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by the states in imposing income taxes on interstate commerce.⁶¹ Certainly such standards are not alone required to achieve elementary fairness in the matter of state taxation of foreign corporations and nonresidents, but they are necessary if a cumulative undue burden on interstate commerce is to be averted.

FEDERAL APPELLATE REVIEW OF EXCESSIVE OR INADEQUATE DAMAGE AWARDS

It is well settled that a federal trial court has the power to review a jury verdict in determining a motion for a new trial on the grounds of excessive or inadequate damages.¹ A conflict of authorities exists, however, as to whether the appellate courts have the power to review the lower court's ruling. Until recently, the circuit courts of appeals have refused to review the question of excessive or inadequate damages. Partly through the efforts of leading jurists and textwriters,² and a recent statutory revision,³ there has developed a growing tendency to relax the restrictions on appellate review of damage awards. There is disagreement, however, as to how far this liberalizing trend should extend, and several circuits have refused to accept it at all. But even these circuits recognize some authority to review.⁴ Further beclouding this area is the fact that the Supreme Court, while hinting that the power exists in certain circumstances,⁵ has never squarely ruled on the question.

The conflict is partially the result of an historical misunderstanding of the

61. 28 U.S.L. Week 19 (U.S. Sept. 8, 1959).

1. The first reported common law case to grant a new trial on the grounds of excessive damages was *Wood v. Gunston*, Style 466, 82 Eng. Rep. 867 (K.B. 1655), which established a precedent for a long line of English cases granting new trials. This review power was codified in the United States by the Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83, which provided: "That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law. . . ."

This power was continued in effect until 1948, and was then superseded by Fed. R. Civ. P. 59. See *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933).

2. Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 J. Am. Jud. Soc'y 130 (1936); Hinton, *Power of Federal Appellate Court to Review Ruling on Motion for New Trial*, 1 U. Chi. L. Rev. 111 (1934); Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49 (1916). See *Fairmount Glass Works v. Cub Fork Coal Co.*, supra note 1, at 486 (Cardozo, J., dissenting); *Miller v. Maryland Cas. Co.*, 40 F.2d 463 (2d Cir. 1930).

3. Judicial Code § 2105, 28 U.S.C. § 2105 (1958).

4. The Second, Fifth and Eighth Circuits have been reluctant to grant review of trial court rulings of a motion for new trial. See *Stevenson v. Hearst Consol. Publications, Inc.*, 214 F.2d 902 (2d Cir.), cert. denied, 348 U.S. 874 (1954); *Sunray Oil Corp. v. Allbritton*, 187 F.2d 475 (5th Cir.), rehearing denied, 188 F.2d 751 (5th Cir.), cert. denied, 342 U.S. 828 (1951); *St. Louis S.W. Ry. v. Ferguson*, 182 F.2d 949 (8th Cir. 1950).

5. *Affolder v. New York, C. & St. L.R.R.*, 339 U.S. 96 (1950); *Dimick v. Schledt*, 293 U.S. 474 (1935); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933).

common law, and a statutory limitation based on this misunderstanding. There are four traditional objections to appellate review.

I. SEPARATION OF WRIT OF ERROR AND MOTION FOR NEW TRIAL

The earliest limitation arose out of the common law practice which surrounded the use of the writ of error. The writ of error was a form of appeal which searched only the record. At common law, the record included the process, pleading, verdict and judgment.⁶ Later, with the statute of Westminster II, it was expanded to include the bill of exceptions, but it did not embrace the motion for a new trial.⁷ The writ of error and the motion for a new trial developed as mutually exclusive proceedings. The writ was of a formal and technical nature and considered only errors in law, while the motion for a new trial was an informal proceeding heard by a trial court *en banc*, which concerned itself not only with errors in law but also errors in fact.⁸ By the Seventeenth Century, new trials were being granted on the ground of excessive or inadequate damages, but review of the award was not available beyond the court *en banc*.⁹

When the federal judicial system was established in America, the appellate practice was molded around the formal and artificial writ of error. Review was thus limited to errors in law found in the record.¹⁰ Since the ruling on a motion for a new trial was not a part of the record, early federal decisions refused to review or consider the excessiveness or inadequacy of damages.¹¹

When the writ of error was abolished and a right of appeal substituted, the restriction remained; the Judiciary Act provided that all common law limitations were to apply to the appeal.¹² As part of the trend toward more liberal procedure, however, the trial judge's ruling on the new trial motion was incorporated by statute¹³ into the record.

II. PROHIBITIONS OF THE JUDICIARY ACT OF 1789

The influence of the writ of error occasioned another restriction on the power of appellate review. The Judiciary Act of 1789, which established the federal judicial system and adopted the writ of error procedure for appellate review, precluded the Supreme Court or any federal appellate court from reversing a judgment of a lower court because of "error in fact."¹⁴ The Act thus denied

6. *Miller v. Maryland Cas. Co.*, 40 F.2d 463, 464 (2d Cir. 1930).

7. *Ibid.*

8. *Riddell*, *op. cit.* supra note 2, at 53-54, 57.

9. See *Sunray Oil Corp. v. Allbritton*, 187 F.2d 475 (5th Cir.), rehearing denied, 188 F.2d 751 (5th Cir.), cert. denied, 342 U.S. 828 (1951).

10. *Sunray Oil Corp. v. Allbritton*, supra note 9, at 478.

11. *Blitz v. United States*, 153 U.S. 308 (1894); *Newcomb v. Wood*, 97 U.S. 581 (1878); *Henderson v. Moore*, 9 U.S. (5 Cranch) 11 (1809).

12. The Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 84.

13. Fed. R. Civ. Proc. 75.

14. The Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 84 provides: "But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. . . ."

authority in the federal appellate courts to examine a jury's verdict, as well as automatic authority to review all trial court rulings on motions for a new trial.¹⁵ Doubtless this provision influenced the early refusal of the courts to review new trial motions on the issue of damages, but it did not prevent review where errors of law were present in the trial court's ruling. Consequently, some courts classified certain factual errors as *analogous* to errors in law and thus reviewable. This was first exemplified in the case where review was granted because there had been an "abuse of discretion" on the part of the trial judge in ruling on the motion for a new trial.¹⁶ In 1948, the statutory barrier to appellate review of damages was overcome. The Judicial Code simply eliminated the restriction against reversals for "errors in fact."¹⁷

III. COMMON LAW REVIEW OF THE VERDICT

The third objection to appellate review of excessive or inadequate damages is the product of a misunderstanding of the common law, which in turn produced erroneous interpretation of the seventh amendment. Shortly after the enactment of the Judiciary Act of 1789, the seventh amendment was adopted. It provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."¹⁸ Obviously, the amendment does not provide that facts tried by a jury shall not be re-examined under any circumstances, but that re-examination shall be in accord with the rules of common law. If the common law, as it existed prior to the ratification of the seventh amendment, sanctioned appellate review of damage awards, then clearly such review does not violate the seventh amendment. In early decisions,¹⁹ the Supreme Court construed common law review as one based exclusively on the writ of error and the statutory restatement of the writ of error in the Judiciary Act of 1789. The reasoning took hold that since the writ of error limited review to errors of law, review for excessive or inadequate damages was forbidden.²⁰

The early decisions, however, overemphasized the importance of the writ procedure and completely ignored the common law relating to the motion for a new trial. By common law procedures, well established in Seventeenth Century England, the question of damages could be raised on a motion for a new trial, and could be reviewed by a trial court sitting *en banc*.²¹

The common law courts of original jurisdiction sitting *en banc* consisted of four judges. Proceedings were instituted before the court *en banc* by the issuance of a writ nisi prius directing that a jury be assembled so that the facts

15. *Miller v. Maryland Cas. Co.*, 40 F.2d 463 (2d Cir. 1930).

16. *Virginia Ry. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948); *Cobb v. Lepisto*, 6 F.2d 128 (9th Cir. 1925). See also the discussion in *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir.), cert. denied, 341 U.S. 904 (1951).

17. 28 U.S.C. § 2105 (1958).

18. U.S. Const. amend. VII.

19. *Hansen v. Boyd*, 161 U.S. 397 (1896); *Minor v. Tillotson*, 43 U.S. (2 How.) 392 (1844); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830).

20. See note 19 *supra*.

21. See note 9 *supra* and accompanying text.

of a case could be determined by that jury at a trial presided over by one of the four judges. The nisi prius court had no function except to render a verdict. Review of the verdict, including the question of damages, was brought before the court *en banc*. The judge in nisi prius had no power of review, since it was considered undesirable to limit review to the discretion of one judge. The court *en banc* functioned in some respects both as a trial and as an appellate court. The object of the review was not to search for errors of law, but to examine the result in the light of the evidence to see if justice had been done. The court did not substitute its own verdict for that of the jury, but granted a new trial when the award was the result of passion or prejudice or clearly excessive or inadequate. Since the court *en banc* offered ample review, it was deemed unnecessary to allow appeal beyond this level. Unfortunately, the early federal decisions considered the court *en banc* to be strictly a trial court and ignored its *appellate* power.

IV. DISCRETION OF THE TRIAL COURT

With the gradual disappearance or undermining of the other objections, the reason most often stated for continuing to deny appellate review has been that the ruling on a motion for a new trial must rest in the sound discretion of the trial judge and, therefore, should not be open for review.²² The rationale is based on the fact that the trial judge is well acquainted with the facts and evidence of the case and is in a better position to review than the appellate court. In line with and in support of this reasoning is the further consideration that a jury verdict should be rarely disturbed, and in the rare instance when it is disturbed, the matter again should be left to the discretion of the trial judge.²³ Since, therefore, it is impossible to establish a rigid formula for applying that discretion, appellate review should be limited.

Although a trial judge is obligated to employ discretion, this is not in and of itself sufficient to deny appellate review where there is clear abuse of that discretion. It has been held, for example, that if a trial judge fails to examine a motion for a new trial, either because he has the mistaken view that he does not have the jurisdiction,²⁴ or because he has misunderstood the facts,²⁵ he has failed to exercise his discretion and, thus, has committed legal error. Also, if the verdict is clearly against the instructions of the judge, the appellate court will consider the denial of a new trial an error in law and will review and grant a new trial.²⁶

A conflict has grown up as to whether an "abuse of discretion" on the part of the trial judge in either granting or denying a motion for a new trial when the above factors are not involved, constitutes an "error in law." In recent

22. *Powers v. Wilson*, 110 F.2d 960 (2d Cir. 1940); *Bernal v. United States*, 241 Fed. 339 (5th Cir. 1917).

23. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *Virginia Ry. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948).

24. *Comiskey v. Pennsylvania R.R.*, 228 F.2d 687 (2d Cir. 1956).

25. *Stevenson v. Hearst Consol. Publications*, 214 F.2d 902 (2d Cir.), cert. denied, 348 U.S. 874 (1954).

26. *Reisberg v. Walters*, 111 F.2d 595 (6th Cir. 1940).

years, several of the circuits have opened the doors for limited review where it was felt that the trial judge abused his discretion, by holding such abuse to be *analogous* to an error in law and thus reviewable.²⁷ Only three of the appellate circuits, the Second, Fifth and Eighth, have refused to follow the trend.

DISSENTING CIRCUITS

The Second Circuit is slowly moving in the direction of the majority. Early decisions opined that the court had no jurisdiction to review.²⁸ In *Miller v. Maryland Cas. Co.*,²⁹ the court expressed the belief that review was favored, but because of a procedural limitation³⁰ the court was powerless to grant it. Now that the statutory barrier has been removed,³¹ the Second Circuit appears to be broadening review hesitantly.³² Decisions in the Second Circuit imply that review is proper where there is an abuse of discretion amounting to an error in law, such as an erroneous conception by the trial judge as to "matters which were appropriate to a decision on the motion,"³³ but the verdict itself will not be examined to determine whether the trial judge abused his discretion in refusing a new trial.³⁴

The Eighth Circuit has held to the old rule of nonreviewability. Although in a recent case³⁵ that court voiced the opinion that there might be appellate review where there is a gross abuse of discretion on the part of the trial judge, it indicated that it still does not favor review.

The Fifth Circuit's position is not at all clear. The key decision is *Sunray Oil Corp. v. Allbritton*,³⁶ wherein the court held that it was without power to review the trial judge's order on the motion for a new trial. A very strong dissent, however, presented the historical background of the problem, and concluded that appellate courts not only have the power to review the lower court's ruling but the power to directly review the verdict.³⁷ The dissent has had no impact on the Fifth Circuit. The position of that circuit is further confused by the fact that it has expressly stated it will examine the record with greater care if the verdict is too large, but that it will require evidence of a grave abuse before it will permit review.³⁸

27. See note 16 supra.

28. *Powers v. Wilson*, 110 F.2d 960 (2d Cir. 1940); *Miller v. Maryland Cas. Co.*, 40 F.2d 463 (2d Cir. 1930).

29. Supra note 28.

30. This procedural limitation was a development of the Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 84.

31. Judicial Code § 2105, 28 U.S.C. § 2105 (1958).

32. *Stevenson v. Hearst Consol. Publications*, 214 F.2d 902 (2d Cir. 1954); *Foley v. Capone Elec. Co.*, 194 F.2d 605 (2d Cir. 1952) (dictum).

33. 214 F.2d at 910.

34. *Ibid.*

35. *St. Louis S.W. Ry. v. Ferguson*, 182 F.2d 949 (8th Cir. 1950). The court indicated that there might be review where the verdict is "monstrous" or "outrageous."

36. 187 F.2d 475 (5th Cir.), rehearing denied, 188 F.2d 751 (5th Cir.), cert. denied, 342 U.S. 828 (1951).

37. 187 F.2d at 477 (Holmes, J., dissenting).

38. *Home Ins. Co. v. Tydal Co.*, 152 F.2d 309 (5th Cir. 1945); *Sinclair Refining Co. v. Tompkins*, 117 F.2d 596 (5th Cir. 1941).

The Supreme Court has never held that review for abuse of discretion is permissible, but frequent dicta³⁹ have opened the door for such a practice. In the leading case of *Fairmount Glass Works v. Cub Fork Coal Co.*,⁴⁰ the Court stated that the mere refusal to grant a new trial is not an "abuse of discretion." This has been interpreted by many as a green light to broaden review to include re-examination where there has been an abuse.⁴¹

ABUSE OF DISCRETION

What are the guideposts for determining an abuse of discretion? No court has clearly established rules for ascertaining such an abuse. Unfortunately, it would seem to be a matter of second guessing.⁴² Several courts in an effort to establish some rule of thumb have only beclouded the issue.⁴³ An abuse of discretion was found, for example, where the jury verdict was "monstrous" or "grossly excessive."⁴⁴ This is of little objective value as we are left to our own devices to determine exactly what constitutes a "monstrous" or "grossly excessive" verdict, which is, after all, a matter of degree, as well as a matter determined by the particular facts of the particular case. Are not the courts, therefore, in their attempt to establish what constitutes an abuse of discretion, in reality directly examining the jury verdict? Is it not a circular approach to review so that an error of fact might be fitted into the "error of law" category?

Is this roundabout method necessary? The traditional limitations on the power of review are now nugatory. A trial court's ruling on a motion for a new trial is now part of the record. The statutory restriction has been removed. The seventh amendment is no longer considered a bar to review. The only traditional bar, the influence of which is still felt, is the tenet that the trial court's ruling is one of discretion, and should be rarely disturbed. But there is an obvious difference between review and reversal. There appears to be no reason why the appellate court cannot, on appeal, review all lower court rulings and reverse only those that show a clear injustice to one of the parties. The

39. See note 5 supra.

40. 287 U.S. 474 (1933).

41. It should be noted that in *Fairmount Glass Works v. Cub Fork Coal Co.*, supra note 40, the Court was concerned with the question of nominal damages, and specifically left open the question with regard to substantial damages. *Id.* at 485.

42. This approach has been criticized by Judge Learned Hand as a tenuous unreality. "We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements. . . ." *Miller v. Maryland Cas. Co.*, 40 F.2d 463, 465 (2d Cir. 1930).

It was further criticized in *Sunray Oil Corp. v. Allbritton*, 188 F.2d 751, 753 (5th Cir. 1951) (Holmes, J., dissenting), where it was described as a "procedure of striking at the jurors' misbehavior over the shoulders of the trial judge. . . ."

43. *Affolder v. New York, C. & St. L.R.R.*, 339 U.S. 96 (1950); *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir. 1951).

44. *Affolder v. New York, C. & St. L.R.R.*, supra note 43; *Southern Pac. Co. v. Guthrie*, supra note 43.