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Civil Procedure—Right of Appellate Court to Dismiss Jury's Verdict

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this action against the attorney who succeeded him in the death action, to impose a trust upon the legal fees received by him, by virtue of an alleged agreement between them. The Court held (4-3), affirming the Appellate Division,¹⁸ that the disclaimers by affidavits by the plaintiff were not sufficient to warrant the motion for summary judgment.

A prior motion to dismiss the complaint on the ground that the decision in the Surrogate's Court was *res judicata* to the present proceeding was denied because the affidavits were filed in proceedings which determined the liabilities of parties foreign to the present case. There was no adjudication of the rights between the present plaintiff and defendant, but rather only a disclaimer of any rights which the plaintiff might have against the estate or railroad company. Therefore, this is not the type of official record which proves a *prima facie* case for the defendant and the controversy should be adjudicated at a trial.

The dissent concludes that the affidavits were a final repudiation by the plaintiff of all of his rights by looking into what it calls the obvious purpose of the plaintiff in filing these affidavits. However, if an analysis of the plaintiff's motive is necessary to determine the effect of his disclaimer, then it seems that there is a sufficient question of fact involved to preclude a summary judgment and warrant a trial of the issues.

Right of Appellate Court to Dismiss Jury's Verdict

*Kline v. Pans*¹⁹ was an action to foreclose a mortgage wherein the defendant counterclaimed for rescission of the mortgage on the ground that plaintiff had fraudulently induced him to execute the mortgage on the false representation that his wife was indebted to the plaintiff. The Court held that the defendant introduced sufficient evidence to establish a *prima facie* case and therefore the dismissal of the counterclaim by the Appellate Division²⁰ after a jury verdict²¹ for the defendant was error.

In jury trial cases, a court may dismiss a complaint if there is insufficient

18. 1 A. D. 2d 804, 148 N. Y. S. 2d 807 (1st Dep't 1956).

19. 1 N. Y. 2d 15, 133 N. E. 2d 447 (1956).

20. 285 App. Div. 981, 138 N. Y. S. 2d 152 (3d Dep't 1955).

21. It is uncertain whether the jury was advisory under the N. Y. CIV. PRAC. ACT §430 or whether the plaintiff had a right to the jury under N. Y. CIV. PRAC. ACT §425. §430 reads . . . where a party is not entitled as of right to trial by jury, the court in its discretion may direct that . . . questions of fact . . . be tried by a jury. . . . §425 reads . . . an issue of fact must be tried by a jury . . . : . . . 2. An action for determination of a claim to real property under article fifteen of the real property law. N. Y. REAL PROPERTY LAW art. XV §500, . . . a person [who] . . . claims an . . . interest in real property . . . may maintain an action against any other person . . . to compel the determination of any claim adverse to that of the plaintiff

evidence as a matter of law²² or when by no rational process could a jury come to a contrary finding.²³ But, as long as there is a question of fact, it is for the jury and not for the court.²⁴ In the latter instance, a court is restricted to granting a new trial if the jury's findings are against the weight of evidence but it may not dismiss the complaint.²⁵ In non-jury trial cases, the Appellate Division may not dismiss the complaint because the trial court's findings are against the weight of evidence but it may reverse the judgment by making new findings of fact supporting that judgment.²⁶

In determining whether sufficient evidence has been introduced to raise a question of fact for the jury, the court will draw every reasonable inference from the evidence in the aspect most favorable to uphold the jury's findings on the issue.²⁷

In the instant case, the court held that evidence which tended to show that the plaintiff had made a gift and not a loan to the defendant's wife was sufficient to establish a prima facie case on the defendant's counterclaim enabling the jury by a rational process to find that the money given to the defendant's wife was *in fact* a gift and not a loan. The Court's determination appears to be entirely correct in view of the fact that rescission may be had if there is a misrepresentation of a material fact although not amounting to fraud.²⁸

Judgment Absolute Stipulations

In *Gilligan v. Tishman Realty & Construction Co.*,²⁹ the non-stockholder tenants of a co-operative apartment building brought an action against the defendant, Realty, and the stockholders of the co-operative apartment building established by Realty. The Appellate Division reversed the trial court's dismissal in favor of the defendants and ordered a new trial.³⁰ Some of the stockholders of the

22. *In re Case*, 214 N. Y. 199, 108 N. E. 408 (1915); *Blum v. Fresh Grown Preserves Corp.*, 292 N. Y. 241, 54 N. E. 2d 809 (1944).

23. *Stein v. Palisi*, 308 N. Y. 293, 125 N. E. 2d 575 (1955), 5 BUFFALO L. REV. 222 (1956).

24. *McDonald v. Metropolitan Street Ry.*, 167 N. Y. 66, 60 N. E. 282 (1901).

25. *Caldwell v. Nicolson*, 235 N. Y. 209, 139 N. E. 243 (1923).

26. N. Y. CONST. art. VI §8, N. Y. CIV. PRAC. ACT §584, . . . appellate court may reverse judgment . . . appealed from . . . and render final judgment . . . except where it may be necessary . . . to grant a new trial . . . ; *Caldwell v. Nicolson*, *supra*, note 25.

27. *Faber v. City of New York*, 213 N. Y. 411, 107 N. E. 756 (1915); *Osipoff v. City of New York*, 286 N. Y. 422, 36 N. E. 2d 646 (1941); *Sagorsky v. Maylon*, 307 N. Y. 584, 123 N. E. 2d 79 (1954), 5 BUFFALO L. REV. 63 (1955).

28. *Bloomquist v. Snow*, 222 N. Y. 375, 118 N. E. 855 (1918).

29. 1 N. Y. 2d 121, 134 N. E. 2d 100 (1956).

30. 283 App. Div. 157, 126 N. Y. S. 2d 813 (1st Dep't 1953),