emphasized that "it would be cruel and inhuman punishment to deport this petitioner to Czechoslovakia, belonging as he does to the race which is thus being persecuted and exiled, especially when the charge against him is that at the time of his entry he was not in possession of an unexpired immigration visa."[33] If this language looks to the Eighth Amendment, it is clear that the instant court has departed from the prior decisions and has extended the scope of this constitutional provision. It has been held that the punishment imposed for a violation of a statute, which is within the punishment provided for by the statute, cannot be regarded as excessive, cruel, or unusual,[34] though there is *dicta* indicating that courts might interfere with the Congressional function of fixing penalties and punishments where such are clearly and manifestly cruel and unusual.[35] Conclusive, however, is the fact that deportation proceedings are of a civil nature, to which constitutional rights of the type guaranteed by the Eighth Amendment are inapplicable;[36] indeed, there is an express holding, where the alien pleaded the Eighth Amendment, that the deportation of an alien is not punishment within the meaning of that amendment.[37] MYRON D. OLIVER

APPELLATE PROCEDURE

APPELLATE PROCEDURE — FINAL ORDER, ORDER GRANTING NEW TRIAL NOT.

"In the opinion of the court, the courts of this state have gone the limit in construing court orders as 'final' . . . and the attempt to make the setting aside of a verdict and the granting of a new trial a final order . . . violates the Constitution. . . . " Thus wrote Judge Hart in his opinion in the recent Ohio case of *Hoffman* v. *Knollman*[1] which reaffirmed the concept of finality as the touchstone of Ohio appellate practice and set forth the rule that the principle could not be disturbed by legislative definition.

The case involved an action to contest a will, wherein the jury had returned a verdict for the plaintiff and the defendant had filed a motion for a new trial which was sustained. The plaintiff then appealed to the Court of Appeals assigning as error that the motion should have been

[33] *U. S. ex rel. Weinberg* v. *Schlotfeldt*, 26 Fed. Supp. 283, 284 (1938).
[34] *Hernandez* v. *U. S.*, 15 Fed. (2d) 190 (1926).
[35] *Bailey* v. *U. S.*, 74 Fed. (2d) 451 (1934).
[36] *Ah Lin* v. *U. S.*, 20 Fed. (2d) 107 (1927).
[37] *Costanzo* v. *Tillinghast*, 56 Fed. (2d) 566 (1932), affirmed without reference to this point in 287 U.S. 341, 53 S.Ct. 152 (1932).
[1] 135 Ohio St. 170, 186, 20 N.E. (2d) 221 (1939).

stricken from the files on the ground that it had not been made during the term at which the verdict had been rendered. Thereupon the defendant moved to dismiss the appeal for the reason that no final order or judgment had been made by the trial court from which an appeal could be taken to the appellate court. The Court of Appeals granted the defendant's motion and dismissed the appeal. The Supreme Court, after holding that the record contained no indication of a failure to move for a new trial within the proper time, proceeded to discuss the constitutional aspects of the case.

The basis of the decision is to be found in the unique[2] provision of the Ohio Constitution creating the Courts of Appeals and limiting their jurisdiction to the review, affirmance, modification, or reversal of *judgments* of courts of record.[3] The judicial construction of the term "judgments" included "final orders,"[4] and the statutory provision permitting review of judgments and final orders became part of the Appellate Procedure Act.[5] A final order was defined in that Act as "an order affecting a substantial right in an action, when in effect it determines the action and prevents a judgment, or an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment."[6] In 1937 the General Assembly amended the Act by adding to the statutory definition "an order vacating or setting aside a general verdict of a jury and ordering a new trial."[7]

In defense of the amendment it was argued that the Constitution must be broadly and liberally construed, that the definition of constitutional terms is properly within the province of the legislature, that similar statutes exist in many states, that such statutes shorten litigation and lessen expense, and that an order granting a new trial is a final order as to the right of the successful party to a judgment on the verdict.[8]

While Mr. Justice Hart, writing the opinion of the Court in *Hoffman* v. *Knollman*, admitted that many of these arguments were valid, he insisted that they hinged upon the "policy or propriety" of the action

[2] Only one other state constitution impinges upon the uniqueness of the Ohio Constitution. The Idaho Constitution contains a provision similar to that of Ohio, except for the fact that the term "decisions" is substituted for the term "judgments." Art. V, sec. 9. Pursuant to this provision, the Idaho Legislature was permitted to provide for a direct appeal from an order granting a new trial. *Weiser Irrigation District* v. *Middle Valley Irrigation Ditch Co.*, 28 Idaho 548, 155 Pac. 484 (1916).

[3] Art. IV, sec. 6.

[4] *Chandler & Taylor Co.* v. *Southern Pacific Co.*, 104 Ohio St. 188, 135 N.E. 620 (1922).

[5] Ohio General Code, sec. 12223-27. This provision replaced Ohio General Code, sec. 12247.

[6] Ohio General Code, sec. 12223-2. This provision replaced Ohio General Code, sec. 12258.

[7] Ohio General Code, sec. 12223-2, effective August 23, 1937.

[8] *Hoffman* v. *Knollman*, 135 Ohio St. 170, 180, 20 N.E. (2d) 221 (1939).

of the legislature rather than on the constitutionality of the amendment.[9] He maintained that the constitutional tampering of 1912 "took away from the legislature the right to fix, determine, and modify the jurisdiction of the Court of Appeals and placed it securely in the Constitution itself."[10] He pointed out that the specific limitation of jurisdiction to to the review of "judgments" was done deliberately "to accelerate litigation by curtailing reviews and to increase the efficiency of the courts of appeals by preventing possible overloads which might occur if the jurisdiction could be increased by legislative enactment."[11] The legislative effort to make the setting aside of a verdict and the granting of a new trial a final order was assailed, not only as being unconstitutional, but as withdrawing "all limitation against future enlargement of the jurisdiction of the Court of Appeals by legislative enactment"—a result which would "make a mockery out of the constitutional limitation of the jurisdiction of that court."[12] In the mind of the Supreme Court, the very nature of a decision or ruling of a trial court in granting a motion for a new trial indicates that nothing has been attained at this stage of the proceeding to give it "such finality as is comprehended by the terms 'judgment' or 'final order'," for there has been no determination of the ultimate rights of the parties.[13] The Court concluded that it was for the people, if they see fit, to "undo what they deliberately and intentionally did in 1912."[14]

The decision in this case will probably be widely criticized by those who wish to accelerate the processes of judicial procedure and heartily approved by those who desire to render fixed and definite the customary forms of legal practice.

From early times in England the method whereby a litigant came

[9] *Ibid.*
[10] *Ibid.*, 182.
[11] *Ibid.*
[12] *Ibid.*, 186.
[13] *Ibid.*, 184. However, while Ohio courts have uniformly held that the setting aside of a general verdict and the granting of a motion for a new trial was not the basis of a review in the court of appeals, where an abuse of discretion in granting the same is shown, such an abuse would be subject to direct review. See cases collected at page 183, *ibid.* The Federal courts adhere to this rule, as pointed out in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 77 L.Ed. 439, 53 S.Ct. 252 (1933), and cases cited therein. Most of the states concur in the view, in spite of the absence of special statutes. *Egan* v. *Standard Oil Co. of Nebraska*, 132 Neb. 518, 272 N.W. 327 (1937); *State* v. *Hunter*, 131 Minn. 252, 154 N.W. 1083 (1915); *State* v. *Zimmerman*, 60 N.D. 256, 233 N.W. 845, 79 A.L.R. 816 (1930); *Scott* v. *Waggoner*, 48 Mont. 536, 139 Pac. 454 (1914); *McMahon* v. *Rhode Island Co.*, 32 R.I. 237, 78 Atl. 1012 (1911); *State* v. *Hawkins*, 121 S.C. 290, 114 S.E. 538 (1922); *Crosby* v. *Canino*, 89 Colo. 434, 3 Pac. (2d) 792, 78 A.L.R. 1202 (1931); *Wyeman* v. *Deady*, 79 Conn. 414, 65 Atl. 129, 118 Am. St. Rep. 152, 8 Ann. Cas. 375 (1906); *Central of Georgia Ry. Co.* v. *Murphey*, 113 Ga. 514, 38 S.E. 970 (1901); *Macartney* v. *Shipherd*, 60 Ore. 133, 117 Pac. 814 (1911).
[14] *Hoffman* v. *Knollman*, 135 Ohio St. 170, 187, 20 N.E. (2d) 221 (1939).

into the king's court and attacked a decision rendered in a feudal or manorial court was the complaint of false judgment.[15] It was soon decided, however, that the king's court could not be charged with a false judgment. The king's bench, therefore, was forced to use writs of error in order to correct mistakes in the other common law courts. The common law decisions involving writs of error are clearly the origin of our rule that only final judgments are appealable.[16]

When the appellate courts in this country commenced to be burdened with appeals, they used as an escape the ready-made device which had its origin in the appellate procedure of the English common law. This purpose of preventing congestion in the appellate courts is the ground upon which the rule permitting appeals from final judgments only is generally based. While it is true that to some extent it prevents a case from being presented for review in fragments, it nonetheless has caused protracted and repeated litigation over the question of what judgments and orders are final. If rigidly adhered to, it relieves only the strain upon the reviewing court, and the trial court is left to dispose of its docket as best it can. In the last analysis, the final judgment, strictly construed, would seem to be a criterion wholly inadequate to determine whether an appeal should be allowed from a given decision.

At least twenty-eight of the states,[17] admittedly possessing constitutional provisions raising no doubt as to the power of the legislature to act,[18] have passed statutes permitting an appeal to be taken from an

[15] 2 Pollock and Maitland, HISTORY OF ENGLISH LAW, (2d ed. 1899), p. 666.

[16] See Mr. Justice Lamar's opinion in *McLish* v. *Roff*, 141 U.S. 661, 35 L.Ed. 893, 12 S.Ct. 118 (1891).

[17] Alabama Code, 1928, sec. 6088; Arizona, Revised Code (1928), sec. 3659; Arkansas, Civil Code (1934), sec. 15; California, Code of Civil Procedure (1937), sec. 963; Connecticut, General Statutes (1930), sec. 5693; Florida, General Laws (1927), sec. 4615; Georgia, Code (1933), sec. 6-803; Idaho, Code (1932), sec. 11-201; Illinois, Civil Practice Act (1933), sec. 77(1); Iowa, Code (1935), sec. 12823(3); Kansas, General Statutes (1935), sec. 60-3302; Minnesota, Mason's Statutes (1927), sec. 9498; Mississippi Code Annot. (1930), sec. 593; Missouri, Ann. Statutes (1932), sec. 1018; Montana, Revised Code (1935), sec. 9731; Nevada, Compiled Laws of 1929, sec. 8375; New York, Civil Practice Act, secs. 588 and 609; North Carolina, Code of 1935, sec. 638; North Dakota, Compiled Laws (1931), sec. 7841; Oklahoma, Okla. St. Ann. (1937), Title 12, sec. 952; Oregon, Code of 1930, sec. 7-501; Rhode Island, Gen. Laws of R. I. (1923), secs. 5118, 5125; South Carolina, Code of Laws (1932), sec. 26-D-(2); South Dakota, Compiled Laws (1929), sec. 3168; Virginia, Virginia Code (1936), sec. 6363; Washington, Remington's Comp. St. 1922, sec. 1716; West Virginia, Code of 1937, sec. 5787; Wisconsin, Statutes of 1937, sec. 274.33.

[18] In Arkansas, however, the Constitution is very similar to our own, allowing review of final judgments only. Art. 7, Sec. 33. However, the statute, though in force and availed of for many years, has not been questioned.

In Oregon the Constitution, like ours, grants to the Supreme Court jurisdiction to review only "final decisions." Art. 7, sec. 6. A statute defining a ruling granting a new trial as a final decision was considered by the Supreme Court of Oregon in *Blumauer-Frank Drug Co.* v. *Horticultural Fire Relief of Oregon*, 59 Ore. 58, 112 Pac. 1084 (1911), and held to be constitutional. The court held it properly within the province of the legislature to define terms used in the Constitution.

order setting aside a general verdict of a jury and granting a new trial. Thus, the action of the Ohio General Assembly in amending the Appellate Procedure Act was in line with the general trend throughout the country.

It seems unfortunate that the Supreme Court of this state, in the light of the widespread tendency to enact legislation of the kind under consideration and in the light of the proven benefits derived therefrom, should have seen fit to take such a narrow and formal view of the constitutional provision. The effect of the decision is to place Ohio appellate procedure in a virtual straight-jacket by insisting that the definition of the term final order be confined to those orders which have in the past been recognized as final. The right of a successful party to a judgment on the verdict which has been rendered in his favor would certainly seem to be a substantial right which, when finally determined, might fairly be deemed to be a final determination of the party's right to that verdict. If it could reasonably be considered as such, the legislature ought to have the power to call it a final order and bring it within the realm of the appellate court's procedure. The action of the General Assembly in so doing need not have been considered as enlarging the jurisdiction of the Court of Appeals, for it merely provided by law for the exercise of jurisdiction already conferred.

While the Supreme Court deplores the treatment of the term "judgments" in a limited sense,[19] it has itself given that term a greatly restricted meaning in narrowing the definition of final order.

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CHATTEL MORTGAGE

CHATTEL MORTGAGES — IS THE MORTGAGEE PROTECTED BY THE RECORDING ACT?

In two recent lower court cases the question of priority of a recorded chattel mortgage has been under consideration. In the first case the defendant was the chattel mortgagee of an automobile sold to one James Goltie. The mortgage was duly filed in the recorder's office. While such mortgage was on file, Goltie purchased four tires from the plaintiff under a conditional sale agreement. The new tires were placed on the mortgaged car by the plaintiff and the conditional sale agreement was

[19] *Hoffman* v. *Knollman*, 135 Ohio St. 170, 176-79, 20 N.E. (2d) 221 (1939).