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PRACTICE AND PROCEDURE — POWER OF THE COURT TO INCREASE INADEQUATE VERDICTS — With the development of the remittitur in the case of excessive verdicts, one would naturally expect the development of an analogous device for cases wherein the verdicts are inadequate. When the plaintiff moves for a new trial because of an inadequate verdict, a denial of the motion on the condition that the defendant agree to a certain increase in the verdict is perfectly analogous to the remittitur in form. But this device has not received the same wide acceptance as its counterpart. In cases in which the plaintiff has appealed [1]

[1] Werner v. Bryden, 84 Cal. App. 472, 258 Pac. 138 (1927); Shanahan v. Boston & Northern St. Ry., 193 Mass. 412, 79 N. E. 751 (1907); Goldsmith v. Detroit, Jackson, & Chicago Ry., 165 Mich. 177, 130 N. W. 647 (1911); Lorf v. City of Detroit, 145 Mich. 265, 108 N. W. 661 (1906); Bradwell v. Pittsburgh & W. E. P. Ry., 139 Pa. 404, 20 Atl. 1046 (1891). But see Anderson v. Jenkins, 99 Ga. 299, 25 S. E. 648 (1896). In Bingaman v. City of Seattle, 139 Wash. 68, 245

this device has been condemned, while it has been approved on appeals by the defendant.[2]

In *Gaffney v. Illingsworth*,[3] the jury awarded plaintiff $190.25 and he moved for a new trial, claiming that the damages were inadequate. The court ruled that the motion was granted unless the defendant would pay plaintiff $480.50. The *defendant* appealed and the decision of the lower court was affirmed. The supreme court said it considered this practice to be as acceptable as the remittitur. The result reached seems to be proper. According to the order defendant has the choice of submitting to a new trial or consenting to an increased verdict. If he consents to the increase, he certainly should not be heard to complain. And if he refuses to so consent, the court's order becomes absolute and a new trial follows. Thus, defendant is no worse off than he would be were the conditional order not used and the verdict set aside as inadequate.

In the case of *Lorf v. City of Detroit*, the plaintiff was awarded nominal damages by the jury. He moved for a new trial and the court ruled that the motion was granted unless defendant would consent to a judgment for $100.00. *Plaintiff* appealed and the supreme court held that the lower court erred. The supreme court, in distinguishing this case from the remittitur cases, said:[4]

> "But in such cases the jury has actually awarded damages, and the court does not attempt to award damages itself, but merely to determine what portion of the damages so awarded it would not regard as excessive, and then to give the plaintiff the option to avoid a new trial by remitting the excess or take the verdict of a new jury upon the subject."

The court went on to say that in the instant case no damages had been awarded by the jury, and that the lower court itself fixed the damages without giving the plaintiff any option to refuse the court's award.

In such a case plaintiff's reason for appealing must be that he regards the increase as insufficient. When the court sets the sum which

Pac. 411 (1926), the plaintiff appealed but the trial court had made no conditional order. The upper court, however, remanded the case to the lower court with orders to give plaintiff the choice of a new trial or a verdict for an increased amount.

[2] Marsh v. Minnesota Brewing Co., 92 Minn. 182, 99 N. W. 630 (1904); Ford v. Minnesota St. Ry., 98 Minn. 96, 107 N. W. 817 (1906); Gaffney v. Illingsworth, 90 N. J. L. 490, 101 Atl. 243 (1917); Bernard v. North Yakima, 80 Wash. 472, 141 Pac. 1034 (1914); Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924); Hillman v. City of Seattle, 163 Wash. 401, 299 Pac. 514 (1931); Gosczinski v. Carlson, 157 Wis. 551, 147 N. W. 1018 (1914). But see the case of Risch v. Lawhead, which is discussed later. That case disapproves of the form of conditional order used in the Gosczinski case.

[3] 90 N. J. L. 490, 101 Atl. 243 (1917).

[4] 145 Mich. 265 at 267, 108 N. W. 661 at 662 (1906).

it regards as adequate and which defendant is given the option to accept, it must fix the damages at the lowest point which it could let stand.[5] There is an area between the highest sum and the lowest sum that a court will let stand as a proper verdict in a given case. If plaintiff gets a new trial, the jury may return a verdict for plaintiff within that area and above the least amount the court would allow to stand. So the plaintiff objects to an order which deprives him of this chance.

But the defendant in the remittitur case might make the same objection. When the court offers plaintiff a chance to remit, the court asks plaintiff to give up all damages in excess of the highest amount the court could let stand.[6] If the plaintiff remits, judgment is entered against defendant without any option on his part. Now if defendant could get a new trial, the next verdict might fall within the above-mentioned area and be less than the highest amount the court could let stand. It is submitted that the plaintiff should be accorded no better treatment in the inadequate-verdict cases than is accorded the defendant in the remittitur cases.

Two Wisconsin cases, however, have gone to the extreme of giving *no* option to the defendant in inadequate-verdict cases. In *Campbell v. Sutliff*,[7] in answer to a question in the special verdict as to the amount of damages plaintiff should get for pain and suffering, the jury replied, "None." The evidence clearly showed this to be an erroneous conclusion. The trial court said that the jury should have awarded at

[5] Campbell v. Sutliff, 193 Wis. 370, 214 N. W. 374 (1927); Risch v. Lawhead, (Wis. 1933) 248 N. W. 127. None of the other cases cited discuss this point although the language of the court in Bingaman v. Seattle, 139 Wash. 68, 245 Pac. 411 (1926), indicates that this standard was adopted in that case.

The statement would seem to follow by analogy to the standard adopted in the remittitur cases. Also, the plaintiff in these cases has received an inadequate verdict and seeks relief and an increase of the verdict to the minimum amount the court would let stand. To grant this should be considered just treatment. Obviously, any attempt by the court to fix the damages within the area mentioned in the text would be judicial usurpation of the jury's province. But see Reuter v. Hickman, Lauson, & Diener Co., 160 Wis. 284, 151 N. W. 795 (1915); Heimlich v. Tabor, 123 Wis. 565, 102 N. W. 10 (1905).

[6] Gila Valley, G. & N. Ry. v. Hall, 13 Ariz. 270, 112 Pac. 845 (1910); Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 So. 714 (1889); North Chicago St. Ry. v. Wrixon, 150 Ill. 532, 37 N. E. 895 (1894).

This seems to be inferred in almost every remittitur case, since the court always speaks of remitting "the excess." But the court in these cases might set the figure below the maximum amount it would allow to stand and neither party could complain. See to this effect: International & G. N. Ry. v. Wilkes, 68 Tex. 617, 5 S. W. 491 (1887); St. Louis, I. M. & S. Ry. v. Adams, 74 Ark. 326, 86 S. W. 287 (1905); Branch v. Bass, 5 Sneed (Tenn.) 366 (1858).

[7] 193 Wis. 370, 214 N. W. 374 (1927). In Apperson-Lee Motor Co. v. Ring, 150 Va. 283, 143 S. E. 694 (1928), the court approved action by the trial court identical with that of the trial court in the Campbell case, but the element of consent by the defendant to the amount of damage distinguishes the cases.

least $50.00, and accordingly changed the verdict and entered judgment without giving any option to either party. The defendant appealed and the judgment was affirmed. The supreme court said that though such an unconditional order is improper, the error was not prejudicial to the defendant since $50.00 was the least amount an impartial jury would award and plaintiff did not complain.

In May, 1933, the Wisconsin court decided the case of *Risch v. Lawhead.*[8] In that case the jury, in answer to a question in the special verdict, assessed plaintiff's damages at $3,000.00. On motion of the plaintiff the court changed the answer to $4,000.00, as the smallest sum any impartial jury would award, and ordered that judgment be entered on the verdict as so amended unless defendant within ten days filed notice of election to accept a new trial. Defendant failed to file such notice, the court entered judgment for the plaintiff for $4,000.00, and defendant appealed. The judgment was affirmed, the supreme court saying that defendant had no complaint as that was the least amount the court would allow to stand, and the plaintiff had no complaint as he consented to the $4,000.00 judgment by moving it. But the court went on to say that the trial court's order was not in proper form in that it did not order a new trial *unless the plaintiff consented* to take judgment for such least amount, but that plaintiff had waived this error by consenting to judgment on the amended verdict.

The results of these cases on the facts therein presented are satisfactory. But the supreme court's ruling that the plaintiff, and not the defendant, should be given the option of accepting the increased verdict in such cases seems to violate the guaranty of jury trial. As pointed out above, plaintiff should not be entitled to an option any more than defendant in the remittitur cases. But where the court denies the plaintiff's motion for a new trial on the ground that the damages are inadequate, on condition that the verdict be increased, defendant should be the one to say whether this increase will become effective. The increment of damages which constitutes the increase is purely "judge made." It does not emanate from the jury and if it is imposed on the defendant without his consent, he is deprived of a jury trial. True, the court says he has no complaint since the amended verdict is the least amount which the court would allow to stand. But without the defendant's consent there is nothing on which to base a judgment.

In conclusion: The power of the court to set aside excessive and inadequate verdicts is established.[9] When the verdict is excessive, the

[8](Wis. 1933) 248 N. W. 127.

[9] 4 SEDGWICK, DAMAGES, 9th ed., secs. 1325, 1368 (1912); 2 SUTHERLAND, DAMAGES, 4th ed., sec. 459 (1916); 14 ENCYCLOPAEDIA OF PLEADING AND PRACTICE 755 *et seq.* (1899).

remittitur is an accepted means of hastening the final adjudication.[10] And the rule should be that when the verdict is found to be inadequate, the court should deny the plaintiff's motion for a new trial when the defendant consents to a proper increase in the verdict.[11] This would seem to follow logically from a comparison with the remittitur cases and from an analysis of the positions of the parties, as pointed out above.[12]

J. I. L.

[10] 39 L. R. A. (N. S.) 1064 (1912); 53 A. L. R. 779 (1928).

[11] See Bingaman v. Seattle, 139 Wash. 68, 245 Pac. 411 (1926) (note 1, supra).

[12] In Gaffney v. Illingsworth, 90 N. J. L. 490, 101 Atl. 243 (1917), the court said after discussing the remittitur cases, "It would seem to follow, by parity of reasoning, that when a new trial is granted because the damages are inadequate, the court may impose like terms, that is, terms to the effect that, if the defeated party will pay a certain sum, greater than that awarded by the verdict, the rule will be discharged. . . ."