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PRACTICE AND PROCEDURE-SEVENTH AMENDMENT-POWER OF FEDERAL COURT TO INCREASE INADEQUATE VERDICT

PRACTICE AND PROCEDURE — SEVENTH AMENDMENT — POWER OF FEDERAL COURT TO INCREASE INADEQUATE VERDICT — A jury in a federal court awarded the plaintiff $500 in a personal injury action; he moved for a new trial on the ground of inadequate damages. Having obtained consent of defendant to entry of judgment for $1500, the trial judge denied the motion. Plaintiff appealed. *Held*, this procedure was a violation of the Seventh Amendment of the Constitution; a new trial must be granted. *Dimick v. Schiedt*, (U. S. 1935) 55 Sup. Ct. 296.[1]

The position of the minority that the Seventh Amendment [2] does not commit the federal courts to the minutiæ of jury trial procedure as it existed in England in 1791 is certainly to be approved. To say, as do the majority in effect, that a rigid historical test must be applied is to curb the full adaptation of the common law to modern needs.[3] But even if the approach of the majority is

[1] Sustaining Schiedt v. Dimick, (C. C. A. 1st, 1934) 70 F. (2d) 558, Hughes, C. J., Stone, Brandeis, and Cardozo, JJ., dissenting.

[2] Text of the Seventh Amendment is as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and 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."

[3] Flexibility and adaptability have long been regarded as salient characteristics of the common law. Holden v. Hardy, 169 U. S. 366 at 385-387, 18 Sup. Ct. 383 (1897). The following are illustrations of modern developments in federal procedure which were unknown to the English common law: Appointment of auditors, without consent of the parties, to hear testimony, examine books and accounts, and frame and report on issues of fact as an aid to the jury, Ex parte Peterson, 253 U. S. 300, 40 Sup.

accepted, *arguendo*, can their conclusion be supported? There seems never to have been any doubt that the granting of a new trial is a matter of discretion rather than right.[4] It would seem to follow logically that the granting of a new trial may be made contingent upon reasonable conditions. This is well supported by the authorities both before and immediately after adoption of the Amendment. Indeed, in the very first known instance of the granting of a new trial on the ground of excessive or inadequate damages the order was made conditionally.[5] When the practice of granting new trials upon conditions [6] had firmly taken root, it was the most natural sort of development that the courts should impose conditions on the denying of a new trial. Logically this was no greater exercise of control over the jury; it simply amounted to fixing the conditions on the other party.[7] This background makes it clear that the *remittitur* practice which Judge Story, on circuit, introduced into the federal courts in 1822 [8] was merely an instance of the application of an old power — in no sense anything anomalous or revolutionary.[9] The *additur* device because of its irresistible analogy to *remittitur*

Ct. 543 (1920); requiring of both a general and special verdict, setting aside the general verdict for plaintiff and directing a verdict for defendant on the facts specially found, Walker v. New Mexico & Southern Pac. R. R., 165 U. S. 593, 17 Sup. Ct. 421 (1897); acceptance of so much of a verdict as declares plaintiff is entitled to recover while rejecting the amount of damages fixed and ordering a new trial on that issue alone, Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U. S. 494, 51 Sup. Ct. 513 (1931).

[4] Wood v. Gunston, Sty. 466, 82 Eng Rep. 867 (1655); Railroad Co. v. Fraloff, 100 U. S. 24, 31 (1879); Wilson v. Everett, 139 U. S. 616, 621, 11 Sup. Ct. 664 (1890); Lincoln v. Power, 151 U. S. 436 at 438, 14 Sup. Ct. 387 (1893).

[5] Wood v. Gunston, Sty. 466, 82 Eng. Rep. 867 (1655) (costs and guaranty of damages). And see Keate v. Temple, 1 Bos. & Pul. 158, 126 Eng. Rep. 834 (1797) (costs); Pleydell v. Earl of Dorchester, 7 T. R. 529, 101 Eng. Rep. 1115 (1798) (verdict to stand as security for damages); Noble v. Adams, 7 Taunt. 59, 129 Eng. Rep. 24 (1816) (consent of plaintiff's assignees in bankruptcy to be bound by new trial); Lopez v. De Tastet, 8 Taunt. 712, 129 Eng. Rep. 561 (1819) (survival of action after death, guaranty of damages); Corlies v. Cummings, 5 Cowen (N. Y.) 415 (1826) (abandonment of bill of exceptions); Thwaites v. Sainsbury, 7 Bingham 437, 131 Eng. Rep. 169 (1831) (single defense on new trial); 1 GRAHAM, NEW TRIALS 610 (1834). "It may be safely asserted, that no case can occur, presenting circumstances timely addressed to the discretion of the court, in which the rights of the parties may not be fully protected, by the imposition of conditions meeting the exigency."

[6] Or "terms," as the old cases expressed it. 1 GRAHAM, NEW TRIALS 610 (1834).

[7] Armytage v. Haley, 4 Q. B. 917, 114 Eng. Rep. 1143 (1843) (*additur*) seems to be one of the earliest instances of exercise of the power in this way.

[8] Blunt v. Little, (C. C., 1st Circ., 1822) 3 Mason 102.

[9] The case of Watt v. Watt, [1905] A. C. 115, overruling Belt v. Lawes, 12 Q. B. D. 356 (1884), is of very questionable force both because of its late date and because of its evident failure to appreciate that the discretionary act of a trial judge was being reviewed. In Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 69 at 74, 9 Sup. Ct. 458 at 459 (1888), *remittitur* is supported in strong terms:

> "The practice . . . is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously exces-

is vindicated by the same principles. It is, after all, simply the denying of a new trial on the condition that the defendant consent to a larger verdict, thereby assuring the plaintiff of substantial justice.[10] In conclusion, it is not amiss to note the force in the minority's observation that by this very decision the majority, in reviewing the discretionary act of a trial judge, have apparently introduced an innovation in the traditional federal practice.[11]

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sive. . . . To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint."

[10] For a discussion of some of the practical advantages of *remittitur* and *additur*, see 33 MICH. L. REV. 138 (1934); also 32 MICH. L. REV. 538 (1934).

[11] Until the present case it has consistently been held that the exercise of judicial discretion in denying the motion for new trial on the ground that the verdict is too small or too large is not subject to review on writ of error or appeal. Railroad Co. v. Fraloff, 100 U. S. 24 at 31 (1879); Wabash Ry. v. McDaniels, 107 U. S. 454 at 456, 2 Sup. Ct. 932 (1882); Fitzgerald & Mallory Constr'n Co. v. Fitzgerald, 137 U. S. 98 at 113, 11 Sup. Ct. 36 (1890); Wilson v. Everett, 139 U. S. 616 at 621, 11 Sup. Ct. 664 (1890); Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 Sup. Ct. 24 (1933) and comment, 32 MICH. L. REV. 387 (1934).