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# Remittitur and the Seventh Amendment

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# NOTE

## REMITTITUR AND THE SEVENTH AMENDMENT

Plaintiff sued to recover damages for breach of contract. After a jury verdict in favor of the plaintiff, the trial judge granted a motion for judgment notwithstanding the verdict and entered a judgment for the defendants. The plaintiff appealed and the United States Court of Appeals, 5th Circuit, reversed and remanded the case to the district court ordering a remittitur, or if the plaintiff refused, a new trial limited to the issue of damages.[1] Upon remand the defendants in district court filed a motion to reopen the record for admission of additional evidence to be considered by the court in determining the amount of remittitur. The district court *held,* (1) the seventh amendment does not permit the court to hear additional evidence in order to set the amount of the remittitur; and (2) even if such a procedure were constitutional, the trial court, as a matter of discretion, should refuse to do so. *Glazer v. Glazer,* 274 F. Supp. 471 (E.D. La. 1967).

The seventh amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The argument which claims that remittitur is per se unconstitutional when used in conjunction with a jury trial is that the court's reduction of the damages set by a jury involves a reexamination of facts tried by a jury, a practice that did not exist at common law when the seventh amendment was adopted. However, the federal courts, since Mr. Justice Story's opinion in *Blunt v. Little,*[2] have permitted the use of remittitur. The most recent United States Supreme Court case in the area is *Dimick v. Schiedt.*[3] It primarily concerned the use of additur which it held to be unconstitutional, but dictum suggested that the use of remittitur should also be restricted:

"In the light reflected by the foregoing review of English de-

1. Glazer v. Glazer, 374 F.2d 390 (5th Cir. 1967).
2. 3 Mason 102 (Mass. 1822).
3. 293 U.S. 474 (1935). The decision was 5-4 with Chief Justice Hughes, Justices Brandeis, Cardozo, and Stone dissenting.

> cisions and commentators, it therefore may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day. Nevertheless, this court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, *it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land.*"[4] (Emphasis added.)

Glazer presented a question of first instance. The defendants sought to introduce additional evidence both with respect to events "which [were] occurring or had occurred at the time of trial, and evidence of events which occurred after the trial."[5] They contended that the district court had the power to hear such evidence and that the court of appeals "intended to permit this court, during the remittitur proceedings, to hear additional evidence on the damage issue."[6] They therefore urged the court to "exercise its discretion by hearing additional evidence."[7]

In denying this motion the court in *Glazer* took several distinct tacks. First it entered into a penetrating discussion of the court of appeal's mandate to the lower court whereby the higher court remanded the case for a remittitur or possible new trial. It detailed the choice of words used by the court of appeals and listed the several ambiguous passages which might support the defendant's motion. It concluded that if the Fifth Circuit had wished to direct the trial court to consider additional evidence it would have expressly done so as it has done in previous cases.[8] It also pointed out that what the defendant's motion sought to do was something quite distinct from a pre-trial hearing to determine if there is enough new evidence for a new trial.

4. 293 U.S. 474, 484-85 (1935).
5. 274 F. Supp. 471, 472 (E.D. La. 1967).
6. *Id.*
7. *Id.*
8. DuBreuil v. Stevenson, 369 F.2d 690 (5th Cir. 1966); Theriot v. Mercer, 262 F.2d 754 (5th Cir. 1959).

Next the court discussed the constitutionality of remittitur under the seventh amendment. Relying on the dictum quoted above from *Dimick* it concluded that although remittitur itself is still constitutional it is nevertheless a borderline device and its use should not be extended by analogy. Since the defendant's motion if granted would result in an extension of the use of remittitur this extension by analogy was denied as being unconstitutional. Even assuming the constitutionality of the extension, the court held that it would still exercise its discretion to deny the motion, because to grant the motion would not commend itself to "orderly judicial procedure."[9] As the court stated earlier, "the purpose of permitting the remittitur is to avoid holding a new trial."[10] Yet if the defendants' motion were allowed it would result in a partial new trial before the plaintiff was given the choice of remittitur or a new trial.

Of these three general areas—the mandate interpretation, the constitutional issue, and the court's discretion in the matter —this writer only takes issue with the constitutional question.

There are several ways to approach the general constitutional issue. The easiest solution would be to find that the device of remittitur was in use in common law practice in 1791. But finding a pattern concerning how the civil jury was protected is a very elusive task. The reporting of cases lacked the detail of today's methods. This difficulty was compounded by the wide variance which existed between the practices employed by the different states at the time.[11] The record is at best equivocal, and often old forms of procedure cannot be matched exactly with modern practice. The evidence as to the exact common law procedure in use then is not sufficient to be conclusive.

The material available from this period is at least clear enough to reflect the general concern which led to the enactment of the seventh amendment. One can piece together why a specific preservation of civil jury trial was favored by several of our early statesmen.[12] One argument advanced for protecting the use of jury trial, as put forth in the Federalist-Antifederalist de-

9. 274 F. Supp. 471, 478 (E.D. La. 1967).
10. 274 F. Supp. 471, 475 (E.D. La. 1967).
11. Henderson, *Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).
12. *See generally* M. BORDEN, THE ANTIFEDERALIST PAPERS 1965; J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION (reprint 1937); A. KOCH, JEFFERSON AND MADISON, THE GREAT COLLABORATION (1964); J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (reprint 1965); 1 J. MADISON, WRITINGS OF JAMES MADISON 1769-1793 (1895).

bates, was that civil jury trial protected against corrupt judges.[13] Evidently it was felt that it would be more difficult for one of the two opposing parties in litigation to influence the jury than to influence the judge, if for no other reason than it would involve more people. Secondly, many colonial personalities, such as Jefferson, who felt so strongly about adopting a bill of rights, believed that the civil jury trial was a safeguard which protected poorer classes of the population from oppression.[14] The assumption was that judges generally came from the upper social level and, whether consciously or not, would tend to favor the upper class in their judgments. If these are the general purposes behind the seventh, it must now be asked whether the use of remittitur would violate the spirit of the amendment. Is it a tool by which the judge can defeat the jury?

Before answering this question it must be noted that there are two important but separate functions that a jury performs in a damage case. First, the jury decides which of the opposing parties is liable. Then secondly, it must determine the amount of damages. Remittitur cannot interfere with the first function as its use does not enable the judge to find for the other party. In the second area, remittitur definitely does affect the jury's verdict, but can it be said to unfairly injure either party? The plaintiff has the option of accepting the remittitur or proceeding with a new trial. To a degree the additional time and money required for a new trial plus the chance that a new jury will find for a lesser amount or even for the other party will militate against his exercising this option. Thus his right to a jury trial could be impaired to some extent. But it is submitted that this restriction is no more severe than devices used by the court in controlling the information which goes to the jury, such as the admission and exclusion of evidence or other devices, such as judgments n.o.v. or new trials, which take the case out of the jury's hands altogether. Thus the plaintiff should not be heard to complain when he accepts the remittitur because his freedom to elect a new trial is not unduly restricted.

One writer has suggested that remittitur is unconstitutional

13. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 630 (reprint 1966).

14. Letter from T. Jefferson to J. Madison, July 31, 1788, from WRITINGS OF THOMAS JEFFERSON 445 (Ford ed. 1892-1899). Address by Luther Martin, Legislature of the State of Maryland, reprinted from ELLIOT 1, 380-82.

not because it interferes with the right of the plaintiff, but rather because it interferes with the defendant's right to a jury trial.[15] This seems doubtful, if it is accepted that the general purpose of the seventh amendment is to avoid the possibility of any corruption or unconscious oppression on the part of the judiciary, as outlined above, and that the jury provides the necessary buffer. From the defendant's viewpoint the use of remittitur does not circumvent this general policy because the court's action is more favorable to the defendant's case than was the jury's since it reduces the amount awarded to the plaintiff by the jury. Thus reconsidered, remittitur per se is constitutional. Likewise if one were to allow additional evidence as requested in *Glazer*, the purposes behind the seventh amendment would not be abridged. Therefore, this writer does not agree with the court in *Glazer* that if the motion made by defendants were granted, that the resulting procedure would be unconstitutional.

The constitutional issue might have been decided differently in *Glazer* if *Dimick* had never been decided. It seems that the decision in *Dimick* is unfortunate because the Supreme Court is inconsistent in trying to differentiate between remittitur which remains constitutional and additur which is declared unconstitutional. It tried to distinguish remittitur as the mere "lopping off" of what the jury has already found, from additur, which it classified as a "bald addition." The argument was weak and the commentators uniformly rejected it, even those who felt that remittitur was unconstitutional.[16] *Dimick* severely crippled the numerous earlier cases which upheld the opposite trend,[17] but it has never been overruled and it is still the latest expression in the remittitur-additur area. All things considered, it is not surprising that the court in *Glazer* felt bound by *Dimick* when presented with the issue of extending remittitur. It is submitted, however, that a reevaluation of *Dimick* by the United States Supreme Court is warranted.

Despite the controversial constitutional issue, this writer

15. Carlin, REMITTITURS AND ADDITURS, 49 W. VA. L.Q. 1, 15 (1911).
16. F. JAMES, CIVIL PROCEDURE 315 (1965).
17. Gasoline Prod. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931); *Ex parte* Peterson, 253 U.S. 300 (1920); Capital Traction Co. v. Hof, 174 U.S. 1 (1899); Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593 (1897); Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889); Northern Pac. R.R. v. Hebert, 116 U.S. 642 (1886); Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830); Blunt v. Little, 3 Mason 102 (Mass. 1822).

believes that the result reached by the court in *Glazer* is the correct one. The court's thorough review and interpretation of the upper court's mandate is very convincing. Likewise the court's exercise of discretion in denying the defendants' motion preserves the procedural device of remittitur for the limited task for which it is designed without destroying its effectiveness as an efficient alternative to a new trial with a jury.

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