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Article 2

The Authority of the Trial Court Upon a Retrial to Vacate and Set Aside the Verdict of a Jury

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NOTES AND COMMENT

THE AUTHORITY OF THE TRIAL COURT UPON A RETRIAL TO VACATE AND SET ASIDE THE VERDICT OF A JURY

The trial court may set aside and vacate the verdict of a jury upon the grounds that the verdict is either inadequate or excessive, or is against the evidence and contrary to law.[1] The power to vacate and set aside the verdict of a jury upon the ground that it is against the weight of the credible evidence in the case rests in the exercise of the sound judicial discretion of the court.[2] In a proper case, the trial court not only has the right, power and authority, but it also has the duty to vacate and set aside a verdict which is against the weight of the credible evidence.[3]

These are fundamental propositions and seldom, if ever, cause difficulty in their application. When, however, the trial judge, has granted a new trial on the ground that the jury's verdict is against the weight of the credible evidence, and the appellate court has affirmed such action as not constituting an abuse of discretion, a much more difficult and subtler problem is presented to the second trial court, when upon the same evidence the same party prevails upon the retrial. In such a contingency, is the trial judge at the second trial bound to set aside the verdict of the jury in favor of the prevailing party again upon the grounds that the finding of the trial judge at the first trial that the verdict was against the weight of the evidence is now the law of the case; or, may the judge at the second trial exercise a free and independent judgment, and reach a different conclusion, without subjecting himself to the charge of abuse of judicial discretion, even though the verdicts of both juries were based upon the same identical proof?

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[1] N. Y. CIV. PRAC. ACT § 549. Motion for new trial upon judge's minutes. The judge, presiding at a trial by a jury, in his discretion, may entertain a motion, made upon his minutes, at the same term, to set aside the verdict or a direction dismissing the complaint and grant a new trial upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law. A minute of the decision of the presiding judge denying a motion for a new trial shall be made, but an order need not be entered unless the party aggrieved desires to take a separate appeal therefrom.

[2] N. Y. CIV. PRAC. ACT § 549, *supra* note 1; Egan v. City of N. Y., 263 App. Div. 387, 388, 33 N. Y. S. (2d) 337 (1942); Hogan v. Franken, 221 App. Div. 164, 165, 223 N. Y. Supp. 1 (1927); Northam v. Dutchess County Ins. Co., 68 App. Div. 475, 478, 74 N. Y. Supp. 29 (1902).

[3] Dashnau v. City of Oswego, 204 App. Div. 189, 191-2, 198 N. Y. Supp. 226 (1923); Leversee v. Neidermyer, 219 App. Div. 214, 216, 219 N. Y. Supp. 591 (1927); Lyons v. Connor, 53 App. Div. 475, 65 N. Y. Supp. 1085 (1900).

In both logic and justice, it would seem to be anomalous, if a party, whose right to recover was once denied, were permitted a recovery upon a retrial, upon the same, identical proof upon which the denial of recovery was based. It is undoubtedly the rule that whatever is once judicially established between the same parties in the same case continues as the law of the case so long as the facts on which the decision was predicated continue to be the facts of the case.[4] It is, likewise, the rule that when an appellate court has passed upon the weight or sufficiency of the evidence in a case that finding is generally regarded as the law of the case if the weight or sufficiency of the evidence is again presented for review or decision.[5]

The law, however, is not concerned with rules of logic in a system of philosophy but solves its problems pragmatically.[6] And so the last mentioned rule has been held to be one of convenience and public policy.[7]

When a judgment has been reversed because it is against the evidence or contrary to law, and no new evidence is adduced at the second trial, the finding of the appellate court is binding and conclusive upon the trial court at the retrial.[8] But in those cases where the appellate court has merely affirmed an order vacating and setting aside the verdict of a jury upon the ground it is against the weight of the credible evidence, the practical and pragmatic aspect of the situation becomes evident. In such cases the verdict was annulled by the exercise of a discretionary power. This act of affirmance does not constitute a finding that the power was validly exercised but is deemed to be a finding that resort to the power was not unwise and that the judicial discretion was not abused.[9] Therefore, the rule of decision laid down by the appellate court has no binding force and effect upon the trial court at the second trial. The judge at the second trial is, accordingly, free to exercise the discretion vested in him by law, and may, in the sound judicial exercise of that discretion, deny a motion to vacate and set aside a second verdict for the same party, notwithstanding the evidence on the second trial is substantially the same as

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[4] 21 C. J. S. 330; Rivara v. Stewart & Co., 241 N. Y. 259, 266-7, 149 N. E. 851 (1925); Hornstein v. Podwitz, 229 App. Div. 167, 169, 241 N. Y. Supp. 123 (1930), *aff'd*, 254 N. Y. 443, 173 N. E. 674 (1930); Gelman v. Day, 229 App. Div. 809, 242 N. Y. Supp. 394 (1930).

[5] 5 C. J. S. 1293-1296.

[6] *See* Milks v. McIver, 264 N. Y. 267, 269, 190 N. E. 487 (1934), wherein Judge Lehman, writing for the Court of Appeals upon the subject of proximate cause in an action for negligence, said: "The law solves these problems pragmatically."

[7] Walker v. Gerli, 257 App. Div. 249, 251, 12 N. Y. S. (2d) 942 (1939); Reamer's Estate, 331 Pa. 117, 122 (1938).

[8] Beers v. McNaught, 180 App. Div. 924, 167 N. Y. Supp. 554 (1917).

[9] Hogan v. Franken, 221 App. Div. 164, 165, 223 N. Y. Supp. 1 (1927); Colburn v. The N. Y. C. R. R. Co., 214 App. Div. 807, 210 N. Y. Supp. 938 (1925).

that adduced on the first trial.[10] However, precedent lays down the practical rule that where two different juries have found a verdict for the same party on the same evidence the second finding should not be disregarded and lightly cast aside merely because the trial court may not agree with it. In the absence of unusual or extraordinary circumstances, the verdict should be sustained so that there may be an end to the litigation.

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ESTATE TAXES—INTER VIVOS TRANSFER WITH POSSIBILITY OF REVERSION

Where the decedent during his lifetime made a transfer of an interest in real or personal property either by deed, trust, insurance contract[1] or any other instrument by the terms of which he reserved the power to revoke any part thereof, the estate tax laws, both federal and New York State, hold such property to be taxable as a part of the decedent's gross estate.[2]

Where the transfer is irrevocable, but the possibility of reversion nevertheless exists dependent upon some condition set forth in the instrument, the question of taxability is not as settled. In recent years the subject of *inter vivos* transfers has been litigated more than any other estate tax question.

When the leading Supreme Court case of *Klein v. United States*[3] was decided in 1930 the Commissioner of Internal Revenue attempted to extract from the decision the rule that all transfers subject to the possibility of reversion are taxable. The court in that case held that a deed containing a provision that title was to revert to the grantor in the event the grantee were to predecease him was a transfer merely of a life estate; the transfer of the remainder could not be complete until the death of the grantor. While the lower courts in cases following the *Klein* case often adhered to the rule of that case,[4] many decisions

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[10] McCann v. N. Y. & Q. County R. R. Co., 73 App. Div. 305, 306-8, 76 N. Y. Supp. 684 (1902), *appeal dismissed*, 172 N. Y. 599, 64 N. E. 1123 (1902); Gutman v. Weisbarth, 194 App. Div. 351, 354-5, 185 N. Y. Supp. 261 (1920); Lyman v. Village of Potsdam, 204 App. Div. 528, 529, 198 N. Y. Supp. 526 (1923); Gnecco v. Pederson, 154 N. Y. Supp. 12, 14-15 (1915).

[1] Goldstone v. United States, 325 U. S. 687, 65 Sup. Ct. 398 (1945).

[2] INT. REV. CODE § 811(c), (d); N. Y. TAX LAW § 249-r(4).

[3] Klein v. United States, 282 U. S. 828, 51 Sup. Ct. 78 (1930); Klein v. United States, 283 U. S. 231, 51 Sup. Ct. 398 (1930).

[4] Union Trust Co. of Detroit v. United States, 54 F. (2d) 152, 52 Sup. Ct. 500 (1931); Estate of Morris Schinasi, 25 B. T. A. 1153 (1932); Estate of Alfred J. Reach, 27 B. T. A. 972 (1933); Estate of Waldo C. Bryant, 36 B. T. A. 669 (1937); Estate of John S. Conant, 41 B. T. A. 739 (1940); Central Nat. Bank of Cleveland v. United States, 41 F. Supp. 239 (D. C. Md. 1941).