enough that ancient equity did permit a somewhat vague de novo review, and that in ancient equity evidence was submitted by depositions rather than by oral testimony. This broad review has been abandoned in this country only in the last century, and it would be idle to deny that one reason for its abandonment was the substitution of oral testimony for depositions in the usual equity

58 Orvis v. Higgins, supra note 57, at 542.
59 Some courts have held Rule 52 (a) not to apply where the findings below were based upon stipulated or undisputed subsidiary facts. We have not
60 In our opinion Rule 52 (a) unambiguously governs all findings, and its additional caveat, that due regard is to be given to the trial court's opportunity to judge credibility, is merely cautionary advice, not a variation in the scope of review. Texas Co. v. R. O'Brien & Co., Inc., 242 F.2d 526, 529 (1st Cir. 1957). Accord Bishop v. United States, 223 F.2d 582, 586-87 (D.C. Cir. 1955), Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954), Hill v. Gregory, 241 F.2d 612 (7th Cir. 1957), Holt v. Werbe, 198 F.2d 910 (8th Cir. 1952), see Heim v. Universal Pictures Co., 154 F.2d 480, 491 (2d Cir. 1946).
61 Pound, Appellate Procedure in Civil Cases 300-1 (1941).
case. But this is not the only factor involved. As Dean Pound points out, an attempt to analogize the scope of review in equity cases with that prevailing in legal actions, the pressure of work in appellate courts, and a feeling that the primary function of appellate courts is to find and declare the law, all played a part. Thus, while isolated cases can be found prior to 1937 in which it was said that the old de novo review continued to apply where the evidence was not oral, it is far from clear that these represented any considered or consistent view. It is of some significance that the major treatises on equity and on federal practice prior to adoption of the Federal Rules are either ambiguous or silent as to the scope of review of findings based on documentary evidence.

The matter is made more complicated because of the union of law and equity which was proceeding in many states during the same years that chancery review was in transition. The experience of these code states was so diverse that it offers little guidance for our problem. Some of the code states adopted for all cases the very limited review theretofore available in actions at law, while other states purported to permit review as in equity of findings in non-jury cases. Just what was meant by the latter must be left to the imagination. In Missouri, for example, it meant that, even where the testimony was oral, the findings of the trial court would be accepted only "when there is conflict of testimony, or where the testimony is evenly balanced and the finding of the chancellor appears to be correct." And in Nebraska, in a thorough and thoughtful opinion, it was concluded that where the evidence is entirely documentary, the appellate court is to be governed by its own conclusion as to the weight of the evidence, and the rule that findings are to be set aside only if clearly erroneous "has no application." Yet in Minnesota it has been settled from the earliest days that the trial court's findings must be accepted unless clearly erroneous, even though they are based exclusively on documentary evidence.

63. Pound, op. cit. supra note 61, at 300-1.
64. E.g., Marker, Federal Appellate Jurisdiction and Procedure § 225 (1935).
66. Benne v. Schnecko, 100 Mo. 250, 258, 13 S.W. 82, 84 (1890).
68. Humphrey v. Havens, 12 Minn. 298 (1867), Sommers v. City of St. Paul, 183 Minn. 545, 551, 237 N.W. 427, 430 (1931), Wright, Minnesota Rules 63 (1956 Supp.).
The California experience is instructive. In *Rexy v. Butler*, an appellant argued that the reviewing court should find the facts for itself, since most of the evidence was documentary. He pointed to cases saying that the reason for giving deference to the findings below is that the trial court has seen the witnesses, and argued that since this reason was inapplicable in his case, the usual rule should not apply. The court rejected this contention.

It has been held here in more than a hundred cases that the finding of a jury or a court as to a fact decided upon the weight of evidence will not be reviewed by this court, and so the general rule is clearly established. It was said, however, in the opinion of the court in two or three cases that the reason of the rule is that the court below has the advantage of observing the appearance and bearing of the witnesses, and that such reason does not obtain when the witnesses do not appear personally in court. But it may be well argued that such is not the only reason of the rule, that it is founded in the essential distinction between the trial and the appellate court under our system, and grows out of considerations of jurisdiction, that it is the province of the trial court to decide questions of fact, of the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion. The appellate court will, no doubt, look a little more closely into the evidence when it consists entirely of depositions, or affidavits, or notes of former testimony; but it cannot be taken as settled that in such a case the rule as to conflicting evidence does not apply.

In 1926 the California Constitution was amended to provide that appellate courts "may make findings of fact contrary to, or in addition to, those made by the trial court." A distinguished proponent of broad appellate review read this as meaning that the appellate courts were now "to permit a review of the facts in cases tried without a jury." But the appellate courts held otherwise. They construed the amendment as not intended to abrogate the general rule respecting the powers of the trial court in its determination of questions of fact or the rule that the reviewing court is bound by the findings of the trial court if based upon substantial evidence.

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69. 95 Cal. 206, 30 Pac. 208 (1892).
70. *Id.* at 214-15, 30 Pac. at 209.
words, it was not the purpose generally to so confuse the functions of the respective courts as to make the findings of the trial courts, when based on substantial evidence, merely recommendations as, for example, the finding of a referee or commissioner.\textsuperscript{73}

In 1903 Roscoe Pound, speaking as Commissioner for the Nebraska Supreme Court, said

The reported decisions of this court leave the question as to the power and duty of the court on appeal from findings of fact in some seeming confusion. [A]s a consequence of this confusion, some support may be found for taking any course, with respect to findings of fact challenged on appeal, which the court may choose.\textsuperscript{74}

What Pound found to be true of a single jurisdiction was the more true for American jurisdictions taken collectively All that can be said with assurance is that there was no generally accepted doctrine as to the scope of review of findings of fact where the testimony was not oral.

Since scope of review in nonjury cases poses no constitutional questions and is subject to alteration by statute or court rule, perhaps history, and particularly, confusing history, can be put to one side, and resort had instead to the language and intent of Federal Rule 52(a). Professor Moore, who favors broad review in the situation we are discussing, concedes that the intent of Judge Charles E. Clark, the draftsman of Rule 52, was to have the "clearly erroneous" test apply regardless of the nature of the evidence, but he believes that the rule as written supports broader review of findings based on nondemeanor testimony, and that "for litigants the pudding is the payoff, not the cook's intent."\textsuperscript{75} One naturally hesitates to disagree with an authority so respected as Professor Moore, but, with deference, I suggest that the history and language of the rule are clearly consistent with Judge Clark's understanding of it.

In the Preliminary Draft of May, 1936, of the Federal Rules, findings were covered by Rule 68. In that draft it was provided that

The findings of the court in such cases shall have the same effect as that heretofore given to findings in suits in equity

This caused some professional controversy Judge Clark revealed publicly that in this instance he did not agree with the action of

\textsuperscript{73} Tupman v. Haberkorn, 208 Cal. 256, 265-66, 280 Pac. 970, 974 (1929)
\textsuperscript{74} Faulkner v. Sims, 68 Neb. 295, 300-1, 94 N.W. 113, 114 (1903)
\textsuperscript{75} 5 Moore, Federal Practice 2642 (2d ed. 1931)
the Advisory Committee, and argued that the very limited review available therefore in law actions should be made the test in all cases.\textsuperscript{76} Judge W Calvin Chesnut supported this view,\textsuperscript{77} while Professor W Wirt Blume defended the Advisory Committee's preference for the broader equity review.\textsuperscript{78} But all this debate ran to the choice between no reversal of findings of fact, as at law, and reversal where clearly erroneous, as in equity. No one urged that there should be an even broader, de novo review where the evidence was documentary.\textsuperscript{79}

The Advisory Committee never explained why it altered the language of the findings rule before finally recommending it to the Supreme Court for adoption as Rule 52. One article even surmised that perhaps Judge Clark had won, and that the law standard of review was being adopted after all.\textsuperscript{80} This suggestion was quite apparently erroneous, in view of the statement in the Committee Note that the test "accords with the decisions on the scope of the review in modern federal equity practice." In two respects the form of the rule as finally adopted seems to prohibit any distinction between findings based on oral evidence and findings based on documents. First, the rule as finally adopted states positively the test to be applied, rather than adopting by reference prior standards of review in equity. Thus even if the historical evidence that distinctions of the sort we are considering had been made in equity were far stronger than it appears to be, these distinctions would nevertheless be improper if contrary to what the rule itself says. Second, Rule 52 says that findings shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. If the word "and" means anything, it must mean that these are two separate restrictions being placed on appellate review of findings. Judge Frank and Professor Moore read the rule as if it said "Findings of fact shall not be set aside unless clearly erroneous if

\begin{itemize}
\item \textsuperscript{79} Indeed the only mention of the point is a statement by Judge Clark and Professor Stone, relying on secondary authorities, that reviewing courts in equity did distinguish between findings based on oral testimony given in open court and those based on written documents and depositions. Clark and Stone, \textit{Review of Findings of Fact}, 4 U. Chi. L. Rev. 190, 208 (1937).
\item \textsuperscript{80} Ilsen and Hone, \textit{Federal Appellate Practice as Affected by the New Rules of Civil Procedure}, 24 Minn. L. Rev. 1, 32–33 (1939).
\end{itemize}
the trial court has had an opportunity to judge of the credibility
of the witnesses.”

That Rule 52 required application of the “clearly erroneous”
test to all findings, regardless of the nature of the evidence, should
thus have been apparent to anyone who understands the difference
between a hypothetical and a conjunctive proposition. And this
conclusion should have been reinforced by the Advisory Committee
Note which said that the “clearly erroneous” test was to apply even
where the finding was “deduced or inferred from uncontradicted
testimony,” a situation which is functionally the same as a finding
based on nondemeanor evidence.81

It must, therefore, be reluctantly concluded that those appellate
courts which have substituted their judgment for that of the trial
court as to findings based on other than oral testimony have acted
contrary to both the plain meaning and the stated intent of the govern-
ing rule. A cynic might say this is a tempest about mere words.
After all, the “clearly erroneous” test “is not a measure of exact
and uniform weight.”82 The courts which have disregarded Rule 52
in substituting their judgment for that of the trial court could
accomplish the same purpose while complying with the rule merely
by announcing that the finding with which they disagree is “clearly
erroneous.” But I think we can safely assume that appellate judges
do make a conscientious attempt to confine their review to that
authorized by law, and that, so far as human frailties permit, they
do not regard a finding as clearly erroneous merely because it
differs from the finding they might themselves have made.

This issue about findings has seemed to me worth exploring
at such length because in final analysis it presents a jurisprudential
question of central importance to this entire paper. Even if we con-
cede that in the situation we have been considering the appellate
court is in just as good a position as the trial court to determine

81. This analysis of the intent of the original rule is fully supported
by the recent proposal of the Advisory Committee to amend Rule 52(a) in
such manner as to ensure that that intent will be followed, and by the Com-
mittee Note to the proposed amendment. Advisory Committee on Rules for
Supreme Court has not yet acted on the proposed amendments. For Professor
Moore’s criticism of the amendment to Rule 52(a) see Moore, Federal Rules
247 (1956).

82. Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954)
See also Learned Hand, in United States v. Aluminum Co. of America, 148
F.2d 416, 433 (2d Cir. 1945) “It is idle to try to define the meaning of the
phrase ‘clearly erroneous’, all that can be profitably said is that an appellate
court, though it will hesitate less to reverse the findings of a judge than that
of an administrative tribunal or of a jury, will nevertheless reverse it most
reluctantly and only when well persuaded. This is true to a considerable
degree even when the judge has not seen the witnesses.”
what the fact is, does it follow that the view of the appellate court
must therefore prevail over that of the trial court? To Professor
Moore it does. This is "a natural and proper concomitant of
appellate power." But others take a different view, eloquently
expressed by the Eighth Circuit:

The entire responsibility for deciding doubtful fact questions in
a nonjury case should be, and we think it is, that of the district
court. The existence of any doubt as to whether the trial court
or this Court is the ultimate trier of fact issues in nonjury cases
is, we think, detrimental to the orderly administration of jus-
tice, impairs the confidence of litigants and the public in the
decisions of the district courts, and multiplies the number of
appeals in such cases.84

I leave for the Conclusion an expression of my own view on this
issue.

USE OF THE EXTRAORDINARY WRITS TO CONTROL
DISCRETIONARY ACTION

In the spring of 1955 the Honorable Walter J. LaBuy, a judge
of the United States District Court for the Northern District of
Illinois, was confronted with a problem. High on his calendar
were two large and complex antitrust cases, which had been pend-
ing for five years.85 In one case eighty-seven operators of retail
independent shoe repair shops were suing six manufacturers,
wholesalers, retail mail order houses and chain operators, alleging
a conspiracy to monopolize and fix the price of shoe repair supplies
sold in the Chicago area in violation of the Sherman Act, and
also alleging price discrimination in violation of the Robinson-
Patman Act. The other case involved similar claims by six whole-
salers of shoe repair supplies against six defendants. These cases
had already occupied much of Judge LaBuy's time. In the first
case alone the original complaint had been twice amended, fourteen
defendants had been dismissed with prejudice, a motion for sum-
mary judgment had been heard and denied, over fifty depositions
had been taken, and numerous hearings had been held in connection
with discovery matters. Judge LaBuy commented that the case had
taken a long time to get to issue and that he had heard more
motions in connection with it than in any case he had ever sat on.

83. 5 Moore, Federal Practice 2642 (2d ed. 1951).
85. The facts as to the cases before Judge LaBuy, and his action thereon,
When the first of these cases appeared on Judge LaBuy's calendar as ready for trial, the lawyers estimated it would take six weeks to try. The judge indicated that he did not know how he could try a case which would take so long, particularly since all parties were anxious for an early trial. When the parties refused to consent to referring the case to a master for trial, Judge LaBuy, on his own motion, ordered the case to a master.

Federal Rule 53(b) provides, in part

A reference to a master shall be the exception and not the rule.

[T]he actions to be tried without a jury shall be made only upon a showing that some exceptional condition requires it.

Judge LaBuy believed that such an exceptional condition was presented because the cases were very complicated and complex, they would take a considerable time to try, and his calendar was congested.

It can well be agreed that reference to a master contains many possibilities of evil, and that this device should be sparingly used. The rule indicates as much on its face. And it is no part of our concern to evaluate Judge LaBuy's decision that conditions in the cases before him were so "exceptional" as to justify a reference. What is of interest to us is that the Court of Appeals for the Seventh Circuit felt that it could and should substitute its judgment that exceptional conditions did not exist for Judge LaBuy's decision that they did, and that it could use the ancient writ of mandamus to compel him to vacate his order referring the cases to a master. And even more important, the United States Supreme Court, by a vote of five to four, upheld this action of the court of appeals.

The significant feature of the case is not that the upper courts disagreed with Judge LaBuy, but that they held they could consider his order at all. The historic federal policy has been that only final judgments can be reviewed, save for a few narrow statutory exceptions. It is true that the concept of finality is not always easy to apply, but on no interpretation could Judge LaBuy's order be regarded as a final judgment. It was a purely interlocutory order,

86. See Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809, 815 (7th Cir. 1942), Vanderbilt, Cases and Materials on Modern Procedure and Judicial Administration 1240-41 (1952)
87. Howes Leather Co. v. LaBuy, 226 F.2d 703 (7th Cir. 1955)
regulating the procedure to be followed in a particular case, of a sort that every trial judge makes many times in the course of every case.

There have been times when the extraordinary writs of mandamus and prohibition have been used to review interlocutory orders, but, as the Supreme Court said in 1947:

We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.90

Again in 1956 the Court summarized the usual federal doctrine.

Such writs may go only in aid of appellate jurisdiction. 28 U.S.C. § 1651. The power to issue them is discretionary and it is sparingly exercised. Rule 30 of the Revised Rules of this Court and the cases cited therein. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. Maryland v. Soper, 270 U.S. 9, 29-30. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases, they may not be used to thwart the congressional policy against piecemeal appeals.91

Tested by those principles the attempt to secure review, by writ of mandamus, of Judge LaBuy's order must have seemed doomed to defeat, for, just as in the case last quoted, apparently the most that could be claimed was that he had erred in ruling on a matter within his jurisdiction. The Seventh Circuit analyzed the matter differently. To that court:

obviously the trial court here was not "acting within its jurisdiction as a federal court to decide issues properly brought before it," for here the court was not deciding issues presented but was, over the objection of both parties to the suit, refusing to be bound by the rule.92

What was "obvious" to a majority of the Seventh Circuit seemed doubtful to others. The rule authorizes a judge to refer a case to a master if he finds some "exceptional condition" which requires this course. Judge LaBuy, expressly grounding his action on the rule, made a finding that there was such an "exceptional condition." Perhaps he was wrong in believing that the circumstances before him were an "exceptional condition" within the meaning

92. Howes Leather Co. v. LaBuy, 226 F.2d 703, 710 (7th Cir. 1955).
of the rule, but surely for a judge to apply a rule mistakenly is not the same thing as "refusing to be bound by the rule." Judge Major, dissenting, stated the matter succinctly:

"No criteria are supplied either by statute or rule for determining the "exceptional condition" referred to in Rule 53(b). Therefore, Judges might well disagree as to the circumstances which would justify a reference. Respondent in the exercise of his judgment concluded that the circumstances were sufficient and ruled accordingly. A judge with authority to make a correct ruling has the same authority to make an erroneous ruling."

Nor was the Seventh Circuit on any sounder ground in finding the irreparable injury which, on the precedents, justifies use of the extraordinary writs. It referred to "the necessity and great expense of protracted trials which conceivably may eventually lead nowhere but to a complete retrial of the causes before a competent tribunal." But Supreme Court decisions had been explicit that the inconvenience and expense of a useless trial "is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."

The opinion of the Supreme Court, affirming the Seventh Circuit, is unenlightening. The Court discusses at some length the evils of reference to masters and the advantages in having Judge LaBuy try the cases himself. All of this discussion might well have been appropriate on review of a final judgment in the case. But the Court never specifies what "exceptional circumstances here warrant the use of the extraordinary remedy of mandamus" to correct Judge LaBuy's error. The Court cautions that its holding in the case before it is not intended "to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders." Unfortunately it draws no line to distinguish proper use from "indiscriminate use." And its conclusion that "supervisory control of the District Courts

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93. Thus instances where the judges of a district have agreed to refer all patent cases, or all admiralty cases, to a master, without regard to the circumstances of the particular case, are clearly distinguishable. Mandamus has been issued, quite properly, in such cases. Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927), United States v. Kirkpatrick, 186 F.2d 393 (3d Cir. 1951), cf. McCullough v. Cosgrave, 309 U.S. 634 (1940).
94. Hoves Leather Co. v. LaBuy, 226 F.2d 703, 712 (7th Cir. 1955).
95. Id. at 705.
98. Id. at 255. Thus the Sixth Circuit has been able to read the LaBuy decision as making no great change in the law. Massey-Harris-Ferguson, Ltd. v. Boyd, 242 F.2d 800 (6th Cir. 1957).
by the Courts of Appeals is necessary to proper judicial administration in the federal system" is not likely to be read as a caution of restraint by appellate judges who believe that one of their trial judges has erred in some interlocutory order.

The potential consequences of the LaBuy decision are truly breathtaking. The central feature of modern procedural reform is that trial courts are given discretion to decide details of procedure which in the past have been governed by rigid statutes. Thus joinder of claims and parties is now virtually unlimited while power is given the trial judge to order separate trials as to particular claims or parties where this seems necessary. The relevant rule provides that the court may order such a separate trial "in furtherance of convenience or to avoid prejudice." Are orders under this rule now reviewable by mandamus? It is hard to see how the trial court's findings as to "convenience" and "prejudice" under this rule differ from his findings as to the existence of an "exceptional condition" justifying reference to a master under Rule 53(b). Will a judge who finds that there is a genuine issue as to some material fact, and thus denies a motion for summary judgment, be told, by an appellate court that disagrees with him, that he was "refusing to be bound by the rule" and that mandamus must issue to correct his determination?

These may be imaginary horribles. But the danger to the discovery process is very real. Such concepts as "good cause therefore" and "any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression" are fully as subjective as the standard of "exceptional condition" involved in

99. 352 U.S. at 259-60.
100. Rives, A Court of Appeals Judge on the Federal Rules, 17 Ala. Lawyer 324, 327-29 (1956). It is strange that modern procedural reform has been centered almost exclusively on the trial courts, and that so little attention has been given to the role of the appellate courts. In a valuable and penetrating recent article, Justice Traynor, of the California Supreme Court notes: "If we are in earnest that the law should keep pace with the times, we must scrutinize appellate review as critically as trial procedure and the practice of law. [D]o we rationalize that the dignity of the appellate courts depends on their mystery? If so, we do not honor them, for the implication hovers in such a premise that whatever dignity attends the judicial process emanates not from its exacting demands on mind and integrity, but from its secrecy. We may even do them injury, for in modern times that which operates in an aura of mystery may eventually find itself suspect rather than respected," Traynor, Some Open Questions on the Work of State Appellate Courts, 24 U. Chi. L. Rev. 211-12 (1957).
the LaBuy case. Already state courts are using the extraordinary
writs to correct discovery orders with which they disagree. It is
terrifying to think of the consequences, to the discovery process, to
the appellate courts, and to the cause of efficient judicial administra-
tion, if litigation is to be suspended by an application for writ of
mandamus every time one side or the other believes that the trial
judge has made a mistake in applying the discovery rules.

The “problems following in the wake of generally encouraged
repetitive invocations of mandamus” are well illustrated by the
controversy which now rages as to use of mandamus to review trial
court orders granting or denying a transfer to a more convenient
forum, pursuant to 28 U. S. C. § 1404(a) The views of the cir-
cuits are utterly conflicting, ranging from the Seventh Circuit, which
grants mandamus to order the trial court to transfer a case for no
better reason than that it disagrees with him as to which forum is
the more convenient, all the way to the Eighth Circuit, which has
announced flatly that “controversies about venue should be finally
settled and determined at the District Court level,” and that it will
not even consider applications for mandamus to review transfer
orders.

Dean Green has observed of forum non conveniens, and its statu-
tory counterpart in the federal system, that “as a delaying tactic it
has few equals” That this is true is largely because there

105. E.g., Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955),
State ex rel. Thompson v. Harris, 355 Mo. 176, 195 S.W.2d 645 (1946),
cf. Ex parte Pollard, 233 Ala. 335, 171 So. 628 (1936), see Brown v. St. Paul
City Ry., 241 Minn. 15, 31-32, 62 N.W.2d 688, 698-99 (1954), Louisell,
Discovery and Pre-Trial Under the Minnesota Rules, 36 Minn. L. Rev. 633,
654-60 (1952). So far the federal cases have been very clear that the extraordi-
nary writs cannot be used to review discovery orders. 4 Moore, Federal

106. Chicago, R.I. & P R.R. v. Igoe, 220 F.2d 299, 305 (7th Cir. 1955)
(dissenting opinion).

107 Kaufman, Further Observations on Transfers under Section
1404(a), 56 Colum. L. Rev. 1, 2-11 (1956), Comment, Review of Section
1404(a) Federal Venue Proceedings by Extraordinary Writ, 43 Calif. L. Rev.
841 (1955).

against the trial judge, since it says “he is limited in his consideration to the
circle of factors specifically mentioned in § 1404(a), and he may not properly
be governed in his decision by any other factor or consideration.” Id. at 302.
Then it goes on to list eight factors which persuaded it transfer should have
been granted in the particular case, only one of which is mentioned in the
statute. Id. at 304.

109. Great Northern Ry. v. Hyde, 238 F.2d 852, 857 (8th Cir. 1956). The
Eighth Circuit has subsequently granted rehearing, 241 F.2d 707 (8th Cir.
1957), to reconsider its decision in the light of the LaBuy case.

110. Green, Jury Trial and Mr Justice Black, 65 Yale L.J. 482, 494
n.36 (1956).
are some federal courts of appeals and some state courts\textsuperscript{111} that continue to entertain petitions for writs of mandamus to review the application by the trial court of a doctrine that is expressly discretionary. The argument against appellate review of these orders has been best stated by Judge Herbert Goodrich.

We think that this practice will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.

Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.

We cannot escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits first, prolonged litigation to determine the place where a case is to be tried, and, second, the merits of the alleged cause of action itself.\textsuperscript{112}

What Judge Goodrich says with regard to 1404(a) orders is largely true of all use of mandamus to review discretionary trial court action. There is much ferment in the profession at the present time to do away with the final judgment rule as a condition to appellate review.\textsuperscript{113} Some jurisdictions have provided for interlocutory appeals under carefully circumscribed circumstances,\textsuperscript{114} and similar proposals are being advanced for the federal courts and elsewhere.\textsuperscript{115} My own view, elaborated in the Conclusion, is that any compromise of the historic policy against piecemeal appeals would be a mistake. But if there is to be any increase in review of interlocutory appeals it seems very clear that it should come about by way of legislation or court rule, rather than by more liberal use of extraordinary

\textsuperscript{111} E.g., Atchison, T. & S.F Ry. v. District Court, 298 P.2d 427 (Okla.), cert. denied, 352 U.S. 879 (1956).
\textsuperscript{112} All States Freight, Inc. v. Modarelli, 196 F.2d 1010, 1011-12 (3d Cir. 1952).
\textsuperscript{113} E.g., Six Moore, Federal Practice § 54.43(4) (2d ed. 1953), Note, Proposals for Interlocutory Appeals, 58 Yale L.J. 1186 (1949), Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539, 558-64 (1932).
writs. A statute or a court rule can set out tight conditions for use of this new kind of appeal. And a statute or a court rule can speak explicitly, in a manner which will be clear to the bar. The cause of proper judicial administration is not well served by expanding reviewability of interlocutory orders through a device so unclear and so unconfined as judicial liberalization of the ancient writs of mandamus and prohibition.

**EVALUATION AND CONCLUSION**

It is easier to summarize what we have seen than it is to evaluate it. The four specific examples considered in this paper should be enough to persuade anyone that appellate power is rapidly on the increase. The appraisal by trial judge and jury of the damages suffered by an injured person is now subject to review by appellate courts, a decade ago it could not have been reviewed. The determination by the trial judge that the verdict is not contrary to the clear weight of the evidence is now said, by at least one appellate court, to be within its power to reverse, heretofore the precedents have been uniform that such a determination was not subject to reversal. Many appellate courts now believe that they need not give any weight to findings of fact of a trial judge sitting without a jury where these findings are based on documentary evidence, both the language and intent of Federal Rule 52(a), adopted by the Supreme Court only 19 years ago, are explicit that such findings can only be set aside when clearly erroneous. Finally discretionary decisions by the trial judge on interlocutory procedural matters may now be vacated in the exercise of a supervisory power of appellate courts, contrary to what the Supreme Court said as recently as 1956. Thus the centralization of legal power in the appellate courts, which Dean Green detected more than a quarter century ago, proceeds at an accelerating pace.

But now we must venture some views as to whether this development is good or bad for the cause of justice to which all are devoted. It would be irresponsible even to suggest that these changes have taken place merely because appellate courts are power-mad. The obvious truth, which must be readily admitted by anyone familiar with appellate judges, is that these recent developments in the law, these departures from what had seemed fairly clear lines of precedent, have come only because the judges who have voted for

them sincerely believe that they are needed and justified by the high-
est public interests.

Thus leads us to the philosophical question which underlies all
these specific issues—what is the proper function of an appellate
court? Everyone agrees, so far as I know, that one function of an
appellate court is to discover and declare—or to make—the law.
From the earliest times appellate courts have been empowered to
reverse for errors of law, to announce the rules which are to be
applied, and to ensure uniformity in the rules applied by various
inferior tribunals.

The controversial question is whether appellate courts have a
second function, that of ensuring that justice is done in a particular
case. In each of the situations considered the motivating force in the
appellate court's mind has been the desire to "do justice." Thus the
appellate court is unwilling to let an award of damages stand which
seems to it so excessive as to be unjust, it refuses to put its approval
on a verdict which it deems contrary to the clear weight of the evi-
dence, it will not affirm a judgment based on findings it thinks wrong
when it is as well able to interpret documentary evidence and make
the finding in question as was the trial court, and it will not let a
trial judge's mistaken conception of what is an "exceptional condi-
tion" result in exposing parties to the delay and expense of reference
to a master.

If it is the function of appellate courts to do justice in individual
cases, then each of the developments we have canvassed was sound
and desirable, since each has made it easier for the appellate court
to enforce its concept of justice in a particular case. The notion that
appellate courts should undertake to "do justice" is so attractive on
its face that it is difficult to disagree with it. And it enjoys the
weighty support of such famous students of the judicial process as
Roscoe Pound, Edson Sunderland, Wirt Blume and James Wm.
Moore. Nevertheless, with deference to these great men, I think we
should refrain from agreeing that appellate courts are to do justice
until we have seen the price we must pay for this concept.

The principal consequences of broadening appellate review are
two. Such a course impairs the confidence of litigants and the public
in the decisions of the trial courts, and it multiplies the number of
appeals.117 Until recently if a defendant thought an award of dam-
gages was excessive, he nevertheless had no choice but to pay it, for
no appellate court would listen to his attack on it. Now, in similar

117 See the observation of the Eighth Circuit, in Pendergrass v. New
circumstances, he will appeal. Until recently if a lawyer was dissatisfied when his case was referred to a master, he appeared before the master nevertheless, for an attempted appeal from the order of reference would have been dismissed out of hand. Now he files a petition for a writ of mandamus. We may be sure that the broadened scope of appellate review we have seen will mean an increase in the number of appeals.\textsuperscript{118} Is this desirable? We need not worry too much that an increase in appeals will mean overwork for appellate judges, they, after all, have invited the increase. But we should worry about the consequences of more numerous appeals for the litigants and the public. Appeals are always expensive and time-consuming. When they are successful, and lead to a new trial, they add to the burden on already-crowded trial courts. Interlocutory review, as by writ of mandamus, delays the case interminably while the lawyers go off to the appellate court to argue the propriety of the challenged order by the trial judge. It is literally marvelous that, at a time when the entire profession is seeking ways to minimize congestion and delay in the courts, we should set on a course which inevitably must increase congestion and delay.

But we have courts in order to do justice. If better justice can be obtained by broadening the scope of appellate review, then even congestion, delay and expense are not too high a price to pay. Do we really get better justice by augmenting the power of the appellate courts? In some fairly obvious senses I feel quite sure that we do not. If in two similar cases the person rich enough to afford an appeal gets a reversal, however just, while the person of insufficient means to risk an appeal is forced to live with the judgment of the trial court, has justice really been improved? And what of the injured person who settles his claim for less than the amount awarded him by the jury and approved by the trial court rather than wait a year or more until an appellate court has agreed that the verdict is not excessive? Broader appellate review has led to injustice for him.

Further, it may well be, as Blackstone says, that “next to doing right, the great object in the administration of public justice should be to give public satisfaction.”\textsuperscript{119} It is hard to believe that there has been any great public dissatisfaction with the restricted appellate review which was traditional in this country. Very early in our history Chief Justice Ellsworth observed

\textsuperscript{118} A usual means of reducing congestion in the appellate courts has been to narrow the scope of review. For an excellent historical account, see Frankfurter and Landis, \textit{The Supreme Court at October Term, 1929}, 44 Harv. L. Rev. 1, 26-35 (1930).

\textsuperscript{119} 3 Bl. Comm. *391.
But, surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his case two or three times over. Yet increased review is likely to lead to quite tangible public dissatisfaction. Every time a trial judge is reversed, every time the belief is reiterated that appellate courts are better qualified than trial judges to decide what justice requires, the confidence of litigants and the public in the trial courts will be further impaired. Under any feasible or conceivable system, our trial courts must always have the last word in the great bulk of cases. I doubt whether there will be much satisfaction with the judgments of trial courts among a public which is educated to believe that only appellate judges are trustworthy ministers of justice.

Finally, to come to the very heart of the issue, is there any reason to suppose that the result an appellate court reaches on the kinds of issues discussed is more likely to be "just" than was the opposite result reached by the trial court? Judge Chase's observation, quoted earlier, is in point here.

Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.

Most of our examples have come from the federal courts, and federal district judges are generally believed to be men of much ability, rightly entitled to the greatest respect. In some of the states, it is true, trial judges are not so highly regarded. But this is wrong, regardless of the scope of appellate review. I think there is wide agreement that trial judges should be picked with the same care as appellate judges, and that it probably would be desirable to give them the same conditions of salary and tenure as are given appellate judges.

If trial judges are carefully selected, as in the federal system, it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges. Where the question is whether an award of damages is excessive or a verdict against the clear weight of the evidence, the trial judge has the vast advantage of having been present in the courtroom and heard the witnesses. Where the question is as to the procedure to be followed in a pending case, the trial judge has the advantage of having lived with the case, and thus should be better able than the appellate judges to gauge its

120. Wiscart v. Dauchy, 3 U.S. (3 Dall.) 320, 329 (1796).
complexity and its procedural needs. And even where the question is what finding of fact should be made on the basis of documentary evidence, the trial judge has the advantage of having made the initial sifting of the entire record and of having put it into logical sequence, while the appellate court has lawyers before it picking out bits and pieces of the record to attack or defend a particular finding.

There is no way to know for sure whether trial courts or appellate courts are more often right. But in the absence of a clear showing that broadened appellate review leads to better justice, a showing which I think has not been made and probably cannot be made, the cost of increased appellate review, in terms of time and expense to the parties, in terms of lessened confidence in the trial judge, and in terms of positive injustice to those who cannot appeal, seems to me clearly exorbitant.

I do not wish to speak critically of the appellate courts which have recently announced broader powers of appellate review. Only the most insensitive observer could fail to sympathize with their problem. When a judge upholds the constitutionality of a statute he believes unwise, he has at least all the tradition of deference to a coordinate and popularly responsible branch of government to sustain him in his self-restraint. But there is no such tradition to bolster self-restraint when he is passing on the work of his constitutional inferiors within the judiciary. It must be hard, indeed, for a judge to approve a judgment below he considers to be unjust when he knows that he has the power to set it aside and achieve justice as he sees it. Our hope must be that in those hard moments the judge will remember Justice Jackson's caution that "we are not final because we are infallible, but we are infallible only because we are final," and that, remembering, he may believe that the best way to do justice in the long run is to confine to a minimum appellate tampering with the work of the trial courts.
