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Appeal and Error-Final Disposition of Equitable Action on Appeal

APPEAL AND ERROR—FINAL DISPOSITION OF EQUITABLE ACTION ON APPEAL—The pertinent facts of this case may be quite briefly stated for the purposes of this comment. An equitable suit was brought against a trust company for the removal of said company, as trustee, for an accounting, and for the appointment of a new trustee. The court, after several amendments had been made and innumerable motions passed upon, finally entered judgment removing the trust company as trustee, appointing another, and made further orders pertaining to the administration of the trust estate.

The plaintiff appealed from this judgment, and the Supreme Court of Indiana *held* that since this was an *equitable* case, the court could properly consider eighteen years of litigation between these same parties and the results thereof, and could enter a mandate consistent with past and present circumstances, disregarding formalities in presentation of question on appeal. The judgment and all orders of the trial court pertaining to the administration of the trust estate were set aside, and the case was disposed of as if tried *de novo*.[1]

This decision is an example of the proper exercise of the power of an appellate court to render final judgment as on a trial *de novo* in an equitable action. The common obstacle to the entering of final judgment by such a court, reversing a judgment for one party and then rendering a judgment in favor of the other party instead of sending the case back for a new trial, is the constitutional right to a trial by jury. Several states have statutes which have authorized an appellate court to direct the entry of the *proper* judgment.[2] But "the power conferred upon the Supreme Court *by* statutes to 'direct the entry of the proper judgment' must be so construed as not to confer upon this court the power to deprive parties of the right to trial by jury as guaranteed by them by the constitution."[3]

But the obvious answer to this in the present case is that in the absence of express constitutional or statutory provision, there is no right to a jury trial in suits in equity.[4] In this state it is expressly provided by statute that issues of fact as well as issues of law in causes that prior to June 18, 1852 were of exclusive equitable jurisdiction shall be tried by the court.[5] While the court may submit questions of fact to a jury, this is purely a matter of discretion, and the finding of a jury in such case is not binding, but merely advisory. Thus in a case of equity jurisdiction, it

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[15] *Northern Pac. R. Co. v. Maerkl* (1912), 198 Fed. 3, 117 C. C. A. 237; *St. Louis, etc. R. Co. v. Conarty* (1913), 106 Ark. 421, 155 S. W. 93; *Carolina, etc. R. Co. v. Shewalter* (1913), 128 Tenn. 363, 161 S. W. 1136, affirmed in (1915) 36 Sup. Ct. 166, 239 U. S. 630, 60 L. Ed. 476; *Baltimore, etc. R. Co. v. Carroll, Adm'r.* (1928), 200 Ind. 589.

[1] *Rooker, et al. v. Fidelity Trust Co., et al.*, Supreme Court of Indiana, Aug. 25, 1931, 177 N. E. 454.

[2] See Burns' 1926, Sec. 725.

[3] *Campbell v. Sutliff* (1927), 193 Wis. 370, 214 N. W. 374.

[4] *McBride v. Stradley* (1885), 103 Ind. 465, 2 N. E. 358; *Vandalia Coal Co. v. Lawson* (1909), 43 Ind. App. 226, 87 N. E. 47.

[5] Burns' 1926, Sec. 437.

is unquestionably proper for an appellate court to examine the whole record, and in view of the same, to render such decree as should have been entered by the lower court.[6]

In Indiana there have been signs of hesitancy, however, in rendering final decrees even in equitable actions. The case of *State v. Newton County*[7] asserted that an appellate court has power to render a final decree in a cause in which the evidence is all *written*, and which would have been of exclusively equitably cognizance under the law of the State prior to the adoption of code practice. This suggested qualification as to the type of evidence would seem to indicate that the court was influenced by the rules governing legal rather than equitable actions. The decision of the Supreme Court in the principal case, however, recognizes the full and obviously inherent powers of an appellate court in equity proceedings to render final judgment, and, in effect, to try the cause *de novo*. That was the English practice, and is the practice in the Federal Courts in this country. Except where Code of Procedure has tended to obliterate the procedural distinctions between legal and equitable actions, the review of an equitable proceeding is always *de novo*. But there is nothing in our Code which suggests any different result. No right to trial by jury can be encroached upon where such right has never existed.

In legal actions, on the other hand, it is quite true that this right is well protected. In England it is authoritatively settled that in a tort action the court has no jurisdiction to order, without the consent of the defendant, that *unless* the plaintiff consents to a reduction of damages, there shall be a new trial. In other words, the defendant must also consent to a remittitur by the plaintiff.[8]

There are some Indiana cases, however, which have recognized the right of the court to deny a new trial, without the consent of the defendant, upon condition of a remittitur by the plaintiff.[9] Some states, although recognizing this right, have limited it to cases where the excessiveness of the verdict of the jury is due to error of judgment rather than to prejudice or passion, these influences being considered as having tainted the whole verdict in such a way as to demand an unconditional reversal.[10]

There are still other cases which hold that even where the verdict is so excessive as to indicate prejudice or passion, the error may nevertheless be cured by remittitur *without* the consent of the defendant, so long as the prejudice or passion is not shown to have affected the decision of the jury on the merits.[11]

"The authorities, however, unanimously hold that a court is powerless to reduce the verdict of the jury in an action for unliquidated damages and

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[6] See *Pyeatt v. Estus* (1919), 72 Okla. 160, 179 Pac. 42.

[7] (1905) 165 Ind. 262, 74 N. E. 1091.

[8] *Watt v. Watt* (1905), A. C. 115.

[9] *Cleveland, C. C. & St. L. R. Co. v. Beckett* (1895), 11 Ind. App. 547, 39 N. E. 429; *East Chicago v. Gilbert* (1915), 59 Ind. A. 631, 109 N. E. 404.

[10] *Tunnel Min. & Leasing Co. v. Cooper* (1911), 50 Colo. 390, 39 L. R. A. (N. S.) 1064, 115 Pac. 901; *Yard v. Gibbons* (1915), 95 Kan. 802, 149 Pac. 422; *Rhyne v. Turley* (1913), 37 Okla. 159, 131 Pac. 695.

[11] *Birmingham R Light and Power Co. v. Comer* (1914), 10 Ala. App. 261, 64 So. 533; *Chicago, R. I. & P. R. Co. v. Batsel* (1911), 100 Ark. 526, 140 S. W. 726; *Ewing v. Stickney* (1909), 107 Minn. 217, 119 N. W. 802.

render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to the reduction, since a reduction under such circumstances invades the province of the jury, the proper course, if a remittitur is refused, being to set aside the verdict and award a new trial."[12]

Likewise an increasing of a verdict by a court without the consent of the party prejudiced is clearly violative of the conditional guaranty of trial by jury.[13]

These various rules exhibit the constant effort to protect the right of parties to trial by jury where such right has not been waived. Where this right exists, it should be protected, but it is certainly not logical for these considerations in any way to affect or hamper an appellate court in its disposition of equity proceedings. The Supreme Court of Indiana has aptly displayed that it fully recognizes its power to render final judgment under such circumstances, although the instant case is one of only a few in which the appellate court of Indiana has exercised its power in reviewing an equitable proceeding. Most of the cases indicate that the distinctions between review of legal and equitable cases are overlooked. Our appellate court ought never to sustain an equitable decree simply because there is some evidence from which the trial court might reasonably have found as it did; they have the power and duty to decide the case on their own view as to what the evidence reasonably establishes. And certainly an equitable case ought not to be sent back for a new trial. If the evidence is incomplete the court can order it supplemented in a proper manner.

P. J. D.

BILLS AND NOTES—ACCOMMODATION PARTIES—LIABILITY BY ESTOPPEL—In November of 1926, $271,000 in Liberty Bonds were stolen from the Wild Bank. An examination of the bank, shortly afterwards, revealed an impairment of capital. The bank commissioner required that the capital of the bank be increased and, as a condition upon which the bank be allowed to continue operation, required that high-grade securities worth $100,000 be delivered to him to hold for the protection of creditors. In December of 1926, Wild, the president of the bank, asked Millikan, Todd and Appel to lend accommodation paper to the bank. Todd executed a note for $25,000 to the bank, Appel executed a $25,000 note to the bank, and Millikan executed a $50,000 note to the bank. The notes were executed without consideration and the makers did not know of the impairment of capital or to what use the notes were to be put. Millikan and Appel knew of the bond theft, which had been published in the papers. Wild abstracted $100,000 of Indianapolis school bonds from the assets of the bank and delivered them to the banking commissioner, substituting the notes as assets of the bank. Statements to the public of the bank's financial condition included the notes as assets of the bank, as did reports to the bank commissioner, which did not disclose the fact that part of the bank's assets consisted of accommodation paper. This fact was discovered on a later

[12] 53 A. L. R. 779.

[13] *American Railway Express Co. v. Bender* (1926), 20 Ohio App. 436, 152 N. E. 197.