December 1942

Remittiturs and Additurs

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THE term remittitur, well established by long and widely recognized usage, has more than one meaning in the law of procedure. The term additur, so far as the writer is informed, has only one meaning; but it is such a newcomer to the field of legal terminology that it is sometimes clothed in quotation marks, or its use is apologetically prefaced by the words "so called". Consequently, it may not be superfluous to begin this discussion with a measure of definition.

The remittitur involved in the present discussion, in its broadest sense, is the procedural process by which the verdict of a jury is diminished by subtraction. The subtraction is usually of money, but it may be of property.1 The term is used to describe generally any reduction made by the court without consent of the jury; but the typical situation in which it is employed, and the one with which this discussion is primarily concerned, is where, on a motion by a defendant for a new trial, the verdict is considered excessive and the plaintiff is given an election to remit a portion of the amount or submit to a new trial. An additur, briefly, is the opposite of a remittitur. In the typical situation, the defendant, on a motion by the plaintiff for a new trial because of an inadequate verdict, is given the option to consent to an addition to the verdict or, in lieu thereof, to submit to a new trial.

Practically all courts in the United States have made extensive

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1 Eaton v. Jones, 107 Cal. 487, 40 Pac. 798 (1895); Johnson v. Duncan, 90 Ga. 1, 16 S. E. 88 (1892); McAlister v. Mullanphy, 3 Mo. 38 (1831); Fry v. Stowers, 98 Va. 417, 36 S. E. 482 (1900); Honaker v. Shrader, 115 Va. 318, 79 S. E. 391 (1913).

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use of the remittitur, and the additur has been resorted to sparingly, but the decisions are not in accord as to the proper limits of the practice. The discord arises from a difference of opinion as to whether a too liberal indulgence in the practice infringes the common law right to a jury trial, or violates constitutional sanctions preserving the right. The question of constitutionality, frequently before the federal and state courts in earlier decisions, has recently been revived and comprehensively considered in the much discussed case of *Dimick v. Schied* where the Supreme Court of the United States, in a five to four decision, condemned use of the additur and, corollary thereto, expressed doubts as to the propriety of the remittitur as approved in prior decisions.

Possibility of use of the additur seems never to have received consideration in the decisions of this state. The remittitur has been recognized and resorted to in no few cases, both early and late, but its use has been limited as compared with the usage in other states and in the federal courts. In none of the West Virginia decisions, apparently, has the court entered into a discussion of constitutional questions, or undertaken to justify its holdings in the light of constitutional provisions. In each case the question has been whether to allow a remittitur would amount to invading the province of the jury, or usurping the functions of the jury, without reference to the Constitution, although it may have been assumed that invasion of the common law right amounted to a violation of constitutional guaranties.

There are two particular reasons why it may be profitable to take an inventory and make an appraisal of the West Virginia decisions and constitutional provisions in a background of what has been said and done in other jurisdictions. First, the West Virginia courts will likely some day find it necessary to decide whether the additur is to be adopted in this state and, if so, what limitations are to be put upon its use. Secondly, since the local decisions regulating use of the remittitur adhere to a rule sanctioned only by a small minority of courts in other jurisdictions — a rule which has been unsparingly criticized as narrow and inexpedient by many courts and commentators — a shift of policy by the West Virginia

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293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1935). The first commentaries were inspired by the decision in the circuit court of appeals, 70 F. (2d) 558 (C. C. A. 1st, 1934). See (1934) 48 Harv. L. Rev. 333; (1934) 33 Mich. L. Rev. 133; (1934) 44 Yale L. J. 318; (1934) 34 Col. L. Rev. 1551. An excellent review of the Supreme Court decision will be found in (1935) 21 Va. L. Rev. 686.
Supreme Court with reference to the remittitur must be reckoned with as a possibility. If such a shift of policy is agitated, it seems almost certain that the court will find it necessary, on account of the peculiar nature of our constitutional provisions, to deal with the question of constitutional sanctions, if consideration is given to all the factors involved in a solution of the problem as has been done in other jurisdictions.

An attempt will be made in this article to review all the pertinent West Virginia decisions and constitutional provisions. Prefatory thereto, an attempt will be made to outline the fundamental features of the remittitur and the additur as developed by the decisions of other jurisdictions, and the views of courts and commentators upon controversial matters, but no attempt will be made to cover all the procedural details, nor to analyze or cite all the numerous decisions dealing even with fundamentals.

Although the remittitur and the additur may be looked upon as equals but opposite in direction, and by proper analysis will be found to be controlled by the same principles, there are reasons why it will be convenient to deal with them in separate topics. First there are a few distinctions between the two which, actually or supposedly, impose different considerations as to the propriety of their use. Furthermore, as compared with the additur, the remittitur has been dealt with much more frequently by the courts and the limits upon its use more frequently adjudicated; for which reasons discussion of the additur in the cases and the commentaries is usually prefaced by a discussion of the remittitur. Consequently, in this discussion it is proposed to deal with the remittitur, the additur and the West Virginia law in three separate topics; the first as prefatory to the second, and the first and second as prefatory to the third.

The Remittitur.

The remittitur is by no means a recent development in the field of procedure. It is recognized in the English cases prior to adoption of the Federal Constitution, was resorted to in the early Virginia cases, and was adopted in the federal procedure over a century ago. The desirability of its use, to avoid the expense, de-

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3 See Dimick v. Schiedt, 293 U. S. 474.
4 See Hook v. Turnbull, 6 Call 85 (Va. 1806); Cahill v. Pintony, 4 Munf. 371 (Va. 1815); Tenant's Ex'r v. Gray, 5 Munf. 494 (Va. 1817); Preston v. Bowen, 6 Munf. 271 (Va. 1819); Gibson v. Governor, 11 Leigh 600 (Va. 1841).
lay and prolongation of litigation incident to a new trial, would seem to be beyond controversy if there are no countervailing considerations. Since the only countervailing consideration that can be urged is the objection that resort to the practice may invade the right to a jury trial, practically all courts permit use of the remittitur to the extent that, according to the views of the particular court, it does not interfere with a common law, statutory or constitutional right to a jury trial.

The test of propriety is whether to allow the remittitur would amount to substituting the judgment of the court for that of the jury. Results from application of the test in specific cases will in general depend upon what the jury has to decide and the manner in which it is decided under all the circumstances of the case. The primary consideration in those jurisdictions which entertain particular solicitude for the preservation of jury trial is whether it is possible, by reference to various factors and circumstances involved in the litigation, to determine definitely the amount of excess in the verdict and so fix a residue in effect truly found by the jury and not by the substituted judgment of the court. Among various factors involved in such a determination are the nature of the claim in litigation; the status of the evidence with reference to different elements of damages or other components upon which the verdict is aggregated; the measure of recovery alleged in the pleadings; separability of the finding of liability from the finding of the amount of recovery; separate findings by the jury with reference to different elements of the claim; and many other circumstances not readily subject to classification, some of which will be illustrated in cases hereinafter considered. In addition to factors concerned with ascertaining the amount of the excess, other matters which receive consideration in determining the propriety of a remittitur are the effect of legal error committed by the court; discretion of the court to elect between allowing a remittitur and ordering a new trial; and the necessity of consent by the parties to the remittitur.

See Comment (1934) 44 Yale L. J. 319, where it is said: ‘‘A few courts, on the ground that the use of remittiturs is unconstitutional, refuse absolutely to allow them, or permit them only when the exact amount of the excess may be computed mathematically.’’ The only American cases, Southern Ry. v. Montgomery, 46 F. (2d) 990 (C. C. A. 5th, 1931) and Louisville & Nashville R. R. v. Earl, 94 Ky. 368, 22 S. W. 607 (1893), cited for the policy of absolute refusal, are not very satisfactory for such purpose. The English case cited, Watt v. Watt, (1905) A. C. 115, is the much cited case overruling earlier English cases approving remittiturs. See (1935) 21 Va. L. Rev. 672.
If the claim in litigation is so liquidated or certain that the jury, finding for the plaintiff, could properly find only one amount, as in an action on an ordinary promissory note or to recover a statutory penalty for a fixed amount, there is no substantial reason why any court should not allow a remittitur of an excess in the verdict above the amount of the claim, if it appears that excess is the only infirmity in the verdict. In such cases, establishing the right to recover, in effect, automatically decides the amount. Typical cases which come within this class, it will be observed, are those in which, on a default judgment, no writ of inquiry is necessary. It should be noted, however, that an excessive verdict in such a case, depending upon the circumstances, might be open to suspicion as involving passion and prejudice on the part of the jury, since under the evidence and the usual instructions given by the court it might be difficult to explain the discrepancy otherwise. In such an event, a remittitur might be refused and a new trial granted, as hereinafter discussed, because of a doubt as to validity of the verdict respecting the right to recover.

Although cases in which the claim is liquidated present the most obvious situation for application of a remittitur, it is not essential, even in those jurisdictions adhering to a conservative policy in application of the remittitur, that the action in which the verdict is rendered be one for recovery of a definite amount fixed by the nature of the cause of action alleged in the pleadings. Particularly is this true in actions for breach of contract, where definite rules of law applied to plainly established facts frequently indicate the proper measure of recovery. The same is also true in

7 It is usually held that mere excessiveness in the verdict is not sufficient alone to show passion and prejudice. See cases cited in note 26 infra. But see Hook v. Turnbull, 6 Call 85, 88-9 (Va. 1806), where the verdict was for double the amount alleged.

8 Cases of this class will be illustrated by the West Virginia cases hereinafter reviewed. Additional illustrations will be confined to one other jurisdiction in which use of the remittitur is limited: Gibson v. Talbotton R. R., 112 Ga. 325, 37 S. E. 365 (1900) (excess barred by Statute of Limitations remitted); Richmond & Danville R. R. v. Benson & Co., 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446 (1890) (excess due to inclusion in verdict of improper attorney's fee remitted); McConnell v. Selph, 30 Ga. App. 795, 119 S. E. 438 (1923) (interest improperly included in verdict under improper instruction remitted, together with additional amount to reduce verdict to amount warranted by pleadings); Huffman v. Carolina Portland Cement Co., 29 Ga. App. 439, 116 S. E. 25 (1923) (amount of illegal lien remitted); Jackson v. Doolittle, 21 Ga. App. 483, 94 S. E. 595 (1917) (amount of set-off established by defendant's undisputed evidence remitted); Langley v. Simmons, 143 Ga. 699, 85 S. E. 832 (1915) (verdict illegal against one of two defendants remitted as to one defendant); Haley v. Covington, 19 Ga. App. 782, 92 S. E. 297 (1917)
many tort actions involving property,9 where property value supplies a sufficiently definite norm to measure the amount of recovery. And even in other tort actions, although less frequently, there may be a remittitur, where, under definite legal rules and sufficiently established facts, the amount of the excess may accurately be determined.10 In cases within the description in this paragraph, the measure of recovery or the measure of the excess is often described as being ascertainable by "settled rules of law,"11 "fixed rules and principles"12 (or expressions of a similar import), which either regulate the measure of recovery or indicate the amount of the excess. If either of these elements is definitely ascertainable, a remittitur may properly be allowed regardless of the fact that the other, standing alone, would not be a proper subject for application of a remittitur. A fair generalization of the theory applicable in such cases would seem to be that a remittitur does not invade the province of the jury, because the jury could not legally have gone beyond the definite legal measure of recovery, or could not legally have added the definitely measurable illegal excess, as the case may be, and therefore the excess may be looked upon as a nullity or mere surplusage, the parties having had a proper jury determination of all the proper elements of the case as included in the residue after severance of the separable excess. On such a theory, the residue has truly been found by the jury and the amount thereof has not been fixed by the court. The court has merely segregated the residue from the excess.

In a third class of cases, the proper amount of recovery is

(portion of verdict including illegal lien remitted); Vigal v. Castleberry, 67 Ga. 600 (1881) (excess due to the improper interest rate remitted; Brinson v. Reid, 107 Ga. 250, 33 S. E. 31 (1899)" (amount due to illegal interest remitted.)

Numerous additional cases, not so significant because decided in jurisdictions where the liberal rule prevails, will be found in 46 C. J. 427, n. 95.

9 See Mayer v. Tufts, 76 Ga. 96 (1885); Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751 (1886). See many additional cases from states adhering to the liberal rule in 46 C. J. 429, n. 96.

10 Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S. E. 51 (1911) (action for unlawful arrest, damages based on one of several counts remitted); Seaboard-Airline Ry. v. Bishop, 132 Ga. 71, 63 S. E. 1103 (1909) (remission of improper interest found in a personal injury case); Chesapeake & Ohio Ry. v. Myers, 50 Ky. 841, 151 S. W. 19 (1912) (improper item of $200.00 included in verdict for surgical operation to be performed in future remitted in personal injury case); McCallam v. Hope Natural Gas Co., 93 W. Va. 426, 117 S. E. 148 (1923) (action by infant for personal injuries, illegal amount for doctor's bills remitted).

11 Vinal v. Core, 18 W. Va. 1 (1881), syl. 23 and page 60 quoting from Nudd v. Wells, 11 Wis. 415.

12 46 C. J. 427.
neither fixed by the nature of the cause of action alleged in the pleadings nor determined definitely by fixed rules of law or legal principles; but, within largely flexible limits, is left to the discretion of the jury. Included in this class are actions to recover damages for personal torts, and preeminently personal injury actions. In such cases ordinarily there would be nothing to indicate that the jury had brought an improper element of damages into the verdict, the excess being due merely to the jury's abuse of its discretion and the amount of the excess, therefore, not being ascertainable by application of fixed rules of law or legal principles. Wherefore, it is held in a minority of jurisdictions that to allow a remittitur in such cases is merely to substitute the court's judgment for that of the jury, and so usurp the functions of the jury. On the other hand, the courts in a large majority of jurisdictions permit remittiturs in such cases, justifying the practice by arguments hereinafter indicated.

In jurisdictions where the liberal rule prevails, the courts are confronted with the problem of fixing some principle upon which the amount of the excess to be remitted may properly be determined. Examination of a number of typical decisions gives the impression that most courts have adopted no definite standard for fixing the amount of the remittitur, other than to reduce the amount of the verdict until it is no longer excessive. Ordinarily the appellate court merely approves an amount fixed by the trial court; or, where the trial court has not allowed the remittitur, itself fixes the amount, without reference to any standard operating within the limits of maximum and minimum limits of permissible recovery.

If such a standard is to be adopted, it may conform to either of three different possibilities, depending upon whether, in order

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13 See cases cited in note 10 supra.
15 See the numerous cases cited in 46 C. J. 429, note 15; 20 R. C. L. 317, note 19. See (1934) 44 YALE L. J. 319. Many of these cases are personal injury cases. Others are cases involving other personal torts, such as malicious prosecution. The federal decisions have had much influence on the state courts. Two decisions particularly, Northern Pacific R. R. v. Herbert, 116 U. S. 642, 29 L. Ed. 755 (1885), and Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 32 L. Ed. 854 (1889), have been frequently cited, the latter as dealing with constitutional questions.
to avoid the appearance of invading the right to a jury trial, solicitude is to be shown for the interests of one or the other of the parties, or the adjustment is to be made realistically, with attention directed merely to the object of accomplishing a proper result under the circumstances. Accordingly, some courts, whether through deference to the opinion of the jury which found the excessive verdict or because the plaintiff is considered the party entitled to complain because of the reduction, pursue the policy of fixing the residue at the highest amount which, if found by a jury, would have been permitted to stand. Only one court, apparently, recognizing that the defendant, who is arbitrarily compelled to submit to the remittitur, is the party entitled to complain, in order to avoid any charge of denying him the results of a proper jury trial, has pursued the policy of fixing the amount of the residue at the minimum which, if found by a jury, would have been approved by the court. Most courts, however, seem to pursue an intermediate course and fix the amount of the residue at what the plaintiff is considered justly entitled to recover; or, what amounts to the same thing, which the court thinks a properly functioning jury would have found. It may be somewhat startling to find suggestions in some of the cases to the effect that so fixing the amount, since it conforms more nearly than any other amount to what a properly functioning jury would have found, is objectionable as invading the province of the jury. It would seem rather remarkable for a court, in order to avoid the appearance of usurping the functions of the jury, and to preserve the right to jury trial, to do something which it thinks a jury should not do; i.e., approve a

16 An illustrative case is Interurban Ry. v. Trainer, 150 Ark. 19, 233 S. W. 816 (1921), reviewed in (1922) 35 HARV. L. REV. 616. Cases sometimes cited [see (1934) 32 MICH. L. REV. 540; (1934) 44 YALE L. J. 320] for this proposition are not very satisfactory. They merely speak of remitting "the excess," and there is no definite indication whether this means excess beyond the maximum amount which would be allowed to stand, or excess beyond what is deemed a reasonable recovery, which may be less.


18 Certainly, if the court is to fix the amount at all, neither party should be heard to complain because the court fixes the amount of recovery at less than the maximum which it would permit a jury to find. The plaintiff has consented to the amount fixed and the defendant is benefited by fixing any amount less than the maximum. See St. Louis, I. M. & S. Ry. v. Adams, 74 Ark. 328, 86 S. E. 287 (1905). "There is, then little danger in putting the amount low, and the court should always go down to a sum which it can feel certain that the defendant should pay, and which under the evidence the plaintiff is clearly entitled to recover." Idem, p. 333.

19 Idem, p. 332.
recovery which is either higher or lower than a truly proper amount, unless it adopts either the maximum or the minimum in pursuance of one or the other of the policies noted above.

In one class of cases a remittitur is proper regardless of the nature of the claim in litigation or of the standards by which the amount of the recovery is controlled. It is a fundamental rule of practice, at least in common law jurisdictions, that a plaintiff is not entitled to recover a greater amount than he has alleged in his pleadings. In a case where the amount of the verdict exceeds the amount alleged, the amount of the excess is a matter of simple mathematical calculation and the amount of the verdict may be reduced by a remittitur to the amount alleged.20 This is a typical instance where the amount of the excess is definitely ascertainable by a fixed rule of law.

A rather remarkable conflict in the decisions is found when circumstances indicate that an excessive verdict was due to what is ordinarily described as "passion and prejudice" on the part of the jury. It seems that a majority of the courts, even in jurisdictions adhering to the liberal practice in allowing remittiturs, refuse to allow a remittitur in such cases, on the supposition that the passion and prejudice may have overstepped a mere consideration of the amount of recovery and permeated the finding as to liability, in which event it would be unfair to the defendant to permit any part of the verdict to stand.21 Other courts permit a remittitur in such cases,22 and some courts even consider passion and prejudice a circumstance peculiarly justifying a remittitur.23 Even in jurisdictions where the passion-and-prejudice rule forbids a remittitur, a remittitur may be proper when it appears that the passion and prejudice affected only the amount of the verdict and did not influence the finding of liability;24 as when the evidence

20 46 C. J. 427. In such cases a remittitur is proper even in jurisdictions limiting use of the remittitur. The Georgia R. R. v. Crawley, 87 Ga. 191, 13 S. E. 508 (1891); Williams v. Baltimore & Ohio R. R., 9 W. Va. 33 (1876).
22 20 R. C. L. 317; (1934) 44 YALE L. J. 321. See cases collected in Henderson v. Dreyfus, 26 N. M. 541, 191 Pac. 442 (1919).
23 See (1934) 44 YALE L. J. 321, citing cases from California, Missouri, Nebraska, North Dakota, Ohio, Oklahoma and Texas.
24 Whitney v. Kaliske, 131 Minn. 261, 154 N. W. 1100 (1915); Trow v. White Bear, 75 Minn. 432, 80 N. W. 1117 (1899); Craig v. Cook, 28 Minn. 222, 9 N. W. 712 (1881); Belknap v. Boston, etc. R. R., 49 N. H. 255 (1870); McNamara v. McNamara, 108 Wis. 613, 84 N. W. 901 (1901); 20 R. C. L. 317.
indicates that a verdict for the plaintiff should have been found in any event.25

It is generally held that a mere excess in the verdict will not alone be sufficient to establish the fact of passion and prejudice;26 but it may be otherwise when the excess is extremely great.27 Of course excessiveness of the verdict may always be considered along with other facts and circumstances indicating passion and prejudice.28 Circumstances which afford a basis for recovery of exemplary or punitive damages are peculiarly apt to arouse passion and prejudice in a jury. Hence where an excessive verdict includes such damages, as a general rule there is a reluctance to allow a remittitur in lieu of a new trial.29

Since a remittitur is refused in the passion-and-prejudice cases on the theory that the whole verdict may be tainted with passion and prejudice, it might be surmised that, even in the absence of passion and prejudice, a remittitur would be refused and an excessive verdict set aside if it appeared that the misapprehension on the part of the jury which caused the excess also led to

It is emphasized in these cases that this is particularly a situation where the court ought freely to exercise its discretion in determining whether a remittitur ought to be allowed or a new trial granted.


26 Cook v. Globe Printing Co., 227 Mo. 471, 127 S. W. 332 (1910); Huston v. Quincy, etc. R. R., 151 Mo. App. 335, 131 S. W. 714 (1910); Henderson v. Dreyfus, 26 N. M. 541, 191 Pac. 442 (1919); Davis v. Reider, 127 Ohio St. 504, 189 N. E. 851 (1934); Eleganti v. Standard Coal Co., 50 Utah 585, 168 Pac. 266 (1917). "If such were the rule, all cases in which excessive verdicts are returned would have to be retried." Stephens Ranch & Live Stock Co. v. Union Pacific R. R., 48 Utah 528, 161 Pac. 459 (1916).

27 The amount may be so flagrantly excessive as to be explainable only on the supposition of passion and prejudice. The Pittsburgh C., C. & St. L. Ry. v. Story, 104 Ill. App. 132 (1902); The Belt Ry. v. Charters, 123 Ill. App. 322 (1905). This exception is recognized in many of the cases where the excessiveness was not sufficient to apply it.

Following are statements taken from the Iowa cases, as reviewed in (1933) 18 Iowa L. Rev. 563, as to the degree of excessiveness necessary to establish passion and prejudice: "grossly excessive character", Brause v. Brause, 190 Ia. 329, 177 N. W. 65 (1920); "they must be so glaring as to shock the conscience," Wald v. Auto S. & E. Co., 190 Ia. 11, 179 N. W. 856 (1920); "the amount allowed must be so great and excessive that the jury has been influenced to its verdict by passion and prejudice", Hall v. Chicago, Burlington & Q. R. R., 145 Ia. 281, 122 N. W. 894 (1910); Ideal C. S. R. Works v. City of Des Moines, 167 Ia. 517, 149 N. W. 640 (1914); "It must appear that the damages are flagrantly outrageous and extravagant!", Knoss v. Kommes, 207 Ia. 137, 222 N. W. 436 (1928).

Similar statements will be found in many decisions of other jurisdictions.

28 See Davis v. Reider, 127 Ohio St. 504, 189 N. E. 851 (1934).

29 Perhaps the best exemplification will be found in the Iowa decisions, reviewed in (1933) 18 Iowa L. Rev. 563.
a misconception with reference to the right to recover; and it has been so held.\textsuperscript{30}

In some cases, where a remittitur would be proper if excess in the verdict were the only error to be considered, a remittitur is refused and the verdict is set aside because of error committed in the course of the trial which may have affected the amount of the verdict;\textsuperscript{31} as where improper instructions are given,\textsuperscript{32} illegal evidence is introduced,\textsuperscript{33} or the jury is guilty of misconduct.\textsuperscript{34} In such cases the defendant is said to be entitled to a new trial "as a matter of right". But even in these cases there is a tendency to allow a remittitur and refuse a new trial, particularly where it is practicable to segregate the excess due to the error.\textsuperscript{35}

Since a trial court has a general discretion as to whether it will set aside a verdict and grant a new trial because of an excessive verdict or will permit the verdict to stand, it is not surprising to find that the court likewise has a discretion as to whether it will allow a remittitur, or, in lieu thereof, order a new trial.\textsuperscript{36} In case of doubt as to which is more likely to accomplish justice, preference for a new trial is indicated.\textsuperscript{37}

A remittitur may in the first instance be proposed in either the

\textsuperscript{30}As where a misconception of the evidence may have affected both the amount of the verdict and the finding as to liability. Lenzen v. Miller, 51 Nebr. 855, 71 N. W. 715 (1897).

\textsuperscript{31}46 C. J. 428, 431; (1934) 44 YALE L. J. 322.

\textsuperscript{32}West Coast Cattle Co. v. Aguilar, 22 Ariz. 484, 198 Pac. 1103 (1921); Smith v. Dukes, 5 Minn. 301 (1861); Slatery v. City of St. Louis, 120 Mo. 183, 25 S. W. 521 (1894). For later cases, see (1934) 44 YALE L. J. 322.

\textsuperscript{33}(1934) 44 YALE L. J. 322, citing Silver King of Arizona Mining Co. v. Kendall, 23 Ariz. 39, 201 Pac. 102 (1921); Foley v. Union House Furnishing Co., 228 Mo. App. 1063, 60 S. W. (2d) 725 (1933).

\textsuperscript{34}As where the jury finds a quotient verdict. Darland v. Wade, 48 Ia. 547 (1878).

\textsuperscript{35}"However, there seems to be an increasing tendency to except from this rule such errors as improper admission of evidence, submission of issues unsupported by evidence, errors in instructions, or misconduct of the jury." (1934) 44 YALE L. J. 322, citing cases. See McCallam v. Hope Natural Gas Co., 93 W. Va. 426, 117 S. E. 148 (1923), where it was possible, in a personal injury case, to remit all possible excess due to an improper instruction.

\textsuperscript{36}The cases emphasizing this discretion are too numerous to cite. It seems to be so generally accepted that little is said about it in the cases except to approve its application by the trial court. The following are some cases. Northern Pacific R. R. v. Herbert, 116 U. S. 642, 29 L. Ed. 755 (1886); Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 32 L. Ed. 554 (1889). See Detzur v. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 949, 44 L. R. A. 500 (1899).

\textsuperscript{37}Prosch v. City of Seattle, 46 Wash. 553, 90 Pac. 920 (1907) (where the evidence "was not uniform"); Ruff v. Georgia, S. & F. Ry., 67 Fla. 224, 64 S. E. 782 (1914); Rief v. Great Northern Ry., 126 Minn. 430, 148 N. W. 309 (1914).
If allowed in the appellate court, in some cases judgment is rendered above for the residue, if the plaintiff elects to accept it; in other cases, the case is remanded to the lower court with directions to permit the election.

If the principle, hereinbefore noted, upon which a remittitur is allowed when the claim is liquidated or the amount of an excess is definitely ascertainable by fixed legal rules, is sound, it would seem to follow as a logical consequence that the court in such cases should have power to fix the amount of a proper residue and render judgment thereon without the consent of either party. Particularly should this be true in the cases hereinbefore mentioned in which the claim alleged in the pleadings is liquidated and of such a nature that, on a default, no writ of inquiry would be necessary. The fact that no jury is necessary, or even permitted, when there is a default admitting the right to recover is sufficient to indicate that the verdict found by a jury on an issue in such a case is concerned only with the question of liability, and that the fixing of the amount by the verdict is a mere formality. That this is true is amply illustrated by the fact that, when the issues in such a case are submitted to a jury for decision, the court definitely instructs the jury what the amount of the recovery must be if a verdict is found for the plaintiff. At the least, if either party is to be given the privilege of repudiating a remittitur in such a case, it should be the defendant, on the ground of passion and prejudice or some other ground which casts suspicion upon the verdict as a whole. However, the cases are few where arbitrary reduction of the amount by the court without consent of the plaintiff has been approved.

As to the possibility of objecting to allowance of a remittitur, the plaintiff has a monopoly of the court's indulgence. After the defendant has made his motion for a new trial, he becomes a helpless bystander, awaiting the court's decision as to whether a re-

38 The West Virginia cases hereinafter reviewed will serve as illustrations. For cases from other jurisdictions, see (1934) 44 YALE L. J. 319.

39 See (1934) 44 YALE L. J. 320, citing Kennon v. Gilmer, 131 U. S. 22, 33 L. Ed. 110 (1888); Johnson v. Louisville & N. R. R., 204 Ala. 602, 87 So. 158 (1920); Barber v. Maden, 120 Iowa 402, 102 N. W. 120 (1905); Cažell v. Schofield, 319 Mo. 1169, 8 S. W. (2d) 589 (1928); Bourne v. Moore, 77 Utah 184, 292 Pac. 1102 (1930); Borowicz v. Hamann, 193 Wis. 244, 214 N. W. 431 (1927).

40 See (1934) 44 YALE L. J. 320, citing Kennon v. Gilmer, 131 U. S. 22, 33 L. Ed. 110 (1888); Johnson v. Louisville & N. R. R., 204 Ala. 602, 87 So. 158 (1920); Barber v. Maden, 120 Iowa 402, 102 N. W. 120 (1905); Cažell v. Schofield, 319 Mo. 1169, 8 S. W. (2d) 589 (1928); Bourne v. Moore, 77 Utah 184, 292 Pac. 1102 (1930); Borowicz v. Hamann, 193 Wis. 244, 214 N. W. 431 (1927).

41 Also see (1933) 18 IOWA L. REV. 405; (1922) 35 HARV. L. REV. 616; Duke v. St. Louis & S. F. R. R., 172 Fed. 684 (W. D. Ark. 1899); Becker Bros. v. United States, 7 F. (2d) 3 (C. C. A. 2d, 1925); Duke v. Fargo, 158 N. Y.
mittitur will be allowed and, thereafter, the plaintiff's decision as to whether he will accept the privilege of remitting or submit to a new trial. On the other hand, the plaintiff cannot be compelled to submit to a remittitur. He has his election to accept it or submit to a new trial; although, it is held, if he does accept it, he does so unqualifiedly and cannot avail himself of any element of coercion by way of accepting it under protest. In effect, it is the plaintiff who is remitting and not the court. Neither party, after the remittitur, is supposed to have any valid objection to rendering judgment for the residue. The defendant is supposed to have no cause for complaint, because he is supposed to have been benefited by the reduction; and the plaintiff cannot be heard to object, because he has voluntarily submitted to the consequences. About the validity or fallacy of these propositions revolve the principal arguments for and against the practice of allowing remittiturs.

In most of the decisions where validity of the practice has come into question, the inquiry has been simply whether indulgence in

Supp. 1009 (1916); Case v. Yazoo & M. V. R. R., 114 Miss. 21, 74 So. 773 (1917); Bare v. Victoria Coal & Coke Co., 73 W. Va. 632, 80 S. E. 941 (1914).

Where the court has exercised the power the amount of the excess has been free from dispute. The Wichita & Colorado Ry. v. Gibbs, 47 Kan. 274, 27 Pac. 991 (1891) (the proper amount fixed by undisputed evidence); Security Benefit Ass'n v. Kibby, 220 Ky. 330, 295 S. W. 164 (1927) (the proper amount determinable from insurance policy sued on); Mullin v. Gano, 299 Pa. 251, 149 Atl. 488 (1930) (amount determinable by mathematical computation).

41 See citations in preceding note; 46 C. J. 432.

42 Koenigsberger v. Richmond Silver Mining Co., 158 U. S. 41 (1895); Colorado City v. Liare, 28 Colo. 468, 65 Pac. 630 (1901); Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 S. E. 593 (1889) (plaintiff estopped by his consent); Young v. Cowden, 98 Tenn. 577, 40 S. W. 1088 (1897); Lynchburg Telephone Co. v. Booker, 103 Va. 594, 50 S. E. 148 (1905). A remittitur under protest should be rejected by the court. Massadillo v. Nashville, etc. Ry., 39 Tenn. 661, 15 S. W. 445 (1891).

By statute in some states the plaintiff is permitted to accept the remittitur under protest and seek a reinstatement of the verdict in an appellate court, as in Virginia.

"In any action at law in which the trial court shall require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remittitur and acceptance, if under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court of Appeals upon a writ of error awarded the plaintiff as in other actions at law; and in any such case in which a writ of error is awarded the defendant, the judgment of the court in requiring such remittitur may be the subject of review by the Supreme Court of Appeals, regardless of the amount." VA. CODE (1936) § 6335.

There still may be an element of coercion if the amount of the remittitur is so small that prudence would impel the plaintiff to accede to it rather than incur the expense and delay of a new trial or an appeal.
the practice amounts to a denial of the essentials of a jury trial to either of the parties, or, as expressed in a frequently recurring phrase, whether resort to the practice "invades the province of the jury". In how many of these cases, constitutional sanctions not being mentioned, the courts have had in mind merely the common law right to a jury trial, regardless of constitutional guaranties, it is impossible to tell; since, where the common law prevails, jury trial is the normal mode of trial, and, independently of constitutional limitations, a party should not be deprived of it without his consent or statutory alteration of the practice. No doubt in many of the cases the courts have had in mind, although not made articulate, the idea of a jury trial, not only prescribed by the common law as the proper method of trial, but also sanctioned by constitutional provisions. In no few cases, the major inquiry centers directly upon questions of constitutionality. Consequently, an inquiry into the validity of the practice of allowing remittiturs may involve one or both of two major considerations: first, whether resort to the practice violates the common law right to a jury trial; and secondly, if so, whether the violation is of such a nature as to come within the prohibition of constitutional guaranties.

In dealing with the first inquiry, it is perhaps unfortunate to employ such expressions as "invade the province of the jury", because of false implications which may arise. The normal province of the jury is invaded in different ways accepted by the common law or prescribed by statutes in various jurisdictions. The two prominent devices developed and approved by the common law having such an effect are the demurrer to the evidence and the motion to direct a verdict on insufficiency or a preponderance of the evidence. A device developed principally by statute is the practice of rendering judgment non obstante veredicto when a verdict is not supported by the evidence. The question, essentially, is not whether the normal functions of the jury are invaded, but how they are invaded. By the three devices mentioned a decision of the right to recover is taken away from the jury, but the parties are supposed to get the same results out of a decision by the court that they would have got by the verdict of a properly functioning jury in the normal course of procedure. At any rate, whichever way the court decides the case, there is no room for varying the measure

43 This device, although enjoying a more respectable career in recent years, was originally condemned by the Supreme Court of the United States as invading the province of the jury. Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913).
of relief within the bounds of the decision, a determination of the amount of the recovery, where unliquidated damages are involved, being left to the jury. Such is not true where a remittitur is allowed and the court fixes the amount of the recovery in a case where there is no definite measure of damages, as in a personal injury case. The excessive verdict, whatever effect may be conceded to it in other respects, can under no stretch of imagination serve as a measure of the proper amount of recovery, and there is no warranty that the amount fixed by the court will even closely approximate the amount which might legitimately be found by a properly functioning jury on a new trial exercising the large measure of discretion to which it is entitled in such cases. It is believed that failure to recognize distinctions such as these is largely responsible for unwarranted assumptions in many of the arguments advanced to justify the remittitur, some of which will be noted hereinafter. The essential inquiry should be, not whether in the abstract the court has power to modify the normal course of a jury trial, but whether what the court does can be accepted as a comparable substitute for what a properly functioning jury would have done under the same circumstances.

There is not much difficulty in justifying a remittitur in any case so far as the plaintiff’s rights are concerned. The court must already have decided that the verdict is excessive and could not be allowed to stand before the privilege of a remittitur can be offered. In such a case, if the rule were that the law allowed no remittitur, the plaintiff would inevitably suffer the consequences of a new trial. The fact that he is offered the privilege of a remittitur, disregarding possibilities of coercion heretofore noted, does not prevent him from accepting the alternative of a new trial if he so desires. Any rights that he may have had to a new trial are relinquished by consent. The real difficulty (which, strange to say, the courts usually disregard or dispose of summarily) comes when an attempt is made to justify the remittitur, in a case involving unliquidated damages, with respect to the rights of the defendant.

Arguments advanced by the courts and commentators justifying the remittitur in controversial cases have been fairly well summarized in the commentaries quoted below. The first, from the Yale Law Journal, is an excerpt from the only legal periodical

44 See note 42 supra.
45 On the naive assumption that the defendant is benefited by the reduction.
46 (1934) 44 Yale L. J. 318, 320.
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cited in Dimick v. Schiedt. The second, a commentary by Professor Scott of the Harvard Law School, has been taken from a quotation in the Virginia Law Review, where it is said to be "perhaps the best argument sustaining the remittitur". Contrary arguments will be presented in the form of replies to these commentaries.

"The power of the court to determine whether the damages awarded are excessive is said necessarily to imply authority to determine an amount that would not be excessive. Consequently, in giving the plaintiff an option to remit the excess or submit to a new trial, the judge is not usurping the function of the jury by arbitrarily fixing the amount of the recovery, but is merely indicating the greatest amount which could have been allowed to stand. The plaintiff who has voluntarily accepted the remittitur is not prejudiced and therefore cannot later complain of the court's action. The defendant is deprived of no right, and since he is benefitted by the reduction, he cannot object."

"The plaintiff cannot object, for he is precluded by his consent. The defendant should not be allowed to object for he is not compelled to pay more than the jury might properly award and did in fact award. The court is not substituting its judgment for that of the jury; it is not deciding what amount the plaintiff ought to recover; it is merely deciding that a part of what the jury awarded was not an excessive amount."

Referring to the statements in the first two sentences quoted from the Yale Law Journal, it may be admitted that the court has power to determine an amount which is not excessive. Any reason which would incapacitate the court to do this would necessarily create an equal incapacity to determine that the verdict was excessive. But the conclusion that, since the court has power to determine what is the minimum excess, therefore it may fix the amount of the residue without usurping a function of the jury,

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47 293 U. S. 474 (1935), at page 490 of the dissenting opinion.
48 SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW (1922) 122.
49 (1935) 21 Va. L. Rev. 666, 672.
50 Citing Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 74 (1888).
51 Citing Florida East Coast Ry. v. Hayes, 67 Fla. 101, 64 So. 504, 506 (1914).
53 Citing Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 74 (1888); Boyer v. Auduiza, 90 Ore. 163, 175 Pac. 853 (1918); Weatherspoon v. Stackland, 127 Ore. 450, 271 Pac. 741 (1928).
does not follow. Particularly would the conclusion not follow if, as suggested by the commentator, the residue were fixed at "the greatest amount which could have been allowed to stand". Such a practice would deprive the plaintiff of any substantial ground for complaint, if any justification other than his consent were necessary, but it would not help the defendant. So far as the defendant is concerned, it makes no difference whether the statement which says that "the judge is not usurping the function of the jury" refers to the jury which found the excessive verdict or to a jury in the abstract. It is idle to contemplate usurping the function of the jury which found the excessive verdict, because it did not function as a proper jury; and there is no way to tell to what extent the result of the court's action allowing the remittitur would approximate the result of a new trial with a properly functioning jury.

The final statement in the Yale commentary to the effect that the defendant cannot object, "since he is benefitted by the reduction", rests wholly on assumption. The statement would be true if it could be assumed that the only way to relieve the defendant from the consequences of an excessive verdict would be to reduce the amount of the verdict, but such an assumption overlooks the possibilities inherent in a new trial. The defendant can be considered benefited by the reduction only on the assumption that he could not have a new trial; or that, if a new trial were granted, he would not ultimately be found liable for an amount still less than the amount of the residue fixed by the court. If the amount of the verdict should be reduced to the minimum which the court would permit to stand, as under the Wisconsin practice, then it could truly be said that the defendant had benefited by the reduction.

Although the subtlety of the argument in Professor Scott's commentary must be conceded, its validity may be questioned in the light of analysis. He says "The defendant should not be allowed to object for he is not compelled to pay more than the jury might properly award and did in fact award". It will be noted that this statement relies on two factors to justify the remittitur: (1) that the jury might properly have found the amount fixed by the remittitur; and (2) that the jury actually did award that amount.

With all deference, it is submitted that error in the excessive verdict cannot be cured by selecting for the basis of a remittitur
any specific amount, within the limits of toleration, and assuming that the defendant may be compelled to accept that amount without valid ground for objection, merely because the jury might have found the same amount. The jury, functioning properly, might have found that amount, but it also might, to the advantage of the defendant, have found many different less amounts; and so might another jury functioning properly on a new trial.

Again with all deference, it is submitted that to assume that the jury found the reduced amount, merely because it found a larger amount from which the reduced amount could be subtracted, is to make a false application of the mathematical formula that the whole includes the part. The amount is divisible, but there is only one verdict and it, as a verdict, is not divisible. If the jury in any proper sense found the amount fixed by the remittitur, it also in the same sense, with equal effect, found numerous other less amounts, any one of which might have been selected by the court as the basis for a remittitur, or might be found by a properly functioning jury on a new trial. When the court is compelled to select the amount which the jury could properly have found, because the jury itself has proved an unreliable finder of amounts, it would seem to be reasoning somewhat in a circle to say that the court can resort to anything that the jury did to justify the amount fixed by the court. In truth, the jury has found only one amount—the amount which it thinks the defendant ought to pay, if not what it thinks the plaintiff is entitled to recover. The mere fact that this amount is mathematically divisible or separable into different amounts does not establish that the verdict itself is divisible into separate verdicts. If the jury had actually found, as a measure of recovery, that the plaintiff was entitled to recover the reduced amount, its verdict would have been for that amount without the excess. In finding the excessive verdict, the jury has in no sense furnished a scale for measurement of a proper amount of recovery. It has merely driven two stakes, one of them entirely beyond the bounds of the premises to be measured. The amount fixed by the court could have been determined as easily if the jury had found no verdict at all.

What has been said may serve as a reply to the statement that the court is not substituting its judgment for that of the jury. It remains to give attention to the statement that the court is not deciding what amount the plaintiff ought to recover; it is merely
deciding that a part of what the jury awarded was not an excessive amount."

First, it is said that the court does not decide "what amount the plaintiff ought to recover". But surely somebody must decide this, if there is to be any pretense of doing justice; if not the court, then necessarily the jury. There does not, however, seem to be any implication throughout the whole commentary that the jury has performed this function. Even if it is true, in accord with the theory of prior statements made by the commentator, that the jury has found various separable amounts within the range of toleration, some one of which might have been selected by it as the proper measure of recovery, the jury has made no such selection. The only amount designated by it is excessive and does not decide what amount the plaintiff ought to have.

It is further said that all the court does in allowing a remittitur is to decide "that a part of what the jury awarded was not an excessive amount". But this amount might be the maximum amount which any jury could properly find. It is not necessarily, nor likely, the amount which a properly functioning jury would find on a new trial, nor even the amount which the court thinks the plaintiff ought to have, if, in the words of the commentator, the court does not decide "what amount the plaintiff ought to recover". In brief, the jury has found an excessive amount and the court has fixed an amount which is not excessive, but nobody has undertaken to decide what the plaintiff really ought to have.54

In some jurisdictions the defendant, in effect, is told to be satisfied with the consequences of a remittitur because his lot might have been worse. The trial court has an absolute discretion as to whether it will grant or refuse a new trial because of an excessive verdict.55 The practice of allowing a remittitur without the defendant's consent is justified on the theory that he can have no ground for complaint, because the court in any event has absolute power to render judgment against him on the excessive verdict and, being unable to seek appellate relief, he would have to abide the consequences.56 This may be a neat formula for telling the defendant to keep his mouth shut; but, if the practice of granting

54 See (1935) 21 VA. L. REV. 666, and (1934) 32 Mich. L. Rev. 538, opposing the theories on which the Yale and Scott arguments are based. Also see (1934) 48 Harv. L. Rev. 333.
55 This has been the rule in the federal courts. See Dimick v. Schiedt, 293 U.S. 474, 489 (1935).
new trials, even under the hazard of the court’s absolute discretion, is recognized at all as a method of relieving the defendant from the consequences of an excessive verdict, it would seem to be something a little short of justice and consistency to tell the defendant that he is entitled to a new trial because the jury has not treated him fairly, and then to tell him that he must forego the privilege because the court and the plaintiff have agreed upon a scheme for disposing of the case without the aid of a jury. 57

No doubt the courts and the commentators are impelled to a preference for the remittitur principally by a desire to end litigation and avoid the undesirable consequences of a new trial; but it may be suspected, particularly because of the liberties that are taken with verdicts and the artificial arguments that are advanced in justification thereof, that there is at least a subconscious tendency to look upon determination of the amount of the recovery as in some degree an inconsequential element of the litigation, and so to be taken away from the jury and treated arbitrarily in order to dispose of the case. If there is such a tendency, it is justified neither by the law nor by proper consideration for the rights of the parties. Determination of the quantum of damages has always been considered peculiarly a function of the jury. This fact is particularly revealed when something has happened in the course of the litigation to separate the determination of liability from determination of the amount of the recovery. When the right to recover has been determined by a default, by nil dicit, or by the court on a demurrer to the evidence or a motion to direct a verdict, if the claim is unliquidated, determination of the amount of the damages is left to the jury. 58 Under the original common law practice, the court did not even officiate at the execution of a writ of inquiry, the jury performing its functions under supervision of the sheriff. 59 So far as interests of the parties are concerned, a proper determination of the amount of the recovery is frequently of much more importance than a determination of the right to recover. Considering all these facts, it should not seem surprising that deter-

57 See (1935) 21 Va. L. Rev. 671-2, attacking the soundness of the practice by way of demonstrating that the court’s absolute discretion is applicable only to the extent of determining whether there ought to be a new trial, and not to a determination of the proper course of procedure after it has been decided that a new trial ought to be granted.
59 Idem, page 300.
mination of the amount of the recovery has been held to be a part of the jury trial guaranteed by the constitutions.60

Most courts find no difficulty in recognizing constitutionality of the practice of allowing remittiturs when the claim in litigation is by its nature definite and fixed in amount, or where the proper amount of recovery can definitely be determined under fixed rules of law on principles hereinbefore noted. The real controversy arises in cases where no definite standards fix the amount of the recovery and a determination thereof lies largely within the discretion of the jury.

Since determination of the amount of the recovery is considered a part of the jury trial guaranteed by the constitutions, it would seem surprising that in so many of the decisions discussing the propriety of the remittitur as affecting the functions of the jury the question of constitutionality is not expressly considered. For example, it seems strange to observe that the Supreme Court of the United States, under one of the few constitutions which most emphatically guarantee the right to jury trial, in its earlier decisions approving remittiturs, disposed of questions of propriety without referring to the Constitution;61 and that the West Virginia Supreme Court, under similar constitutional provisions, has pursued a like course throughout the whole series of its decisions. In such cases determination of propriety of the practice is permitted to rest upon an inquiry merely as to whether allowing the remittitur interferes with the essential processes of a common law jury trial. Of course, if this question is answered in the negative, as it is in most jurisdictions, it would be superfluous to inquire into the effect of constitutional provisions.

The provisions in the Seventh Amendment to the Federal Constitution regulating the right to jury trial apply only to cases in the federal courts.62 Practically all state constitutions, some more emphatically than others, contain provisions for preservation of the right to jury trial;63 but only a few have provisions for the purpose of preserving the fruits of the trial after it has culminated in a verdict.64 A minority of the state constitutions and the Federal

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60 Hickman v. Baltimore & Ohio R. R., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455 (1887).
63 For a list of some of the provisions, see (1935) 21 VA. L. Rev. 675.
64 Only those of Oregon and West Virginia are listed in (1934) 44 YALE L. J. 325, as additional to the Federal Constitution.
Constitution, perhaps on the assumption that a party may get little benefit from a jury trial if the court has power to meddle with the result, have undertaken expressly to safeguard the verdict. The provision in the Federal Constitution will serve as an example.

"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." \(^5\)

The right to jury trial contemplated and intended to be preserved must necessarily refer to the mode of jury trial prevailing in any particular jurisdiction at the time when its constitution was adopted. Consequently, it is held that the jury trial guaranteed by the Federal Constitution is that which prevailed in England in 1791,\(^6\) and the jury trial mentioned in a state constitution must be that which prevailed in the state at the time when its constitution was adopted.\(^7\)

It is conceded in the majority opinion in *Dimick v. Schiedt*,\(^8\) which presents the most comprehensive judicial review of the subject, that the practice of allowing remittiturs was not unknown to the common law of England prior to adoption of the Federal Constitution, but doubt is expressed as to whether sufficient precedents existed at that time to give it recognition as a method of interfering with the verdict of a jury in a case involving unliquidated damages. Cases in the state courts, where the question of constitutionality is considered at all, usually do not undertake to define the status of jury trial, historically or otherwise; but merely discuss the attributes of jury trial as a process assumed to be understood, and reach the conclusion that a remittitur is or is not proper in a given case, depending upon the preference given to arguments hereinbefore noted as to the proper limits of the practice.

The common law which is prescribed as limiting methods of re-examination is understood to be the common law which prevailed in the jurisdiction at the time when the constitution was adopted;\(^9\) and it seems to be conceded that a new trial was the only method of review recognized by the common law at the time when the

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\(^5\) U. S. Const., Seventh Amendment.


\(^7\) *Hickman v. Baltimore & Ohio R. R.*, 30 W. Va. 296, 301, 4 S. E. 654, 7 S. E. 455 (1887); *Campbell v. Sutliff*, 193 Wis. 370, 214 N. W. 374 (1927).

\(^8\) Note 66 *supra*.

Federal Constitution was adopted. Whether, after all, allowing a remittitur amounts to re-examination of a fact found by a jury is a question to be determined by the extent to which it substitutes the judgment of the court for that of the jury; a controversial matter to be settled on the basis of considerations hereinbefore set forth.

The most ambitious judicial effort to sustain the remittitur against arguments of unconstitutionality perhaps will be found in the dissenting opinion to *Dimick v. Schiedt.* The arguments for constitutionality would not seem to be very satisfying for those who desire a settlement of the controversy on a logical basis. Where the effort is not directed at a demonstration that allowing the remittitur does not invade the province of the jury, it is mostly based on the practical expediency of indulging in a practice that will avoid new trials, and on generalities extolling progress and condemning reliance on precedents. Attention is called to the federal rule of practice giving the trial judge an absolute discretion in the matter of granting a new trial because of an excessive verdict. What are supposed to be analogous instances of interfering with the normal course of jury trial are noted, such as aiding the jury with findings by auditors, and supplementing the general verdict with special findings on interrogatories, devices which have been approved by the courts as not infringing the jury’s constitutional prerogatives; but there is a failure to note that, in spite (or rather in pursuance) of these devices, the court after all enters judgment on a definite finding by the jury, whether general or special, and not on an amount found by the auditor or fixed by the court. The conventional generalities, that the common law must grow and constitutions must be elastic, the *res gestae* of those who find it necessary to take refuge in generalities, are mentioned. It is said that the Constitution should not be construed ‘as intended to perpetuate in changeless form the minutiae of trial practice as it existed in the English courts in 1791’; and that the Seventh Amendment to the Federal Constitution was intended merely ‘to preserve the essentials of jury trial.’ This statement apparently is an echo from prior statements made by courts and commentators with reference to the Seventh Amendment, such as ‘its aim is not to

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10 Or a *venire facias de novo,* which amounts to the same thing. See Parsons v. Bedford, 3 Pet. 433, 447-8, 7 L. Ed. 723 (U. S. 1830), cited and quoted in (1935) 21 VA. L. Rev. 667. Also see (1934) 33 Mich. L. Rev. 139. Of course the contention of those favoring the remittitur is that its allowance does not amount to any substantial re-examination of the verdict.


12 *Idem,* 491.
preserve mere matters of form and procedure but substance of
right”;73 or “This purpose the Supreme Court has repeatedly held
to be the preservation of the substance of trial by jury, not the
traditional forms of procedure.”74

Perhaps nobody will quarrel with these abstractions, so long
as they receive proper application and are not resorted to as a
procedural res gestae; but to undertake to apply them to solution
of the problem at hand is a different thing. If the result of the
verdict (in the present case the amount) is not a matter of sub-
stance, it may very well be asked, What constitutes the substance
of a jury trial? What interest any party can have in a jury trial,
except on the expectation of a jury determination of his rights or
liabilities, is difficult to imagine.

Some commentators seem to assume that the re-examination
problem presents no difficulties in the majority of states,76 where
there is no re-examination clause in the constitutions.78 But, while
absence of the provision may lend assistance to arguments in favor
of constitutionality, it seems too much to assume that it disposes
of arguments to the contrary. That a party should be entitled to
a proper result determined by a jury trial would seem to be in-
herent in his right to a jury trial. The result, and not “the
minutiae of trial practice”, is what is important to him. If his
right to a jury trial can be disposed of by going through the
formalities of a trial with an improperly functioning jury, then
throwing away the result and letting the court have a hand, the
constitutional guaranty of the right may have little efficacy.77

The Additur.

There is not much to be said about the additur which has not
already been said about the remittitur. So far as encroaching
upon the right to a jury trial, or violating constitutional sanctions,
is concerned, there is essentially no distinction between them. On
a proper analysis the two will be found to be on a par in these

73 Quoted in (1935) 21 VA. L. Rev. 668, citing Walker v. New Mexico &
So. Pac. R. R., 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837 (1897); Gasoline
Products Co. v. Champlin Refining Co., 283 U. S. 494, 51 S. Ct. 513, 75 L.
Ed. 1188 (1913).

74 (1934) 44 YALE L. J. 324, citing the same cases.
76 See (1935) 21 VA. L. Rev. 675; (1934) 44 YALE L. J. 324-5.
77 See note 64 supra.
78 ‘‘Furthermore—and this is of great importance—the constitutional
right is not merely to trial by one jury, but by a properly functioning jury,
acting in obedience to the instructions of the court, and mindful of the law
respects. An inadequate amount of unliquidated damages found by a jury and increased by an additur represents just as truly the verdict of the jury as an excessive amount reduced by a remittitur. In neither case is judgment entered for the amount found by the jury, and in both cases the judgment of the court is equally substituted for that of the jury. The only circumstance that should tempt anybody to make a distinction between the two is the fact that the remittitur, clothed deceptively in a garb of respectability, is subject, on the basis of a false analysis, to an illusory justification; while the additur, free from deception, stands exposed in its true light. Consequently, there is no substantial reason why the additur should not be used in the same situations in which the remittitur is used in the same jurisdiction: e.g., when the claim in litigation is fixed and certain; when the amount of the deficiency can be determined by fixed rules of law; or even when the damages are wholly unliquidated and uncertain, depending in each case upon the policy of the court respecting remittiturs in a similar situation. In fact, opportunity for application of the additur may be even broader, owing to the fact that the defendant, and not the plaintiff, is the party who consents to an additur. As hereinbefore noted, it is not proper to impose the consequences of a remittitur upon the defendant in a case where it appears that the same motive or misapprehension on the part of the jury which is responsible for the excessive amount likewise affected the decision of liability, as where the jury is motivated by passion and prejudice. The propriety of allowing an additur is not affected by such a circumstance, since the defendant, by consenting to the additur, concedes liability.

However, no intimation is intended that the additur has enjoyed such a comprehensive usage in practice. In fact (whether deterred by the illusory distinction before mentioned and which will be discussed later, or for other reasons), the courts have made very little use of additurs, and where they have been used, it is


79 In two personal injury cases an additur was granted on the theory that an additur and a remittitur are equally proper procedural devices. Gaffney v. Illingsworth, 90 N. J. L. 490, 101 Atl. 243 (1917); Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924). In American Railway Express Co. v. Bender, 20 Ohio App. 436, 152 N. E. 197 (1926), the court by way of dictum implies approval of the same theory.

Apparently the practice has been so seldom attempted in the trial courts that the appellate courts have had little opportunity to deal with its propriety.
generally only in cases where the amount of the increase can definitely be determined, a unique exception being the practice in Wisconsin, where an additur may be allowed in a case where the measure of damages is uncertain, provided the defendant consents to such an increase that a further increase would warrant the court in setting aside a verdict for the same amount as excessive—a practice adopted to insure that the plaintiff shall have no ground for complaint that he has been deprived of the fruits of a proper jury trial.

Although the federal decisions have had much influence in establishing and maintaining the practice of allowing remittiturs in unliquidated damage cases, it was not until 1934 that the question of allowing an additur in such a case came before the Supreme Court of the United States for decision, in the case of *Dimick v. Schiedt*. Since this case illustrates the only rational process employed, within the observation of the writer, in an attempt to differentiate the remittitur and the additur, it is worthy of particular attention.

The plaintiff sued the defendant in a federal district court to

Two cases where it was definitely disapproved are City of Grand Rapids v. Coit, 149 Mich. 668, 113 N. W. 362 (1907); Bradwell v. Pittsburgh & W. E. Ry., 159 Pa. 494, 20 Atl. 1046 (1891).

Where the jury has found for the defendant the court cannot fix an amount and render judgment thereon for the plaintiff, because the jury has found the issue on liability against plaintiff. Werner v. Bryden, 84 Cal. App. 472, 258 Pac. 138 (1927); Goldsmith v. Detroit, J. & C. Ry., 165 Mich. 177, 130 N. E. 647 (1911); Shanahan v. Boston & Northern St. Ry., 193 Mass. 412, 79 N. E. 751 (1907). *Contra:* Stagg v. Broadway Garage Co., 87 Mont. 254, 286 Pac. 415 (1930), where the jury found for the defendant, who admitted that the plaintiff was entitled to recover $9.50.

In most of the cases the jury had failed to allow definitely calculable interest, as in Marsh v. Kendall, 65 Kan. 48, 68 Pac. 1070 (1902); Fall v. Tucker, 113 Kan. 713, 216 Pac. 283 (1923); Collins v. Carter, 155 Miss. 600, 125 So. 89 (1929); Calmon v. Fidelity-Phenix Fire Ins. Co., 114 Neb. 194, 206 N. W. 765 (1925); McAfee v. Dix, 101 App. Div. 69, 91 N. Y. Supp. 464 (1905); Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. 123 (1890); or calculated interest at an improper rate, as in Carr v. Miner, 42 Ill. 179 (1866). Other miscellaneous cases where the deficiency was definitely calculable are E. Tris Napier Co. v. Glass, 150 Ga. 561, 104 S. E. 230 (1920); James v. Morey, 44 Ill. 352 (1887); Clark v. Henshaw Motor Co., 246 Mass. 386, 140 N. E. 593 (1923). In Apperson-Lee Motor Co. v. Ring, 150 Va. 283, 143 S. E. 694 (1928), in effect an additur was allowed to fix the amount of damages to an automobile at an amount conceded by the defendant; but the verdict for a less amount was set aside and judgment rendered in pursuance of a statute.

Many of the cases cited in this and the preceding note are cited in (1935) 21 Va. L. Rev. 674-5, and (1934) 44 Yale L. J. 325, where, and in 46 C. J. 425, additional cases of less significance will be found.

*Reuter v. Hickman, Lauson & Diener Co., 160 Wis. 284, 151 N. W. 795 (1915).*

*2293 U. S. 474 (1935).*
recover damages for personal injuries. The jury returned a verdict for $500.00, which the court, on the plaintiff's motion for a new trial, deemed inadequate. The court ordered a new trial, on condition that the defendant should refuse to consent to an additur of $1000.00. The defendant consented and judgment was rendered for $1500.00. The plaintiff appealed. The judgment was reversed in the circuit court of appeals by a majority of the court, on the ground that the additur was improper. The defendant appealed to the Supreme Court, where the decision of the circuit court of appeals disapproving the additur was affirmed, by a five to four decision.

The majority opinion in the Supreme Court decision enters into a historical review of the additur, as well as the remittitur, finding no precedent for the additur prior to 1791 except an analogous practice in actions for mayhem, where the court, upon viewing the wound (super visum vulneris), might award an extra recovery. It is emphasized that this practice was not the modern practice of allowing an additur, because the additional amount was awarded absolutely and not as alternative to ordering a new trial, the practice of granting new trials being in fact unknown at that time; nor was the increase conditioned on consent of the defendant. Moreover, it is noted, this ancient practice had been abandoned by the English courts long prior to 1791.

It seems rather plain, from the general purport of the opinion, that the majority would have preferred to have disapproved the additur on principles that would equally have condemned the remittitur; but, feeling that the remittitur had become too firmly established by prior decisions to be disturbed, found it necessary to resort to a differentiation. The following quotation presents the rationale of the attempt.

"Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court found that the damages awarded by the jury were so inadequate as to entitle the plaintiff to a new trial, how can it be

83 70 F. (2d) 558 (O. C. A. 1st, 1934).
held, with any semblance of reason, that the court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To hold so is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'

It is obvious that the majority, in order to justify the attempted differentiation, has adopted the theory which Professor Scott, in the commentary hereinbefore quoted, urged to support the propriety of a remittitur; and, in so doing, has in effect lent formal approval to the practice—which the whole tenor of its opinion shows that its conscience repudiates.

The minority undertakes to justify the additur by demonstrating the propriety of a remittitur (advancing the arguments hereinbefore noted in discussion of the remittitur) and insisting that, since the two are similar in principle, they are equally justified.

"In neither does the jury return a verdict for the amount actually recovered, and in both the amount of the recovery is fixed, not by the verdict, but by the consent of the party resisting the motion for a new trial."

Here the minority, confronted with its own dilemma, but recognizing the paramount urgency of invalidating the attempted differentiation, has neatly stated the argument of those who contend that there is no justification for either the remittitur or the additur in such cases, although it stoutly insists that both are proper. To complicate matters further, it will be noted that to insist that the remittitur and the additur are similar in principle and equally appropriate and justifiable must amount to abandonment of what has been said to be the best argument in favor of the remittitur—Professor Scott's argument that the jury has actually found the residue resulting from the remittitur, on the theory that the verdict includes its parts. Obviously such a mode of reasoning could not be applied to an additur. Consequently, some other ground for justification must be sought which will apply equally to the re-

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84 Dimick v. Schiedt, 293 U. S. 474, 486.
85 See notes 48 and 49 supra.
86 Dimick v. Schiedt, 293 U. S. 474, 494.
87 See note 49 supra.
88 See notes 48 and 49 supra.
mittitur and the additur, if their similarity in principle is to be accepted.

The commentators seem to be agreed that the minority is correct in rejecting the validity of the majority’s attempted differentiation, although it does not follow that either is correct in approval of the remittitur or the additur. In neither case has the amount fixed by the court been found as the verdict of a jury. The deception in the attempted differentiation arises because this fact is obvious in the case of an additur, but in the case of a remittitur may be obscured in a haze of abstract mathematics which has nothing to do with a true solution of what the jury actually decided. The result must be, however regretful to state, that, as contended by the minority, the court, in fixing the amount of a remittitur or an additur, where the damages are unliquidated, simply abandons the verdict of the jury and, looking to the evidence, finds (or at least fixes) the amount which the plaintiff may recover. The word “may” is used advisedly, because no jury has decided what the amount of the recovery ought to be; and, depending upon the jurisdiction, the court may not attempt to do so, however important it may seem for somebody to perform this function if justice is to be done.

Remittiturs and Additurs in West Virginia.

A topic discussing the additur under the West Virginia law would be equivalent to Dean Wigmore’s suggested chapter on the ophidians in Ireland: there is simply nothing to discuss. If the practice has ever been attempted in this state, there is nothing in the decisions to indicate that the Supreme Court has ever been called upon to decide its propriety. The remittitur has come up for discussion in some two dozen cases.

The West Virginia decisions have consistently adhered to the minority rule, the court refusing to allow a remittitur where the amount of damages recoverable is measureable by no definite standard and the amount of the excess is equally indeterminable.

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89 See note 78 supra.
90 Depending upon the jurisdiction, the amount may be fixed at the highest or the lowest amount which would be tolerated in a verdict.
91 Vinal v. Core, 18 W. Va. 1 (1881) (malicious prosecution, remittitur allowed by trial court disapproved, but verdict held not excessive); Unfried v. Baltimore & O. R. R., 34 W. Va. 260, 12 S. E. 512 (1890) (personal injuries); Rodgers v. Bailey, 68 W. Va. 186, 69 S. E. 698 (1910) (action by wife for selling intoxicants to husband); Hall v. The Philadelphia Co., 74 W. Va. 172, 81 S. E. 727 (1914) (personal damages from breach of contract); Lutz v. City of Charleston, 76 W. Va. 657, 86 S. E. 561 (1915) (tort, casting water on
It is said that a remittitur is not proper except where the amount of the excess is ascertainable by the "nature of the case in issue," or by "application of settled rules of law to the evidence"; and that there must be "findings of fact by the jury justifying it," or data before the court upon which it may be estimated. The "data", it is said, must be such that "the court can ascertain the exact amount of the excess." The usual source of data is the evidence, although other elements of the trial may be considered. But even in a personal injury case, a remittitur may be allowed if it is possible by the record to ascertain and eliminate an excess due to inclusion of an illegal element of damage. Where justification of the rule adhered to by the court is stated, the rule is justified on the ground that to permit a contrary practice would amount to substituting the judgment of the court for that of the jury, and so allow the court to assume the functions of the jury.

The West Virginia Supreme Court has not been unaware of the fact that it adheres to a minority rule, and in some instances has followed the rule with reluctance. In one of the earlier cases Judge Brannon, resorting to the familiar arguments of other jurisdictions, expressed a preference for the majority rule.


Clark v. Lee, 76 W. Va. 144, 85 S. E. 64 (1915).


For example, the instructions. McCallam v. Hope Natural Gas Co., 93 W. Va. 426, 117 S. E. 148 (1923).

Idem. In this case an infant sued for personal injuries. The declaration claimed $500.00 for doctor's bills. The court instructed the jury that it might include this item in its verdict. The Supreme Court held this an illegal element of damages, the father being liable for the infant's medical expenses. The plaintiff was allowed to remit $500.00, the largest amount that the jury might have found under the instruction.


"My opinion is that not only in actions for damages based on contract, or for civil injuries, where the law furnishes rules and principles for measuring damages, but also in actions based on tort, though the law does not furnish such rules and principles, but the amount of damages rests with fair, impartial, and enlightened conscience of a jury, on a motion for a new trial the court may suggest or accept a less sum, and if the plaintiff accepts it, overrule the defendant’s motion for a new trial. The authorities are somewhat divided. Earlier authorities denied the proposition, perhaps, but later ones uphold it, and the great and decided preponderance of the highest authorities sustains it, to the ends of the exercise of the court of a salutary power over verdicts, and especially to end litigation."\(^{101}\)

In a later decision,\(^{102}\) where the action was to recover damages for personal injuries, Judge Williams expressed an inclination to follow the earlier views expressed by Judge Brannon, but considered the court committed to a contrary policy by precedents.

"In Ohio River R. R. Co. v. Blake, 38 W. Va., at page 724, Judge Brannon expresses doubt concerning the propriety of the rule, saying it is against the weight of authority, especially the modern decisions, and he cites numerous cases, holding that the court can thus compel a plaintiff to remit a portion of his damages when determined by it to be excessive. If the point were one of first impression, I would be inclined to hold with Judge Brannon. But, in view of the many decisions by this court, following the rule, I feel bound by them."\(^{103}\)

In apparently the first case in which a remittitur was approved in this state, it was allowed, even after judgment had been entered on the verdict, to reduce the amount of the recovery to the amount of damages alleged in the declaration.\(^{104}\) Although this was an action to recover damages for breach of a contract, there is no reason why the court would not have applied the same rule in any tort action for the recovery of damages, since the amount of the excess is definitely ascertainable by application of a fixed legal rule. A remittitur under such circumstances is now prescribed by statute.\(^{105}\)

In cases where the court has had a definite guide for the purpose of ascertaining the excess, it has been liberal in its application

\(^{101}\) Idem, 724.


\(^{103}\) Idem, 150.


of the minority rule. A remittitur has been approved where the amount of the excess could be determined from the nature of the claim in action;\textsuperscript{106} where, in a condemnation case, the court had data before it based on the evidence for a proper determination of the value of property taken and damaged;\textsuperscript{107} where the excess was ascertainable by legal construction of the contract sued upon;\textsuperscript{108} where the amount of an improper element of damage was fixed by uncontradicted evidence;\textsuperscript{109} where the jury’s answers to interrogatories fixed the amount of improper elements included in the general verdict;\textsuperscript{110} where the excess was ascertainable from items of account established by the evidence;\textsuperscript{111} where an excess of interest was due to calculation from an improper date, and the proper date was fixed by legal principles;\textsuperscript{112} where it appeared from the evidence that calculation of the amount of recovery for personal services was based on a wrong legal theory, and the proper amount could be determined by application of true legal principles to the evidence;\textsuperscript{113} where the amount of a legally invalid claim was distinguishable from the amount awarded for valid claims.\textsuperscript{114}

In all these cases but one,\textsuperscript{115} the action was a contract action, where situations warranting a remittitur are peculiarly apt to develop; but in spite of general statements therein which might be taken to the contrary, it evidently is not the policy of the court to restrict the practice to contract actions. As heretofore noted, a remittitur has been allowed even in a personal injury case where, although the measure of recoverable damages was indefinite, the amount of an illegal excess was definitely ascertainable.\textsuperscript{116}

On the other hand, general statements in the cases that might be understood as implying that a remittitur is proper in all contract


\textsuperscript{107} Ohio River R. R. v. Blake, 38 W. Va. 718, 18 S. E. 957 (1894).

\textsuperscript{108} Roberts v. Bettman, 45 W. Va. 143, 30 S. E. 95 (1898).

\textsuperscript{109} Chapman v. Beltz, 48 W. Va. 1, 35 S. E. 1013 (1900).

\textsuperscript{110} Bare v. Victoria Coal & Coke Co., 72 W. Va. 632, 89 S. E. 941 (1914).

\textsuperscript{111} Clark v. Lee, 76 W. Va. 144, 85 S. E. 64 (1915).

\textsuperscript{112} Millan v. Bartlett, 78 W. Va. 367, 89 S. E. 711 (1916).

\textsuperscript{113} Taylor v. Sturm Lumber Co., 90 W. Va. 530, 111 S. E. 481 (1922).

\textsuperscript{114} Southern Billiard Supply Co. v. Lopinsky, 93 W. Va. 214, 116 S. E. 253 (1923).

\textsuperscript{115} Ohio River R. R. v. Blake, 38 W. Va. 718, 18 S. E. 957 (1894) (condemnation proceeding).

\textsuperscript{116} McCallam v. Hope Natural Gas Co., 93 W. Va. 426, 117 S. E. 148 (1923), note 98 supra.
actions should not be interpreted literally. In one case a remittitur was refused in a contract action, because there were "no data in the evidence" upon which the amount of the excess could be ascertained.

No decision is found adjudicating the effect of passion and prejudice, although Judge Brannon, by way of dictum, indicates a preference for the more flexible rule, that possibility of a remittitur should not be considered barred by passion and prejudice where it appears that only the amount of the recovery was affected thereby.

"Some of the cases admit a qualification in this: that where, in cases of tort, the amount of damages found by a jury is so enormous as to give evidence of prejudice, passion or corruption in the jury, the verdict ought to be set aside, and a new trial granted, without allowing a remittitur of part, and this because if such bad influences operated in producing the unjust verdict, so it likely operated upon the jury in passing on other matters in the case. Lowenthal v. Streng, 90 Ill. 74; Stafford v. Hair Cloth Co., 2 Cliff. 82. There is force in this view, and yet why should not those other matters stand on their own merits? If there was no issue, and only the quantum of damages to be passed on by the jury, or if, where there are other issues, and the finding as to them is plainly right, why should not a remittitur be allowed? True, in cases where the case is nicely balanced, or involving credibility of witnesses, it would seem proper to apply this qualification; but that is only to say that this action is within the discretion of the court, and this question only an element in its exercise, and it can refuse a remittitur when it thinks bad influences may have tainted the findings on other matters; for the allowance or disallowance of a remittitur is within the sound discretion of the trial court, and its refusal to allow it would not, as I think, be ground for reversal."

The statements in the dicta quoted above constitute the only instance noted where the Supreme Court has discussed discretion in the trial court to permit or refuse a remittitur in cases where circumstances are such as to permit a choice between a remittitur and a new trial. Some cases have been reversed because of excessive verdicts, with directions to the trial courts to offer the privilege of a remittitur, but in each of these cases propriety of the remittitur was plainly apparent and possibility of a discretion in the trial

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118 Hall v. The Philadelphia Co., 74 W. Va. 172, 81 S. E. 727 (1914).
court, on a remanding of the case, to make a choice between a remittitur and a new trial was not discussed. The typical cases in other jurisdictions calling for exercise of the trial court's discretion are cases involving unliquidated damages, a class of cases in which remittiturs ordinarily are not allowed in West Virginia.

In the majority of cases, although the point seems never to have come up for express adjudication, it appears to have been assumed that it is the duty of the trial court, when a remittitur is proper, of its own accord to offer the plaintiff an opportunity to remit before ordering a new trial. In only one case does it appear to be assumed that the trial court was warranted in ordering a new trial when a remittitur was proper because the plaintiff failed to claim the privilege on his own initiative. Most of the decisions are emphatic in the assertion that, even in cases where a remittitur is plainly proper, a remittitur cannot be forced on the plaintiff, and the court cannot arbitrarily reduce the amount. Only one case is found where the court "amended" the verdict and entered judgment, apparently without consent of the plaintiff; and this was a case where there was no dispute as to the facts and the excess was ascertainable by arithmetical computation controlled by "a pure question of law".

In most cases where a judgment on an excessive verdict is reversed in the Supreme Court and a remittitur is deemed proper, the case is remanded to the trial court, with directions to permit the plaintiff to accept a remittitur or submit to a new trial, without comment as to the possibility of entering judgment above on a proper residue. The typical practice seems to be that prescribed in Taylor v. Sturm Lumber Company, as follows.


121 See same citations.


125 See cases cited in notes 106-114.

126 90 W. Va. 530, 111 S. E. 481 (1922).
"If the jury, in assessing damages, allows too much by a sum definitely ascertainable as to amount, from the evidence, by reason of the adoption of a legally erroneous basis of estimate and allowance, it is the duty of the trial court, on the motion for a new trial, to put the plaintiff to his election as to whether he will remit the excessive sum included in the verdict or suffer the verdict to be set aside; and, if this duty is omitted by such court and judgment rendered on the verdict, the appellate court will reverse the judgment, without disturbance of the verdict, and remand the case for proper action by the trial court, on the verdict."

In one case this practice was followed because the items of account involved could "be more readily and safely ascertained in the court below, with the assistance of counsel", than in the appellate court. However, in two cases the plaintiff was permitted to make his election in the appellate court and take judgment there for a residue fixed by it.

As hereinbefore noted, the West Virginia court has never considered the propriety of allowing a remittitur in the light of constitutional provisions guaranteeing the right to a jury trial. If it should be found necessary, at some time in the future, to appraise the effect of constitutional guaranties, on a question of shifting to a more liberal rule in the use of remittiturs, or of adopting the additur, it is pertinent to note that our constitution is one of the minority of constitutions which, like the Federal Constitution, have the most emphatic provisions for preservation of the right to jury trial.

"In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law."

It should also be noted that in this state a trial court does not have an absolute discretion, as do the federal courts, to grant or refuse a new trial when a verdict is excessive. A statute in this state provides that a writ of error may be granted when a verdict is either excessive or inadequate. Hence one of the considerations

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127 Clark v. Lee, 76 W. Va. 144, 85 S. E. 64 (1915).
130 W. VA. REV. CODE (1931) c. 56, art, 6, § 38.
which has been chiefly relied upon by the federal courts to justify
remittiturs in unliquidated damage cases will have no force in West
Virginia.

Conclusion.

What has been said in this discussion is in no sense intended
to indicate a personal preference for the practice which limits the
use of either the remittitur or the additur. The object has been to
seek the truth, however unpalatable. It is believed that no legal
approach can be justified which evades realities and leads to in-
consistencies, however desirable the goal, and however difficult to
reach the goal by an alternative path. It is assumed that the days
of legal fictions are past.

The expediency of indulging in a liberal use of the remittitur
and the additur, with appellate check upon the discretion of the
trial court, may be conceded without argument. There are no doubt
many cases in which the interests of both parties to the litigation
would be served by permitting the court to substitute its judgment
for that of the jury, when an excessive or inadequate verdict has
been found, in lieu of granting a new trial; just as there are many
cases where both parties, really seeking justice, would profit by
submitting to the court in the first instance both the question of
liability and the amount of the recovery, as is often done by agree-
ment. But as long as the law, particularly in the form of constitu-
tional sanctions, gives to a party the right to a jury trial, it would
seem that the right should carry with it the privilege of determining
its expediency. The only object in protecting the right with con-
stitutional sanctions must have been to give a litigant power to
make an arbitrary choice and prevent legislators and courts from
determining any question of expediency. Otherwise, the whole
matter would have been trusted to legislative and judicial regu-
lation.

The writer has an abundance of sympathy for the motives of
those who argue for the legality and constitutionality of the more
liberal practice, even if the argument is motivated by an inarticu-
late assumption that the end justifies the means; but he cannot
cheerfully accede to the accusation that those who see difficulties in
the way may be charged with a lack of realism. Those who indulge
in such an accusation should beware of the rebound. If there ever
was anything which needed the aid of sophistry and artificial logic,
it would seem to be a demonstration that the court, when it allows
a remittitur or an additur under ordinary circumstances in a personal injury case, does not substitute its judgment for that of the jury. If the substitution takes place, how can it be asserted with any semblance of realism that the jury has tried the case and the parties have had a jury trial? Those who assert the contrary do not need to resort to the "legal scrap heap", or any other source of precedents, to defend their stand. All that is necessary is to face the situation with a realism unadulterated with preference and let common sense have full sway.

As a last thought, attention may be called to a legitimate practice that no doubt would have a tendency in some cases to discourage new trials in those jurisdictions, including West Virginia, where a remittitur is not permissible for such a purpose. If the practice of granting a new trial confined to an inquiry of damages, when the only error is an excessive verdict, is liberally pursued, a defendant may be encouraged to join with the plaintiff in consenting to a remittitur, since doubtless his interest in a new trial is frequently enhanced by a hope that another jury may free him entirely from liability. If both parties agree, of course propriety of the remittitur cannot be questioned. The practice of granting new trials confined to the quantum of damages, although widely resorted to in other jurisdictions, and approved by the West Virginia Supreme Court,\textsuperscript{131} seems to have received little recognition in the local trial courts.