EXTENT TO WHICH COURTS OF REVIEW WILL CONSIDER QUESTIONS NOT PROPERLY RAISED AND PRESERVED—PART I

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Courts of review are an integral part of our judicial system. The experience of Georgia during the seventy years that its judiciary functioned without a reviewing court conclusively demonstrates the folly of giving each trial judge final authority in dealing with litigation.[1] As its name implies, a court of review does not, except in a limited number of cases, hear a case *de novo*. Its primary function is to decide whether the trial court erred in its disposition of the case. In doing this, the reviewing court not only determines the rights of the litigants actually involved, but also decides the rules of substantive law and procedure of the particular jurisdiction.

Whenever an action is brought in a court of original jurisdiction, it presents in substantially all cases the possibility of a subsequent review of the decision of that court. In the event of such a review, the record of the proceedings below is of fundamental importance. Without this record the appellant is helpless. Careful attorneys keep this thought in mind from the moment that they lay plans for drafting the initial pleadings. All questions which may have an important bearing upon a client's claim should be presented to the trial judge. This presentation may be made, in general, by a pleading, a motion, or an objection. The nature of the question determines which mode is the proper one. And in a few instances an exception may be the only proceeding which will bring an error to the attention of the trial court; for example, where the trial court has erred in its instructions. In some cases an exception, or a motion for a new trial, or both, are necessary to preserve the point raised. In the event that an appeal is actually taken in a particular case, the next step necessary is to incorporate the matter relating to the questions raised in the record for review. Documents appearing on the "record proper" need no further authentication. But other matter must be made a part of a duly authenticated bill of ex-

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[1]Lamar, *A Unique and Unfamiliar Chapter in Our American Legal History* (1924) 10 A. B. A. J. 513.

ceptions or one of its statutory substitutes. The federal judicial system and a number of the state judicial systems include intermediate courts of review. The extent to which the decisions of these intermediate courts are final on particular questions varies in different jurisdictions. But in all jurisdictions there are some questions which may be urged upon a subsequent appeal to the highest court of review. If a party expects to rely on a contention in the highest court of review, he should preserve it, not only in the trial court, but also in the intermediate court of review. The question in each case is whether the court whose judgment is under review committed reversible error.

When a case reaches an appellate court, it still retains its character of a contest between individuals. These individuals are expected to assert their respective claims in a logical and orderly manner. Failure to do so will usually be deemed a waiver of the alleged error. An assignment or a specification of errors is the proper method of raising questions in an appellate court. This assignment or specification should be supported by argument and authority briefed and filed in accordance with court or statutory regulations.

When attorneys perform their duty in the presentation and preservation of questions in trial and appellate courts, the problem of this paper does not arise. Unfortunately, they frequently fail to perform this duty. In that event, the courts are forced to determine how far they can relieve a client from the consequences of his attorney's fault, and consider questions not properly raised and preserved. It is the purpose of this paper to show how the courts have handled this delicate question.

I

Extent to Which Questions not Raised and Preserved in the Trial Court Will Be Considered on Review

It is the general rule that courts of review will refuse to consider questions which have not been raised and preserved in the trial court.[2] The rule, except in a few jurisdictions, exists without the aid of statutory recognition. The reasons assigned for it vary. That in many cases the error might have been cured if an objection had been seasonably interposed is a consideration of weight.[3] If litigants were permitted to urge new points not going to the merits of the is-

[2]Spencer v. Black, 232 Mich. 675, 206 N. W. 493 (1925); Burroughs v. Donner, 282 Ill. 299, 118 N. E. 400 (1917); Dodd & Edmunds, Illinois Appellate Procedure, Sec. 771; Elliott, Appellate Procedure, Sec. 470; Note (1927) 40 Harv. L. Rev. 997.

[3]See White v. Western Assurance Company, 52 Minn. 352, 54 N. W. 195 (1893).

sues, it would give them an opportunity and an incentive to conceal errors during the trial in order that they might use them as grounds for a reversal on review, in case a decision below was adverse. This would make litigation practically interminable.

The frequent refusal of a court of review to consider a new question which would have enabled it to make a final disposition of the case indicates that some broader principle is involved. Undoubtedly the feeling that fairness to the trial court requires that questions be raised at the trial is a material factor.[4] But the primary basis for the rule lies in the inherent nature of a court of review. Except for a very restricted original jurisdiction, courts of review are limited to the consideration of errors committed by lower courts. An error can only be committed by a trial court in respect to questions actually presented to it. When a court of review considers questions which have not been presented to the trial court, it is exercising original jurisdiction.[5]

A few decisions have indicated a tendency to treat the failure to preserve a question in the trial court as less serious than the failure to raise it.[6] But usually both are treated alike. It is obvious that if a question is of a nature which a court of review would consider although not raised below, the failure to preserve it will not be fatal, unless a statute or rule of law prescribing a certain method of preservation is construed to be mandatory. Of course, questions which have been expressly waived will not be considered on review, except where they are of such a nature that the law will not permit a waiver.

In most jurisdictions there are a few statutes prohibiting the review of certain specific questions when not raised in a particular time and manner in the trial court. And a few states have statutes of broad scope which impose limitations on the consideration of new

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[4]See De Jianne v. United States, 282 Fed. 737 (C. C. A. 3rd, 1922); Robinson & Co. v. Belt, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65 (1902); Missouri-Kansas-Texas By. Co. v. Prince, 133 Okla. 228, 271 Pac. 253 (1928). In Buxton v. City of Nashville, 132 Ark. 511, 516, 201 S. W. 512, 514 (1918), the court said: "To permit appellants to remain silent in the court below on the issue as to whether the date mentioned was Sunday and to invoke here the doctrine that the court will take judicial notice of the fact that such date was on Sunday would be tantamount to firing upon the rulings of the trial court from a battery that was kept masked in the court below."

[5]See Jones v. Seymour, 95 Ark. 593, 130 S. W. 560 (1910); M. R. Smith Lumber Co. v. Russell, 93 Kan. 521, 144 Pac. 819 (1914); Henry v. Zurflieh, 203 Pa. 440, 53 Atl. 243 (1902); Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141, 165 N. W. 856 (1917); Bank of Italy v. Candenasso, 206 Cal. 436, 274 Pac. 534 (1929); ELLIOTT, MINNESOTA PRACTICE & PROCEDURE, sec. 1197.

[6]See State v. Foyte, 43 Idaho 459, 252 Pac. 673 (1927).

questions on review.[7] In the absence of statutory restriction, courts of review have the power to consider questions although they were not raised and preserved in the trial court.[8] A few decisions base this power on the general supervising authority and control exercised over inferior courts;[9] others base it solely on the inherent right and duty of the courts to administer justice.[10] As the Wisconsin Supreme Court said in *Cappon v. O'Day*:[11]

> Any rule the enforcement of which results in a failure of justice should be carefully scrutinized and not blindly adhered to unless the abandonment of it will work more injustice than will follow if it be adhered to.

The difficulty is that of determining when the power should be exercised. Justice in the individual case must sometimes be sacrificed in order that justice may be rendered to society generally.

The extent to which the New Mexico Supreme Court, after seriously questioning its power in 1914 to consider an error not properly raised and preserved in the trial court, has gone since 1914 is illustrative of the tendency of the courts to view the rule regarding the proper presentation and preservation of questions below as purely one of discretion.

In *State v. Garcia*,[12] Francisco Garcia and his brother were indicted for murder, and both were found guilty of manslaughter. The evidence disclosed conclusively that it would have been physically impossible for the former to have participated in the crime. Because of the failure of counsel to move the trial court for an instruction of acquittal, the supreme court held that it did not have the power to consider the question.[13] But the decision was repudiated on a rehearing of the case.[14] As Professor Sunderland said:[15]

> This monstrous sacrifice of justice on the altar of a common law procedural tradition, was too much for the court.

In *State v. Taylor*,[16] the defendant was convicted of rape. The supreme court held that the improbable evidence of the prosecutrix,

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[7]A discusslon of these statutes will appear in a subsequent installment.

[8]Ohama v. State, 24 Wyo. 513, 161 Pac. 558 (1916); Chicago, Milwaukee & St. Paul Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124 (1918); Cappon v. O'Day, 165 Wis. 86, 162 N. W. 655 (1917); Langen v. Borkowski, 188 Wls. 277, 206 N. W. 181 (1925).

[9]See People v. Murray, 72 Mich. 10, 40 N. W. 29 (1888); Bishop v. State, 43 Tex. 390 (1875).

[10]See Chicago, Mllwaukee & St. Paul Ry. Co. v. Sprague, *supra* note 8.

[11]*Supra* note 8, at 490, 162 N. W. at 657.

[12]19 N. M. 414, 143 Pac. 1012 (1914).

[13]*Cf.* Roper v. Territory, 7 N. M. 255, 33 Pac. 1014 (1893).

[14]State v. Garcia, *supra* note 12.

[15]Sundcrland, *The Problem of Appellate Review* (1927) 5 TEX. L. REV. 126, 141.

[16]32 N. M. 163, 252 Pac. 984 (1927).

uncorroborated by facts pointing to the guilt of the defendant was not sufficient to support a conviction, and remanded the case for a new trial. The question had not been raised in the trial court.

Similar results have been reached by the New Mexico Supreme Court in civil cases. *Schaefer v. Whitson,*[17] was an action in replevin for an automobile which had been sold to a third party under a conditional sale contract. The defendant's answer alleged that he had purchased the automobile in good faith for a valuable consideration without knowledge of the plaintiff's rights. The defendant failing to appear at the trial, the court directed a verdict for the plaintiff. In proving up his case, the plaintiff had failed to establish that the defendant had notice of the plaintiff's rights. The defendant subsequently moved the trial court to vacate the judgment but he did not raise the point of this defect in the proof. The supreme court noticed the error, and reversed the judgment and remanded the case for a new trial.

By these and other decisions[18] the Supreme Court of New Mexico has demonstrated its power, in either criminal or civil cases, to consider new questions irrespective of whether or not this action enables it to make a final disposition of the litigation.

The view that the problem is one of policy rather than one of power has not, however, been uniformly accepted as applied to all types of questions. The situation with respect to the New York Court of Appeals constitutes a striking example of this. The constitution and statutes of New York limit the jurisdiction of the Court of Appeals to the correction of errors of law,[19] except where (1) the court is satisfied that a judgment is against the weight of the evidence, or against the law, or that justice requires a new trial in a criminal case where the judgment is of death,[20] or (2) the Appellate Division of the Supreme Court, on reversing or modifying a final judgment in an action or a final order in a special proceeding, makes new findings of fact and renders final judgment or a final order thereon.[21] Errors of law are construed to include only errors either (1) apparent on the face of the "record proper," or (2) raised and preserved in the course of the trial by the proper motion or objection, and exception. Consequently, the Court of Appeals has

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[17]32 N. M. 481, 259 Pac. 618 (1927).

[18]State v. Diamond, 27 N. M. 477, 202 Pac. 988 (1921); First National Bank of Raton v. McRride, 20 N. M. 381, 149 Pac. 353 (1915); Crawford v. Diliard, 26 N. M. 291, 191 Pac. 513 (1920).

[19]N. Y. CONST., art. VI, sec. 7.

[20]N. Y. CONST., art. VI, sec. 7; N. Y. CODE OF CRIM. PROC., sec. 528.

[21]N. Y. CONST., art. VI, sec. 7; N. Y. CIV. PRAC. ACT, sec. 589.

no power to consider errors of the latter type unless they are properly raised and preserved in the trial court,[22] or unless the case is one involving capital punishment. Of course, this does not prevent the court from considering a new theory of substantive law advanced for the first time on review, provided the proper motion or objection, and exception was made at the trial.[23] Reviewing a recent decision of the court in *People v. Nixon*,[24] it was said in the Columbia Law Review:[25]

> The court may be envolving a common sense rule that in ordinary cases errors should be pointed out by exceptions, but where proceedings are informal or where justice demands it full appellate review will be given despite the lack of formal motions and exceptions.

The broad discretion exercised by courts of review in dealing with the rule that questions not raised and preserved in the trial court will not be considered on review prevents the formulation of many clearly defined exceptions to the rule. But a few can be shown, and numerous distinct tendencies can be indicated. The exceptions to the rule may be classified conveniently in three groups: (1) Exceptions of general application; (2) exceptions based on the nature of the problem (jurisdiction, constitutionality, public policy, etc.); and (3) exceptions based on the nature of the case (criminal, equity, persons under disability).

A. Exceptions of General Application.

(1) **Questions First Arising on Review.** It is apparent that questions which do not arise until after a case has reached the court of review do not come within the scope of the rule that new questions will not be considered on review. The reviewing court's jurisdiction of the subject matter is a question of that nature. That question is always open, and is sometimes raised by the court on its own motion.[26]

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[22]Schwinger v. Raymond, 105 N. Y. 648, 11 N. E. 952 (1887); People v. Sherlock, 166 N. Y. 180, 59 N. E. 830 (1901). In distinct contrast to the rule in the New York Court of Appeals, the Appellate Division of the Supreme Court is held to have authority to reverse a judgment and grant a new trial upon errors occurring in the course of the trial although they are not raised and preserved by the proper motions or objections, and exceptions. The appellate division has frequently exercised this authority. See, for example, People v. Calabur, 91 App. Div. 529, 87 N. Y. S. 121 (1904), appeal dismissed, 178 N. Y. 463, 71 N. E. 2 (1904); Raible v. Hygienic Ice & Refrig. Co., 134 App. Div. 705, 119 N. Y. S. 138 (1909).

[23]Van Bergh, New York Court of Appeals Jurisdiction and Practice, sec. 24, page 97.

[24]248 N. Y. 182, 161 N. E. 463 (1928).

[25](1928) 28 Col. L. Rev. 980, 981.

[26]King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 48 Sup. Ct. 489 (1928).

In some instances constitutional questions do not arise until after a case has left the lower court. *Clowry v. Holmes*[27] *illustrates* such a situation. In that case, the plaintiff having recovered judgment, the defendant sued out a writ of error to the Appellate Court. Subsequently, he made a motion before a judge of that court to have the writ of error made a supersedeas. A statute provided that if such an application was denied the judgment below should be affirmed. The judge in the instant case denied the application. The defendant carried the case to the Illinois Supreme Court. The supreme court held that the constitutionality of the statute by which the judgment below stood affirmed should be considered although not raised below for the reason that it could not have been raised below as there was then no constitutional question to raise.[28]

In several other fact situations, new questions have been considered in a court of review on the theory that they were raised at the first opportunity.[29]

(2) **New Arguments or Theories of Substantive Law on Point Technically Raised.** It is immaterial what theory the trial court proceeded on in making its decision, provided the contentions and theories urged by the parties were properly presented and preserved by them. And it is usually said that the parties, although limited to the points and questions made below, are not limited to the arguments made there.[30]

Bond v. The Wabash, St. Louis & Pac. Ry. Co.[31] affords a good illustration of the difficulties of applying the latter rule. The action was one for treble damages, under a statute, for discrimination against the plaintiff by refusing to transport certain goods for him. Various objections were taken by the defendant to the evidence introduced and to the rulings of the trial court, but in none of these was it suggested that the statute applied only to extortionate charges. Nevertheless, the Iowa Supreme Court reversed a judgment for the plaintiff on that theory. The extreme care with which the court pointed out that it was reversing the judgment on a new argument, not on a new question, indicates the court's appreciation of the inherent difficulties in the distinction. A logical adherence to this view would justify the consideration on review of the constitution-

[27]238 Ill. 577, 87 N. E. 303 (1909).

[28]The same action was taken under similar facts in Sixby v. Chicago City Ry. Co., 260 Ill. 478, 103 N. E. 249, Ann. Cas. 1914D 539 (1913).

[29]Darling v. Nelson, 171 Wis. 337, 176 N. W. 847 (1920); In re Taxpayers & Freeholders of Village of Plattsburgh, 157 N. Y. 78, 51 N. E. 512 (1898), *rev'g* 27 App. Div. 353, 50 N. Y. S. 356 (1898).

[30]District Townsbip of Boomer v. Frenceb, 40 Iowa 601 (1875).

[31]67 Iowa 712, 25 N. W. 892 (1885).

ality of a statute although the constitutional issue had not been raised below, a practice which most courts have refused to sanction.[32]

Apart from the attempted distinction between new questions and new arguments, it has been held in a few cases that where a legal point has been raised and preserved below by a proper motion or objection, and exception, a new theory of substantive law in support of that point is properly before the court.[33] Where a question of the reviewing court's power is involved, this distinction is important although not conclusive. But in most jurisdictions the rule that points must be raised in the trial court is not viewed as a limitation on the reviewing court's power. In these jurisdictions, the distinction does not seem to have any merit.

(3) **To Affirm Judgment.** Although generally the rule that new questions can not be raised for the first time on review applies where the contention is urged by the appellee in support of an order or a judgment in his favor,[34] there is a distinct tendency to consider new points of legal theory in order to support an order or judgment.[35] Some of the points considered in decisions purporting to adopt this view might properly be classified in the category of new arguments. But in others it is apparent that distinctly new questions were considered.

Bailey v. O'Fallon[36] was an action in replevin for the recovery of a mare. The defendant claimed a lien on the mare. The trial court gave judgment for the plaintiff on the theory that the statute under which the defendant claimed his lien was unconstitutional. The Colorado Supreme Court affirmed the judgment on the contention first made there that the defendant had lost his lien by tak-

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[32]A discussion of the constitutional problem will appear in a subsequent installment.

[33]Hempsted v. Wisconsin Marine & Fire Ins. Co., 78 Wis. 375, 47 N. W. 627 (1890); Troy Automobile Exchange v. Home Insurance Co., 221 N. Y. 58, 116 N. E. 786 (1917), rev'g 164 App. Div. 761 (1914); People's Bank of St. Paul v. School District No. 52, 3 N. D. 496, 57 N. W. 787, 28 L. R. A. 642 (1893); Brightman v. United States, 7 F. (2d) 532 (C. C. A. 8th, 1925). The Connecticut Supreme Court of Errors has held in several cases that statutes of that jurisdiction constituting the "law of the land" are necessarily involved in and decided by the trial court, and will be considered on review although entirely overlooked below. Cunningham v. Cunningham, 72 Conn. 157, 44 Atl. 41 (1899); Schmidt v. Town of Manchester, 92 Conn. 551, 103 Atl. 654 (1918); *cf.* Baymond v. Bailey, 98 Conn. 201, 118 Atl. 915 (1922).

[34]Straub v. Missouri Pac. Ry. Co., 170 Ark. 1174, 283 S. W. 36 (1926); Michigan Pipe Co. v. Sullivan County Water Co., 190 Ind. 14, 127 N. E. 768 (1920).

[35]Smith v. Buhler, 121 N. Y. 213, 24 N. E. 11 (1890); Newcomb v. Clark, 1 Denio (N. Y.) 226 (1845); Clarke v. Huber, 25 Cal. 594 (1864); General Motors Acceptance Corporation v. Dallas, 198 Cal. 365, 245 Pac. 184 (1926); Kraus v. Lehman, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769 (1908); Hartford Fire Ins. Co. v. Peterson, 209 Ill. 112, 70 N. E. 757 (1904).

[36]30 Colo. 419, 70 Pac. 755 (1902).

ing steps to sell the mare without giving the plaintiff notice. The court said:[37]

> It is also urged that the question of notice was not raised by the plaintiff below. If he were the party bringing the case here for review, that would be material, but he is not, and is, therefore, not precluded from calling the attention of the court to any proposition presented by the record, from which it appears that the judgment below should not be disturbed.

The decision of the New York Court of Appeals in *Svenson v. Svenson*[38] affords an interesting contrast to this principle. The action was one to annul a marriage on the ground of fraud. The trial court found that there was no fraud and gave judgment for the defendant. The Appellate Division held that this finding of the trial court was erroneous, but affirmed the judgment on the theory that the record showed collusion on the part of the parties. The Court of Appeals reversed the judgment, holding that although the Appellate Division had authority to grant a new trial where a judgment was erroneous because of errors in matters not raised in the trial court, it had no authority to affirm a judgment upon questions not litigated in the trial court.

(4) **Argument Witbout Objection.** It sometimes happens that when a new contention is made on review the party against whom it is urged, instead of objecting to its consideration on that ground, meets the point on the merits in his brief and oral argument. In some instances all parties involved actually urge the court to consider new questions. It is apparent that none of these considerations will influence courts in so far as they hold their jurisdiction to be limited to errors properly raised and preserved at the trial.[39] And it is the general rule in other jurisdictions that the consent of the litigants will not induce a court of review to consider new questions.[40] Any other view would give sanction to a practice which would disregard well settled rules of procedure. But the failure of the opposing party to object to a consideration of the ques-

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[37]Bailey v. O'Fallon, 30 Colo. 419, 421, 70 Pac. 755, 756 (1902).

[38]178 N. Y. 54, 70 N. E. 120 (1904), *rev'g* 78 App. Div. 536, 79 N. Y. S. 657 (1903).

[39]In Edmunds v. Inman, 24 S. Dak. 457, 124 N. W. 430, Ann. Cas. 1912A 1035 (1910), the South Dakota Supreme Court refused to consider a new question on appeal on the theory that it lacked jurisdiction to do so. The party affected had made no objection to a consideration of the question.

[40]Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692 (1905); Houts v. Brass Works, 134 Iowa 484, 110 N. W. 166 (1907).

tion tends to influence courts in situations where they are in doubt as to what action to take.[41]

(5) **To Determine Principles of Law.** Courts of review perform the dual role of deciding individual cases, and of determining principles of law applicable to future cases. The danger of establishing a misleading precedent, and the desire to correct an erroneous interpretation of an important principle of law, have been decisive factors in the consideration of a new question on review in some instances.[42]

Reviewing courts in some cases, although deciding that they will not consider a question for the reason that it was not properly raised and preserved in the trial court, add that the contention would not have succeeded even if the question had been considered.[43] Similarly, although deciding that a question is not properly before them, courts of review frequently express their opinion on the merits of the question when they do not agree with the contention urged.[44] When adopting this procedure, they sometimes expressly state that the opinion is not to be binding upon them when a similar question arises in the future. Even in the absence of this qualification it is dangerous to rely upon such opinions as determining principles of law. They are probably made primarily for the purpose of making it clear that a rule of practice has not caused a miscarriage of justice.

B. Exceptions Based on the Nature of the Problem

(1) **Jurisdiction.** It is an almost universal doctrine that the question of the trial court's jurisdiction of the subject matter will be considered although raised for the first time on review.[45] The situation arises most frequently in the federal courts, and they

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[41]See Heffelfinger v. Appleton, 144 Minn. 208, 175 N. W. 105 (1919); State v. Houston, 155 N. C. 432, 71 S. E. 65 (1911); State v. Griffin, 129 S. C. 200, 124 S. E. 81 (1924); Schwartz v. People, 46 Colo. 239 (47 Colo. 483), 104 Pac. 92 (1909); City of Montpelier v. McMahon, 85 Vt. 275, 81 Atl. 977 (1911).

[42]Magoun v. Quigley, 115 App. Div. 226, 100 N. Y. S. 1037 (1906); Eller v. Carolina & W. Ry. Co., 140 N. C. 140, 52 S. E. 305 (1905).

[43]See Goldstandt v. Goldstandt, 102 Okla. 218, 228 Pac. 770 (1924).

[44]Weinstein v. Laughlin, 21 F (2d) 740 (C. C. A. 8th, 1927); Parkside Realty Co. v. McDonald, 166 Cal. 426, 137 Pac. 21 (1913).

[45]Recklenberg v. Becklenberg, 232 Ill. 120, 83 N. E. 423 (1908); Telford v. City of Ashland, 100 Wis. 238, 75 N. W. 1006 (1898); Klaise v. State, 27 Wis. 462 (1871); State v. Wyatt, 207 Iowa 322, 222 N. W. 867 (1929); Tiliery v. Royal Benefit Society, 165 N. C. 262, 80 S. E. 1068 (1914); *Cf.* Dobbins v. Syracuse B. & N. Y. R. Co., 215 N. Y 674, 109 N. E. 79 (1915), where the court had jurisdiction of a part of the subject matter of the action.

consistently apply the doctrine stated.[46] Even where the parties disregard the jurisdictional question, the court is likely to raise the issue on its own motion.[47]

In some instances the subject matter is of such a nature that jurisdiction might properly be taken under certain circumstances. Bills in equity where there is an adequate remedy at law are illustrative of jurisdiction of that nature. In 1820 Chief Justice Spencer of the Court for the Trial of Impeachments and the Correction of Errors of the State of New York, in reversing a judgment and dismissing a bill in equity on the ground of lack of equity jurisdiction[48] where that point was raised for the first time on review, said:[49]

> I regret that the bill was not so framed as to enable the court to put an end to the controversy; but justice must be administered on established principles and according to established forms.

This respect for form, although by no means obliterated even today, has undergrone a marked change since 1820. It has for some time been recognized in most jurisdictions that where a case has been tried in equity, the objection that there was a complete remedy at law comes too late when first made on review.[50] This rule is a particularly salutary one in view of the fact that if the objection had been made at the trial it could, even in most jurisdictions retaining the formal distinction between law and equity, have been corrected by a transfer to the law side of the court.[51] In "Code States" the justification for the rule is even more complete. In those states the only reasons for continuing the distinction between legal and

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[46]Royal Insurance Co. of Liverpool, Eng. v. Stoddard, 201 Fed. 915 (C. C. A. 8th, 1912); Hare v. Birkenfield, 181 Fed. 825 (C. C. A. 9th, 1910); Egyptian Novaculite Co. v. Stevenson, 8F(2d) 576 (C. C. A. 8th, 1925).

[47]Chicago, R. I. & Pac. Ry. Co. v. State of Nebraska, 251 Fed. 279 (C. C. A. 8th, 1918).

[48]But the court expressed its opinion on the merits of the case. Beekman v. Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246 (1820).

[49]Beekman v. Frost, *supra* note 48, at 564, 9 Am. Dec. at 253.

[50]Hart v. Oliver, 296 Ill. 209, 129 N. E. 833 (1921); Savannah, etc. Ry. Co. v. Talbot, 123 Ga. 378, 51 S. E. 401, 3 Ann. Cas. 1092 (1905); Dant & Russell v. Pierce, 122 Ore. 337, 255 Pac. 603 (1927); City of Omaha v. Venner, 243 Fed. 107 (C. C. A. 8th, 1917). *Contra*: Arnold v. Mylius, 87 W. Va. 727, 105 S. E. 920 (1921). The Florida decisions are conflicting. See, for example, City of Jacksonville v. Massey Business College, 47 Fla. 339, 36 So. 432 (1904); Williams v. Peeples, 48 Fla. 316, 37 So. 572 (1904); State Board of Control v. King Lumber Co., 73 Fla. 80, 74 So. 5 (1917); First National Bank of Leesburg v. Mackenzie, 131 So. 790 (Fla. 1931) where the court considered the objection; and De Cottes v. Clarkson, 43 Fla. 1, 29 So. 442 (1901); Williams v. Wetmore, 51 Fla. 614, 41 So. 545 (1906) where the court refused to consider the objection. Several decisions have considered the objection that the subject matter was wholly foreign to equity jurisdiction although that objection had not been raised below. Manchester, etc. Dist. v. Murrayville, etc., Dist., 309 Ill. 403, 141 N. E. 129 (1923).

[51]See Barrett Co. v. Panther Rubber Mfg. Co., 24 F (2d) 329 (C. C. A. 1st, 1928); Corey v. Sherman, 96 Iowa 114, 60 N. W. 232, 64 N. W. 828 (1895).

equitable causes of action are the right to a jury trial in law cases and certain differences in the mode of appellate review in law cases from that in equity cases. The right to a jury trial may be waived in civil cases, and generally is deemed waived when a party goes to trial without objection. Differences in the mode of appellate review between law cases and equity cases do not seem to justify the parties in urging for the first time on appeal that the action should not have been in equity because there was an adequate remedy at law. It has been suggested by the United States Supreme Court that although a litigant can not for the first time on review raise the objection that an equity court did not have jurisdiction because there was an adequate remedy at law, the court may, in its discretion, deem it advisable to raise the objection.[52]

In the absence of consent, the question of jurisdiction over the person will be considered although raised for the first time on review; for example, where the plaintiff has failed to obtain jurisdiction over the person of a defendant who is in default.[53] Except where a state is the defendant and has not given a legal consent to a suit against it,[54] the objection that there is no jurisdiction over the person of the defendant is lost, where the defendant pleads to the merits of the case or otherwise enters a general appearance.

The question of venue does not go to the general jurisdiction of the court in civil actions. Consequently, that objection is waived by going to trial upon the merits.[55] But it has been held in certain statutory actions that the requirement of venue is mandatory, and that the question is open for review although not raised below.[56]

Several jurisdictions have held that venue in criminal actions goes to the general jurisdiction of the court, and that the failure to prove it will be noticed although raised for the first time on review.[57] In *Brightman v. United States,*[58] the Circuit Court of Appeals of

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[52]See Twist v. Prairie Oil & Gas Co., 274 U. S. 684, 47 Sup. Ct. 755 (1927), *rev'g* 6 F (2d) 347 (C. C. A. 8th, 1925).

[53]Coal & Mining Co. v. Edwards, 103 Ill. 472 (1882); Burns v. Stolze, 111 Wash. 392, 191 Pac. 642 (1920).

[54]Alabama Industrial School v. Adler, 144 Ala. 555, 42 So. 116, 113 A. S. R. 58 (1905); O'Conner v. Slaker, 22 F(2d) 147 (C. C. A. 8th, 1927).

[55]Raymoud v. Harrison, 27 Colo. App. 484, 150 Pac. 727 (1915); Hines v. Hines, 203 Ala. 633, 84 So. 712 (1920). Where a suit is removed to a federal court on the ground of diversity of citizenship, the objection that the suit was not brought in the district of the residence of either party is an objection of this nature, and is waived by pleading to the merits. Shanberg v. Fid. & Cas. Co. of N. Y., 158 Fed. 1 (C. C. A. 8th, 1907).

[56]Baltimore & O. R. R. v. Hollenberger, 76 Oh. St. 177, 81 N. E. 184 (1907).

[57]People v. Warner, 201 Mich. 547, 167 N. W. 878 (1918); Johnson v. State, 7 Ga. App. 551, 67 S. E. 224 (1910).

[58]*Supra* note 33.

the Eighth Federal Circuit suggested that at least where it was not apparent that the entire lack of proof of venue was merely an oversight the question should be considered.[59] But it is probably the majority rule that even in criminal cases the question of venue must be raised in the trial court in order to be available on appeal.[60]

Jurisdictional questions arise in various other situations.[61] In *Davidson v. Munsey*,[62] the defendant was convicted of contempt of court for the violation of a temporary injunction. The hearing on the order to show cause why he should not be adjudged in contempt had taken place on a legal holiday contrary to the express terms of a statute. The Utah Supreme Court held that this rendered the contempt proceedings void, although this point had not been suggested in the trial court.[63] And the Wisconsin Supreme Court considered the contention urged for the first time on review that the trial court had no jurisdiction in the sense that it ought not to entertain it because it was interfering with the judgment of a court of co-ordinate jurisdiction.[64]

The reasons for considering jurisdictional questions for the first time on review are obvious. As the Virginia Supreme Court of Appeals said in *South & W. Ry. Co. v. Commonwealth*:[65]

> To hold that the question of the jurisdiction of the trial court could not be made in the appellate court for the first time would be in effect to hold that consent could give jurisdiction, and might result in the affirmance of a judgment which the trial court had no authority to enter.

But good practice requires that a jurisdictional question, as well as other questions, be raised in a timely manner.[66]

Under a statute providing that no void judgment should be reversed until after a motion had been made in the lower court to set

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[59]A general motion for a directed verdict had been made.

[60]State v. Holder, 133 N. C. 709, 45 S. E. 862 (1903); Ryan v. United States, 285 Fed. 734 (C. C. A. 5th, 1922).

[61]Where a case is tried in an inferior court of limited jurisdiction which is without jurisdiction of the subject matter, and is subsequently heard *de novo* in a court of general jurisdiction which does have jurisdiction of the subject matter, and the question of the inferior court's jurisdiction is not raised in the court of general jurisdiction, it is not open for review. South & North Alabama Ry. Co. v. Brown, 53 Ala. 651 (1875). *Contra*: People v. DuRell, 1 Idaho 44 (1866). The question of the disqualification of the trial judge, or of his want of authority, must be raised in the trial court. Bank of Italy v. Cadenasso, *supra* note 5. But the opposite conclusion was reached by the Texas Court of Civil Appeals where the judge was acting without any statutory authority whatever. Dunn v. Home Nat'l Bk., 181 S. W. 699 (Tex. Civ. App. 1915).

[62]27 Utah 87, 74 Pac. 431 (1903).

[63]*Supra* note 62.

[64]Libby v. Central Wis. Trust Co., 182 Wis. 599, 197 N. W. 206 (1924).

[65]104 Va. 314, 316, 51 S. E. 824 (1905).

[66]Voorheis *ex rel.* Bradburn v. Nier, 222 Mich. 374, 192 N. W. 719 (1923).

it aside, an early Kentucky decision held that the objection that a judgment was void because the trial court was without jurisdiction could not be raised for the first time on review.[67] The Mississippi Supreme Court in discussing a statute of that state said that if it was intended to prevent the Supreme Court from considering jurisdictional questions which had not been raised below it was unconstitutional.[68]

(2) **Sufficiency of Pleadings in Civil Cases.** It is the rule in a great majority of jurisdictions that the objection that a complaint fails to state facts sufficient to constitute a cause of action will be considered for the first time on review.[69] But where the objection is first made on review, the complaint will be construed liberally in favor of the plaintiff.[70] That the cause of action is poorly and imperfectly stated will not be considered.[71]

In discussing the basis of the rule that the failure of a complaint to state a cause of action will be noticed at any stage of the proceedings, Elliott on *Appellate Procedure* said:[72]

> It would seem on principle and independent of statute, that where a complaint or declaration fails to state a cause of action the judgment should not be allowed to stand, for it is difficult, if not impossible, to conceive how a judgment can stand where there is no cause of action. An unsupported judgment is as a foundationless structure.

This argument is far from conclusive. It fails to recognize that usually the defect in the complaint is the result of a careless statement rather than of a basic weakness in the plaintiff's case. Counsel for the defense deliberately conceal the defect from the trial court in order that it may be used to obtain a reversal on appeal in case the judgment below is adverse. The new trials which this procedure fosters are a burden upon the courts, the opposing litigants, and the taxpayers.

A few courts have refused to follow the rule accepted by the majority.[73] In Indiana the legislature finally took the initiative, and

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[67]Western Union Telegraph Co. v. Lyonds & Co., 5 Ky. Law Rep. 250 (1883).

[68]Arbuckle v. State, 80 Miss. 15, 31 So. 437 (1902).

[69]Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891 (1895); National Surety Co. v. Rank of Debeque, 78 Colo. 145, 240 Pac. 691 (1925); Delfelder v. Farmers' State Bank, 38 Wyo. 481, 269 Pac. 418 (1928); Gilmore v. Ozark Mut. Ass'n, 21 S. W. (2d) 633 (Mo. App. 1929); Whitney Co. v. Smith, 63 Ore. 187, 126 Pac. 1000 (1912); Stern v. Moore, 166 Minn. 502, 207 N. W. 740 (1926); Note (1906) 3 ANN. CAS. 545.

[70]Jensen v. Clausen, 34 N. D. 637, 159 N. W. 30 (1916).

[71]West v. Johnson, 15 Idaho 681, 99 Pac. 709 (1909); Holmberg v. Prudential Savings & Loan Ass'n, 130 Ore. 1, 278 Pac. 943 (1929).

[72]ELLIOTT, APPELLATE PROCEDURE, sec, 471.

[73]Midlothian Iron Mining Co. v. Dahlby, 108 Wis. 195 (1900); *cf.* K..... v. H....., 20 Wis. 239, 91 Am. Dec. 387 (1866).

provided that the objection that a complaint failed to state facts sufficient to constitute a cause of action must be raised in the trial court.[74]

The failure of a cross-complaint, a complaint in intervention, or a counterclaim to state facts sufficient to constitute a cause of action is analogous to the failure of a complaint to state facts sufficient to constitute a cause of action. And the objection is treated in substantially the same manner in either situation. Consequently, in most jurisdictions it will be noticed for the first time on review that a cross-complaint,[75] a complaint in intervention,[76] or a counterclaim[77] fails to state a cause of action.

The attitude of the courts when a question of the sufficiency of an answer or a reply is first raised on review is in marked contrast with that taken where the question of the sufficiency of the complaint is involved. This difference in attitude can only be explained upon the theory that a proper initiatory proceeding is necessary to enable a court to exercise jurisdiction of a cause of action. In a majority of jurisdictions, the objection that an answer does not state facts sufficient to constitute a defense will not be considered unless raised in the trial court.[78] Even the failure of the defendant to file an answer will not be noticed on review where the plaintiff voluntarily goes to trial and accepts the issues raised by the evidence.[79] But where the evidence given under a defective answer fails to establish a valid defense, the plaintiff is entitled to the reversal of an adverse judgment although he did not attack the pleading below, provided he has raised and presented the question of the sufficiency of the evidence by the proper motion and exception.[80]

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[74]Laws of Indiana, 1911, Ch. 157, sec. 2; Cincinnati, etc. R. Co. v. Gross, 186 Ind. 471, 114 N. E. 962 (1917). The objection can not even be made by a motion in arrest of judgment in the trial court. Hedekin Land and Imp. Co. v. Campbell, 184 Ind. 643, 112 N. E. 97 (1916). Prior to the passage of the statute the Indiana Supreme Court would have considered the objection although it was not raised below. ELLIOTT, APPELLATE PROCEDURE, sec. 472.

[75]Western Loan & Bldg. Co. v. Gen. State Lbr. Co., 32 Idaho 497, 185 Pac. 554 (1919); Coppes v. Union N. S. L. Ass'n, 33 Ind. App. 367, 69 N. E. 702 (1904). The rule in Indiana has been changed by statute. See *supra* note 74.

[76]Cameron v. Ah Quong, 8 Cal. App. 310, 96 Pac. 1025 (1908); *cf.* Lopes v. Burns, 92 Cal. App. 691, 268 Pac. 928 (1928), where the sufficiency of a cross-complaint was involved.

[77]Hackett Digger Co. v. Carlson, 127 Ore. 386, 272 Pac. 260 (1928); Koenig v. Truscott Boat Mfg. Co., 155 Mo. App. 685, 135 S. W. 514 (1911).

[78]Moreland v. Thorn, 143 Ind. 211, 42 N. E. 639 (1895); Hynes v. Plastino, 45 Wash. 190, 87 Pac. 1127 (1906); Sucha v. Sprecher, 84 Neb. 241, 121 N. W. 106 (1909). But see State v. Seabright, 15 W. Va. 590 (1879).

[79]Gray v. Blackwood, 112 Ark. 332, 165 S. W. 958 (1914).

[80]Pilcher v. Brown, 6 Kan. App. 795, 51 Pac. 239 (1897).

The insufficiency of a reply, or even the entire lack of a reply, will not be considered on review where the case has been tried on its merits on the issues tendered by the evidence, without objection by the defendant.[81]

(3) **Sufficiency of an Indictment or an Information.** The failure of an indictment or an information to charge the defendant with the commission of a criminal offense presents substantially the same problem as that presented by the failure of a complaint in a civil case to state a cause of action. And generally, except where controlled by statutory provisions, both objections have been treated in the same manner when first urged on review.[82] In most jurisdictions, the objection that an indictment or an information fails to charge the defendant with a criminal offense may be raised for the first time on review.[83] This view has legislative recognition in some jurisdictions.[84]

A few states hold on common law principles that the question of the sufficiency of an indictment or an information is not open when raised for the first time on review.[85] And in others statutory provisions have been construed to have the same effect.[86] For instance, the Indiana statute, as we have seen, prohibits courts of review of that state from considering the sufficiency of a complaint in a civil case when the question was not raised in the trial court.[87] Prior to its passage, it was the Indiana view that the contention that an indictment or an information failed to charge the defendant with a criminal offense might be first presented on review.[88] The Indiana Supreme Court held that the statute indicated a legislative

[81]Alfred v. Pleasant, 175 S. W. 891 (Mo. 1915).

[82]See People v. Wallace, 316 Ill. 120, 146 N. E. 486 (1925).

[83]State v. Dolan, 58 W. Va. 263, 52 S. E. 181, 6 Ann. Cas. 450 (1905); Blanton v. State, 1 Wash. 265, 24 Pac. 439 (1890); State v. Emry, 18 S. W. (2d) 10 (Mo. 1929); Sonnenherg v. United States, 264 Fed. 327 (C. C. A. 9th, 1920); Connley v. United States, 46 F (2d) 53 (C. C. A. 9th, 1931); Note (1906) 1 ANN. CAS. 479. In Commonwealth v. Andler, 247 Mass. 580, 142 N. E. 921 (1924), the court said that the question was a jurisdictional one. The rule also applies to cases where the defendant pleads guilty. State v. Levy, 119 Mo. 434, 24 S. W. 1026 (1894); State v. Kelley, 206 Mo. 685, 105 S. W. 606 (1907); and to criminal proceedings in inferior courts brought on affidavit. State v. Tracy, 82 Minn. 317, 84 N. W. 1015 (1901).

[84]See, for example, the opinions in the following cases: Morgan v. Commonwealth, 202 Ky. 211, 259 S. W. 46 (1924); Gaines v. State, 146 Ala. 16, 41 So. 865 (1906). A discussion of an Iowa statute, which is construed to require the Supreme Court of that State to consider the sufficiency of an indictment or an information although that point has not been suggested below, will appear in a subsequent installment.

[85]State v. Sbehi, 125 Kan. 110, 263 Pac. 787 (1928).

[86]State v. Malish, 15 Mont. 506, 39 Pac. 739 (1895); State v. Hinckley, 4 Idaho 490, 42 Pac. 510 (1895).

[87]See *supra* note 74.

[88]Henderson v. State, 60 Ind. 296 (1878).

policy in opposition to such procedure, and that the question must be raised in the trial court.[89]

In a number of cases a defective description of parties in an indictment has been held to be fatal although first argued on review. This rule has been applied, and the conviction of the defendant reversed, where (1) an indictment alleged the Christian name of the victim to be Rosetta, but the proof showed her name to be Rosalia;[90] (2) an indictment charged the defendant with killing Tobe Wallace, but the record showed that he had killed Tobe Hollis;[91] (3) an indictment contained five counts, and, although four of the counts contained the defendant's name, the count on which he had been convicted did not contain it.[92] These decisions are subject not only to the objection that they violate the rule requiring questions to be raised in the trial court, but also to the objection that they grant reversals of the judgment below for non-prejudicial error.

[To be Continued in the Next Number]

[89]King v. State, 191 Ind. 306, 132 N. E. 628 (1921); see Robinson v. State, 184 Ind. 208, 110 N. E. 980 (1916).

[90]People v. Smith, 258 Ill. 502, 101 N. E. 957 (1913). On the authority of this case, the Illinois Supreme Court recently considered a question of variance between the pleadings and the proof in a criminal case. People v. Feldstein, 342 Ill. 615, 174 N. E. 843 (1931).

[91]Clark v. State, 100 Miss. 751, 57 So. 209 (1911).

[92]State v. McCollum, 181 N. C. 584, 107 S. E. 309 (1921).