

have done its duty? That would have been a more rational presumption than to reach out into the region of speculation and presume that the jury would not have done its duty, when the record made plain, as the Court itself said, beyond the possibility of a doubt, what that duty was.

What is it that this rule that I am considering requires of the trial Court? Not justice, but infallibility. Now, consider the circumstances under which the trial is carried on. The primary duty of the trial judge is to proceed with the cause. If he stops to debate and investigate all the questions that will arise in the course of the trial, he is sure to fall into error. He has no time for the investigation. He must proceed with the cause on its merits, giving to these questions his best judgment as they arise, and if the appellate Court, having abundant leisure to investigate the matter, finds that the trial Court has fallen into error as to a matter of practice or pleading or evidence, then, unless that error causes, as the English rule puts it, a miscarriage of justice, the error should be disregarded.

I am not so uninformed as to contend for one moment that matters of practice or pleading are not important, for sometime they go to the very foundation of the cause; but it is my observation, and I know it is the observation of most trial judges, that it is very seldom indeed that it is necessary to sacrifice substantial justice to these matters of procedure. There is no scourge in the hands of the strong against the weak like this scourge of new trials. It can wear out the strength and endurance of the weak, and it has been used for that purpose. It is not necessary as I have pointed out to you as a matter of actual experience, that it should continue.

The administration of the criminal law has nearly broken down in America under the application of this rule. After an experience of one hundred and twenty-five years, we have not that swiftness and certainty of legal action, that respect for law, which ought to characterize a civilized people; on the contrary, this principle has brought inefficiency in legal administration, pestilence of refinements and new trials, and such a reign of dis-