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Trial Practice -- Power of Court to Increase Damages as Condition to Denial of Motion for New Trial

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court upon which service by publication could be predicated, despite the fact that the security was Georgia realty. This conclusion is not altogether without support,[33] and it follows logically from the premise if we permit our deductions to lead us through the esoteric technicalities with which the field of mortgage law is replete. But in this respect there is no empirical difference between trustees of Georgia and of North Carolina real estate. In the last analysis what the trustee does have, whether it be legal title, lien, power, or whatnot, is intimately associated with the property conveyed as security. The court's control over the latter should form a basis for publication of service. Mere names should not alter the situation. Otherwise substantial interests of bondholders may sometimes be sacrificed for the preservation of this legal will-o'-the-wisp that is the trustee's interest, an interest that exists only for the protection of the bondholders, and serious difficulties might arise should the trustee choose to absent himself at a time when his services are most necessary.[34]

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Trial Practice—Power of Court to Increase Damages as Condition to Denial of Motion for New Trial.

A jury in a federal district court awarded the plaintiff $500 damages for personal injuries caused by the defendant's negligence. On the plaintiff's motion a new trial was ordered because of inadequacy of damages unless the defendant consented to increase the verdict to $1500. The defendant consenting, the motion for new trial was automatically denied, and the plaintiff appealed to the circuit court of appeals where the trial court's action was reversed.[1] Defendant obtained certiorari in the Supreme Court, which divided five to four in upholding the action of the intermediate appellate court.[2]

Mr. Justice Sutherland, writing the majority opinion, said that the imposition of such a condition on the denial of a motion for a new trial violated the plaintiff's right to jury trial, as guaranteed by the Seventh Amendment. He traced the historical development in early English mayhem cases of the procedure followed by the trial court in this case, but concluded that those cases had been overruled and were not the common law at the time the Constitution was adopted. The converse

[33] *Cf.* Sanders v. Hall, 74 F. (2d) 399 (C. C. A. 10th, 1934).

[34] Ordinarily a trustee must obtain court approval in order to free himself from the trust if he chooses to resign. Under the doctrine of the principal case, the Tennessee court would have authority to approve such resignation, since the *situs* of the trust is within its jurisdiction. *Cf.* Sanders v. Hall, 74 F. (2d) 399 (C. C. A. 10th, 1934).

[1] Schiedt v. Dimick, 70 F. (2d) 558 (C. C. A. 1st, 1934).

[2] Dimick v. Schiedt, 55 Sup. Ct. 296 (U. S. 1935).

procedure of allowing a plaintiff to make a remittitur when a verdict is excessive in lieu of granting the defendant a new trial was criticized by the majority as being based on poor authority and illogical reasoning. This practice of remittitur was said to be too well settled to be disturbed and, "is not without plausible support in the view that what remains is included in the (jury's) verdict along with the unlawful excess. . . . 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."

Mr. Justice Stone, speaking for the minority, relied upon two principal grounds in support of the trial judge's order. First, it is logically inconsistent and practically inexpedient to permit the use of remittitur when damages are excessive and to deny the addition of damages in cases of inadequacy. Second, a trial court's exercise of judicial discretion in the decision of motions for new trials on the grounds of excessive or inadequate damages is not open to review on appeal. This opinion points out many procedures which were unknown to the common law and yet are firmly embedded in federal practice.[3]

The court purposely refrained from any consideration of the state court decisions, but in view of the conflict of authority, and since the question decided in the principal case is an open one in most of the states, it is believed that a review of these cases will not be profitless.

The great majority of the state courts hold that a new trial may be granted by the trial judge, if, in the exercise of his sound judicial discretion, he considers the damages excessive[4] or inadequate.[5] A new trial because of inadequate damages in actions for injury to person or reputation, or where the damages equal the actual pecuniary loss sustained by the plaintiff, is prohibited by statute in several states.[6]

An overwhelming majority of the state cases, following the federal rule, permit the trial judge to condition the denial of a defendant's motion for a new trial because of excessive damages upon the plaintiff's consent to a remittitur of the excess to be fixed by the judge.[7] The

[3] Dimick v. Schiedt, 55 Sup. Ct. 296, 303 (U. S. 1935). Since 1836 the federal courts have had the power to treble damages awarded by jury in patent cases when the court thought that defendant should be punished. Stimpson v. The Railroads, 23 Fed. Cases No. 13, 456 (C. C. 3d Cir. 1847).

[4] Cables v. Bristol Water Co., 86 Conn. 223, 84 Atl. 928 (1912); Ostrander v. Messmer, 315 Mo. 1165, 289 S. W. 609 (1926); Hogg v. Plant, 145 Va. 175, 133 S. E. 759 (1926).

[5] Anglin v. City of Columbus, 128 Ga. 469, 57 S. E. 780 (1907); Tathwell v. City of Cedar Rapids, 122 Iowa 50, 97 N. W. 96 (1903); Brown v. Wyman, 224 Mich. 360, 195 N. W. 52 (1923).

[6] Note (1934) 88 A. L. R. 943.

[7] Edwards v. Willey, 218 Mass. 363, 105 N. E. 986 (1914); Herrman v. U. S. Trust Co. of N. Y., 221 N. Y., 143, 116 N. E. 865 (1917); McIntyre v. Smyth, 108 Va. 736, 62 S. E. 930 (1908).

state decisions are practically unanimous in holding that the plaintiff must submit to a new trial, the verdict being set aside, upon his refusal to consent to a remittitur. The defendant's consent is not necessary.[8]

Some cases permit the trial judge to condition the granting of a new trial upon the payment of attorneys' fees and costs by the moving party.[9] Other conditions are occasionally attached to orders for new trials.[10]

The procedure followed by the trial court in the principal case has been directly upheld in four states: Illinois,[11] New Jersey,[12] Wisconsin,[13] and Washington.[14] In condemnation cases the practice is allowed in California;[15] and although money damages were not involved, the denial of the plaintiff's motion for a new trial upon the defendant's consent to an increased liability is allowed in Iowa.[16] In Virginia, by statute,[17] the trial court may raise the jury's verdict, if it is clearly inadequate and the facts conclusively show the amount it should be.[18]

In two states, Louisiana and Washington, the appellate court may increase an award of damages which is inadequate. In Louisiana neither

[8] Note (1928) 53 A. L. R. 779.

[9] Brown v. Cline, 109 Cal. 156, 41 Pac. 862 (1895); Wooster v. Calhoun, Circuit Judge, 150 Mich, 459, 114 N. W. 232 (1907); Myers v. Fox, 129 App. Div. 31, 113 N. Y. S. 116 (1908); Jaquish v. Kelly, 167 App. Div. 523, 153, N. Y. S. 114 (1915); Pennsylvania Coal Co. v. Schmidt, 155 Wis. 242, 144 N. W. 283 (1913).

[10] Dunning v. Crofutt, 81 Conn. 101, 70 Atl. 630 (1908); Wirsing v. Smith, 222 Pa. 8, 70 Atl. 906 (1908); Hall v. Northwestern R. R. Co., 81 S. C. 522, 62 S. E. 848 (1908); Honaker v. Shrader, 115 Va. 318, 79 S. E. 391 (1913).

[11] Carr v. Miner, 42 Ill. 179 (1866); James v. Morey, 44 Ill. 352 (1867).

[12] Gaffney v. Illingsworth, 90 N. J. Law 490, 101 Atl. 243 (1917) (compare the reasoning in this opinion with the opinion of Mr. Justice Stone in the principal case).

[13] Risch v. Lawhead, 211 Wis. 653, 248 N. W. 127 (1933) (dictum that the plaintiff may have a new trial if he refuses to take the increased verdict, implying that the whole procedure is optional with both parties); *cf.* Gosczinski v. Carlson, 157 Wis. 551, 147 N. W. 1018 (1914); Reuter v. Hickman, Lawson, and Diener Co., 160 Wis. 284, 151 N. W. 795 (1915); Campbell v. Sutcliff, 193 Wis. 370, 214 N. W. 374 (1927).

[14] Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924); Hillman v. City of Seattle, 163 Wash. 401, 299 Pac. 514 (1931).

[15] Adamson v. Los Angeles County, 52 Cal. App. 125, 198 Pac. 52 (1921); *cf.* Taber v. Bailey, 22 Cal. App. 617, 623, 35 Pac. 975, 979 (1913).

[16] Smith v. Ellyson, 137 Iowa 391, 115 N. W. 40 (1908) (Jury found that defendant must maintain half of a fence. It was held proper for the trial court to deny plaintiff's motion for a new trial upon condition that defendant maintain more than half the fence).

[17] VIRGINIA CODE ANN. (Michie 1930) §6251.

[18] Blake Co., Inc. v. Smith & Son, Ltd., 147 Va. 960, 133 S. E. 685 (1926); *cf.* Forbes v. Southern Cotton Oil Co., 130 Va. 245, 108 S. E. 15 (1921). The statute is not applicable in the federal courts sitting in Virginia, because the Seventh Amendment would be infringed. Norton v. City Bank etc. Co., 294 Fed. 839, 843 (C. C. A. 4th, 1923). But see Schuerholz v. Roach, 58 F. (2d) 32 (C. C. A. 4th, 1932).

party has any option to a new trial, nor any further appeal.[19] In Washington the appellate court gives the plaintiff an option of taking the increased verdict or a new trial.[20]

In two states, Georgia and Massachusetts, the cases are conflicting. The older cases in both these states disapprove the procedure,[21] but a more recent case from each state decides differently.[22] In only one state, Michigan,[23] are the cases unanimously in accord with the majority decision in the principal case.

A South Carolina case inferentially supports the majority of the state decisions;[24] while in Indiana and Missouri the authorities indicate that the procedure would be disallowed.[25]

Although the majority state rule thus permits the conditioning of a plaintiff's motion for new trial because of inadequate damages upon the defendant's consent to an increase of the verdict, the practice is said to be limited to clear cases and should be sparingly used.[26]

The exact question involved in the principal case does not appear to have been raised in North Carolina. It has been held in this state that the trial judge may set aside a verdict and grant a new trial when he regards the damages assessed by the jury as excessive[27] or inadequate.[28] His exercise of judicial discretion in passing upon motions for new

[19] Sullivan v. Vicksburg, S. & P. R. R. Co., 39 La. Ann. 800, 2 So. 586 (1887); Caldwell v. Vicksburg, S. & P. R. R. Co., 41 La. Ann. 624, 6 So. 217 (1889).

[20] Bingamin v. City of Seattle, 139 Wash. 68, 245 Pac. 411 (1926).

[21] Jones v. The Water Lot Co., 18 Ga. 539 (1855); Scott v. Taylor, 57 Ga. 168 (1876); Shanahan v. Boston & N. St. Ry. Co., 193 Mass. 412, 79 N. E. 751 (1907).

[22] Anderson v. Jenkins, 99 Ga. 299, 25 S. E. 648 (1896); Clark v. Henshaw Motor Co., 246 Mass. 386, 140 N. E. 593 (1923) (The court said that the jury must not be separated before the conditional order for new trial is entered, as was the situation in Shanahan v. Boston & N. St. Ry. Co., 193 Mass. 412, 79 N. E. 751 (1907) cited *supra* note 21, and the cases are distinguished on this basis); *cf.* Gordon v. Mitchell, 68 Ga. 11, 22 (1881).

[23] Lorf v. City of Detroit, 145 Mich. 265, 108 N. W. 661 (1906); Goldsmith v. Detroit, J. & C. Ry., 165 Mich. 177, 130 N. W. 647 (1911). However, the Michigan court permits the practise of remittitur. North Michigan Land Co. v. Kneeland, 149 Mich. 495, 112 N. W. 1114 (1907).

[24] Laney v. Bradford, 4 Rich. 1 (S. C. 1850) (held that the trial court might impose reciprocal conditions).

[25] De Ford v. Urbain, 48 Ind. 219 (1874); Kortjohn v. Altenbernd, 14 Mo. App. 342 (1883) (It was held error to order a new trial unless the defendant, for whom the jury found a verdict, would allow judgment against him for part of the damages claimed by the plaintiff; but if the defendant consents then the error is not a ground for reversal on the plaintiff's appeal.)

[26] Carr v. Miner, 42 Ill. 179, 192 (1866); Risch v. Lawhead, 211 Wis. 653, 657, 248 N. W. 127, 130 (1933).

[27] Goodson v. Mullen, 92 N. C. 211 (1885); Norton v. North Carolina R. R., 122 N. C. 910, 29 S. E. 886 (1898); Boney v. Atlantic & N. C. R. R., 145 N. C. 248, 58 S. E. 1082 (1907); Johnson v. Seaboard Air Line Ry. Co., 163 N. C. 431, 79 S. E. 690 (1913).

[28] Harton v. Reavis, 4 N. C. 256 (1815); Benton v. Collins, 125 N. C. 83, 34 S. E. 242 (1899); Burns v. Asheboro etc. R. R. Co., 125 N. C. 304, 34 S. E. 495 (1899); Jarrett v. High Point Trunk & Bag Co., 142 N. C. 466, 55 S. E. 338 (1906).

trials upon these grounds is said to be not reviewable on appeal,[29] unless there is a gross abuse of discretion.[30] In an early case there is a dictum that a trial judge may not revise or correct the verdict of a jury, but is limited to setting it aside in a proper case.[31] However, more recent cases indicate that the judge does have the power to revise a jury's verdict, although no case affirmatively holds that a trial judge may deny a motion for a new trial upon condition that the non-moving party consent to a reduction or increase in damages, according as they are excessive or inadequate. It has been held that a trial judge may not enter a verdict for a less amount than that found by the jury without the plaintiff's consent.[32] The compelling inference to be drawn from this case is that if the plaintiff consented to a remittitur the court might deny the defendant a new trial. The same implication is found in another case.[33] Three other recent cases[34] clearly indicate that the practice of the trial judge reducing excessive verdicts upon the consent of the plaintiff is widely followed in North Carolina. These cases are based upon a statute[35] which authorizes the trial court to set aside excessive verdicts.

When the problem of the principal case is presented to the North Carolina Supreme Court, it is submitted that the court will pursue a wiser course if the majority state cases are followed. Such a result would be logically consistent with the procedure approved in the cases mentioned above. It would tend to accelerate the now sluggish processes of trial and appellate practise, thereby reducing the costs of litigation. After the jury has first determined where the liability falls, there is no serious invasion of its functions in permitting the trial judge to revise the amount of damages.

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Vendor and Purchaser—Restrictive Covenant—Marketable Title.

A covenant restricting the use of real property is perhaps the most widely used device for protecting residential districts from the inroads of business and industrial establishments.[1] While first enforced in

[29] See cases cited *supra*, notes 27 and 28.
[30] Pender v. North State Life Insurance Co., 163 N. C. 98, 79 S. E. 293 (1913).
[31] Shields v. Whitaker, 82 N. C. 516, 522, 523 (1880).
[32] Isley v. Virginia Bridge & Iron Co., 143 N. C. 51, 55 S. E. 416 (1906).
[33] Decker v. Norfolk & Southern R. R. Co., 167 N. C. 26, 83 S. E. 27 (1914).
[34] Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 108 S. E. 439 (1921); Bailey v. Dibbrell Mineral Co., 183 N. C. 525, 112 S. E. 29 (1922); Hyatt v. McCoy, 194 N. C. 760, 138 S. E. 405 (1927).
[35] N. C. CODE ANN. (Michie 1931) §591.

[1] The more recent development and use of zoning ordinances offers another method of protection. For a comparison of the utility of the two methods, see