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no duty whatever to appeal to them, before instituting a representative suit. Close study of the quoted rule will show substantial conformity to the analysis made *supra,* and it seems that the rule advanced is supported by both better reasoning and authority.[25] The Montana court should adopt it for future cases, the situation being approached from the standpoint of what would be equitable to both ownership and management, rather than what seems to be a questionable tendency to favor management by placing unnecessary conditions on the right of a stockholder to institute a representative suit.

—Grover C. Schmidt, Jr.

DAMAGES: THE DOCTRINE OF REMITTITUR IN MONTANA

After finding by the Supreme Court[1] that defendant is entitled to a new trial because of excessive damages[2] the doctrine of remittitur permits the court to compel him to forgo that right provided that plaintiff accepts a reduced verdict.[3] The doctrine came into use as a means of eliminating the expense and dilatory process of repeated trials and in many instances there can be

[25]4 COOK, *supra* note 5, §740 *et seq.*

[1]Remittitur is also applied by the trial courts, and its use therein is universally upheld. Bull v. Butte Electric Railway Co. (1924) 69 Mont. 529, 223 P. 514; Northern Pacific Railway Co. v. Herbert (1885) 116 U. S. 642, 29 L. Ed. 755, 6 S. Ct. 590; Arkansas Cattle Co. v. Mann (1888) 130 U. S. 69, 39 L. Ed. 854, 9 S. Ct. 458. No attempt is made in this comment to deal with this aspect of the doctrine.

[2]Though *increscitur* (increasing amount of the damages) is much less frequently indulged in than *remittitur*, it has been followed in some jurisdictions. MCCORMICK, DAMAGES (1935) §19 at p. 82 and cases there cited. In Dimick v. Schiedt (1935) 93 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603, 95 A. L. R. 1150, the Supreme Court of the United States prohibited *increscitur* in any event. Mr. Justice Stone wrote a strong disenting opinion, which was concurred in by three other Justices, in which he pointed out that it is altogether inconsistent on principle to utilize *remittitur* without recognizing *increscitur.*

[3]The doctrine is most frequently stated in terms of the plaintiff's acceptance of a reduced verdict in lieu of demanding a new trial, whereas the defendant is compelled to accept the judgment of the appellate court. 20 R. C. L., *New Trial,* §99; 54 C. J. REMITTITUR p. 108. Compulsory remittitur has been denied in both this country and England. Kennon v. Gilmer (1885) 5 Mont. 257, 5 P. 847; (1888) 131 U. S. 22, 33 L. Ed. 110. 9 S. Ct. 696. This decision was followed in Kennon v. Gilmer (1889) 9 Mont. 108, 22 P. 448. See also, Watt v. Watt (1905) House of Lords, A. C. 115, 2 Am. & Eng. Cases 672; MCCORMICK, DAMAGES (1935) §19; 4 SEDGWICK, DAMAGES (9th ed. 1912) §1330.

no question of its value or the validity of its use.[4] But all courts have recognized that the right of trial by jury, whether given by the common law, by statute, or under a constitutional provision, imposes certain restrictions upon the free use of remittitur. Principally under the direction of Judge Theo. Brantley, the Montana Supreme Court once worked out and long applied a carefully stated restriction upon its use, founded in the court's idea of what the Constitutional right to jury trial guaranteed the parties. This comment will try to show that in more recent years, our court has unintentionally lost sight of its own long established limitation upon the use of remittitur. To accomplish that purpose it will be necessary to trace and appraise the doctrine as applied in Montana decisions at different periods.

As applied in the past, the use of remittitur has been restricted particularly under Section 9397 (5), of the REVISED CODES OF MONTANA, 1935, which provides that "the former verdict may be vacated and a new trial granted for: . . . 5. Excessive damages, appearing to have been given under the influence of passion and prejudice." The basic reason for this provision is that where the conditions set out therein exist it cannot be said that the parties have had a *fair* trial by jury. Therefore, both parties are entitled to a new trial.

Now, conceding the right to a new trial has been established under this CODE provision, should the court be entitled to apply remittitur in lieu thereof? Courts, confronted with the constitutional guarantee of jury trial,[5] have taken varying po-

[4] 9 BANCROFT'S CODE PRACTICE, *Appeal and Error*, (1928) §7379. When the amount of the excess is liquidated, note 6 *infra;* where evidence was improperly admitted, Irving v. Town of Stevensville (1915) 51 Mont. 44, 146 P. 483; where the jury have clearly mistaken rules of law by which damages are to be regulated, Conway v. Monidale Trust (1915) 51 Mont. 113, 146 P. 711; Hall v. Northern Pacific Ry. Co. (1919) 56 Mont. 537, 186 P. 390.

[5] The exact extent of the guarantee of trial by jury under either the common law or constitutional provision is not clear. "The general rule is that the right to jury trial preserved by Federal and State Constitutional provisions has substantially the same meaning, extent, and application that it had at common law at the time of the adoption of such provisions, and they are to be construed in light of the common law at that time." 31 AM. JUR., *Jury*, §8, at p. 557. Montana follows this rule, Chessman v. Hale (1905) 31 Mont. 577, 79 P. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038; Cunningham v. Northwestern Improvement Co. (1911) 44 Mont. 180, 119 P. 554; Davidson v. Davidson (1916) 52 Mont. 180, 119 P. 554; Davidson v. Davidson (1916) 52 Mont. 44, 158 P. 680; Bull v. Butte Electric Ry. Co. (1924) 69 Mont. 529, 223 P. 514. "This court has repeatedly held that the right guaranteed by the state Constitution (Article III, sec. 23) is the same as that guaranteed by the federal Constitution (Seventh Amendment), because the federal Constitution was the fundamental law of the territory at the time it was admitted into the Union as a state, and the right as it then existed was preserved in the state Constitution." Consolidated

sitions on this difficult question, and in the United States at least three rules have been developed to govern the use of the doctrine. The first of these, applied by the Georgia courts, denies the use of remittitur unless the damages are liquidated.[6] Several jurisdictions in the United States, however, permit the use of remittitur even though the damages are unliquidated, provided there is no evidence that passion and prejudice affected either the finding of liability or the measure of damages imposed.[7] The third rule permits the use of the doctrine even though the verdict is due to the influence of passion and prejudice, provided that, in the opinion of the court, there is no fair probability that this influence extended to the finding of liability.[8] The real difficulty has arisen in the application of this third rule.

The history of the doctrine in Montana may be conveniently divided into three periods. From the earliest case in point[9] until 1901 the rule was that wherever there were excessive damages resulting from passion and prejudice, a remittitur might be used. There was no qualification of this simple statement. The second period began with the case of *Chicago Title & Trust Co. v. O'Marr,*[10] in which the early rule was qualified; and in the same year Chief Justice Brantley set down the rule that remittitur should not be applied unless there was a clear affirmative showing that the passion and prejudice went only

Gold & Sapphire Mining Co. v. Struthers (1910) 41 Mont. 565, 571, 111 P. 152, 155. In fact it is not clear in the cases whether the limits the courts have imposed upon themselves have come from the common law or the Constitution.

[6]Tifton, T. & G. Ry. v. Chastin (1905) 122 Ga. 250, 50 S. E. 105.

[7]Northern Pacific Ry. v. Herbert (1886) 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755; Gila Valley, G & N Ry. v. Hall (1911) 13 Ariz. 270. 112 P. 845, *aff'd* (1913) 232 U. S. 94, 34 St. Ct. 229, 58 L. Ed. 521; North Chicago St. Ry. v. Wrixon (1894) 150 Ill. 532, 37 N. E. 895; Doran v. Cedar Rapids & M. C. Ry. (1902) 117 Iowa 442, 60 N. W. 815; Union Pac. Ry. v. Mitchell (1896) 56 Kan. 324, 43 P. 244; Burdict v. Missouri Pac. Ry. (1894) 123 Mo. 221, 275 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; Chester Park Co. v. Schulte (1929) 120 Ohio 273, 166 N. E. 186; Anderholt v. Bishop (1923) 94 Okla. 203, 221 P. 752.

[8]Bull v. Butte Electric Ry. Co. (1923) 69 Mont. 529, 223 P. 514.

[9]Kennon v. Gilmer (1885) 5 Mont. 257, 5 P. 847, applied compulsory remittitur, but on appeal to the United States Supreme Court, (1889) 131 U. S. 22, 33 L. Ed. 110, 6 S. Ct. 696, compulsory remittitur was denied and the rule established that the appellate court might order a new trial *unless* plaintiff *elected* to remit part of the verdict. This position was accepted in Kennon v. Gilmer (1889) 9 Mont. 10, 22 P. 448, and followed in Cunningham v. Quirk (1891) 10 Mont. 462, 26 P. 184; Hamilton v. Great Falls Ry. Co. (1895) 17 Mont. 334, 42 P. 860, 43 P. 713.

[10](1901) 25 Mont. 242, 64 P. 506.

to the amount of the damages.[11] With this strict rule in force there was a strong presumption against the use of the doctrine where there was any showing of passion and prejudice. In *Blessing v. Angel*,[12] it was said:

> "... yet such practice (the use of remittitur) is wholly unwarranted where, as in this case, the verdict may only be accounted for by reason of the passion and prejudice of the jury. Based on reason, the same rule should be, and is, applicable where the successful party makes voluntary remission of the full amount of the verdict."

During this period the court developed two lines of decisions: First, if they were inclined to grant a remittitur they did it on the basis of Section 9397 (6), providing for a new trial when the evidence is insufficient to justify the verdict or other decision, or when it is against the law,[13] or on the grounds that there was miscalculation. This led to an independent line of cases in which remittitur was freely used.[14] Second, recognizing that under Judge Brantly's rule no remittitur should be allowed where there was a clear showing of passion and prejudice, throughout this period nearly every case in which this showing was made was sent back and a new trial was granted[15]

[11]During the second period, the rule in form was the same as the third general rule set out above, emphasizing, however, a strong presumption against the use of remittitur, which application thereof approaches in result the majority rule; that remittitur should never be used if there is any showing of passion and prejudice.

[12](1923) 66 Mont. 482, 485, 214 P. 71, 73.

[13]It is submitted that where this is the basis for granting the new trial in many instances the verdicts have been so excessive as to indicate passion and prejudice, so that the same constitutional limitations apply as in the case of a verdict excessive because of passion and prejudice. Chicago Title & Trust Co. v. O'Marr (1901) 25 Mont. 242, 245, 64 P. 506, 507.

[14]Stewart v. Pittsburg & Montana Copper Co. (1910) 42 Mont. 200, 111 P. 723; Forquer v. North (1910) 42 Mont. 272, 112 P. 439; McCabe v. City of Butte (1912) 46 Mont. 65, 125 P. 133, failure of the jury to regard instructions; Hall v. Northern Pac. Ry. Co. (1919) 56 Mont. 537, 186 P. 340, insufficiency of the evidence. Anderson v. Wirkman (1923) 67 Mont. 176, 215 P. 224.

[15]Allen v. Bear Creek Coal Co. (1911) 43 Mont. 269, 115 P. 673, Emerson v. Butte Electric Ry. Co. (1912) 46 Mont. 454, 129 P. 319; DeCelles v. Casey (1914) 48 Mont. 568, 139 P. 586, McRae v. Lethlean (1919) 56 Mont. 215, 194 P. 1070; Wegge v. Great Northern Ry. Co. (1921) 61 Mont. 377, 203 P. 517; Wilber v. Wilber (1922) 63 Mont. 587, 207 P. 1002; Gillespie v. Great Northern Ry. Co. (1922) 23 Mont. 598, 208 P. 1059; Everett v. Hines (1922) 64 Mont. 244; 208 P. 1063; Hauley v. Great Northern Ry. Co. (1922) 64 Mont. 267, 213 P. 235; Prenzeau v. Davis (1923) 67 Mont. 523, 216 P. 773. See Bull v. Butte Electric Ry. Co. (1924) 69 Mont. 529, 534, 223 P. 514, 516. The Court was only passing on the propriety of the trial court's action in using remittitur. Since they state the grounds upon which the trial court might properly have utilized remittitur practically in terms

without inqury as to whether the passion and prejudice went to the amount of the damages alone or to the entire verdict.

At an early date the Montana Supreme Court expressly recognized the rule that the best evidence as to whether a verdict is excessive as a result of passion and prejudice is the size of the verdict itself in relation to all the evidence.[16] In the case of *White v. Chicago, Milwaukee, St. Paul & Pacific Railway Co.*,[17] another important rule was laid down to the effect that no verdict would be deemed excessive unless it was such as to *"shock the conscience and understanding . . . of the court"*.[18]

of the Brantley rule, and then raise a presumption that those grounds existed, this case leaves unaffected the Brantley rule governing the condition under which the Supreme Court may use remittitur. In Allen v. Bear Creek Coal Co. (1911) 43 Mont. 269, 290, 115 P. 673, 680, the court recognized the distinctions between these two lines of cases in the following language: "In Forquer v. North (1910) 42 Mont. 272, 112 P. 439, a verdict for $10,000, for an injury to the left hand of a boy thirteen years of age, was reduced to $4,000. This was done taking into consideration all the circumstances, we being of the opinion that the plaintiff was entitled to recover, and that this amount would compensate him for the pain suffered and the impairment of his hand. *In this case, however*, though the evidence is sufficient to go to the jury, *we think the excessive award was due to passion and prejudice, rather than to an inadvertance of the jury in making their estimate.*" (Italics supplied) Judge Brantly granted a new trial, refusing flatly to allow remittitur. Thus it is evident that these two lines of decisions should at all times be kept carefully separated. A case under R. C. M. 9397 (6) never should be considered precedent for a decision under 9397 (5).

[16]DeCelles v. Casey (1914) 48 Mont. 568, 139 P. 386.

[17](1914) 49 Mont. 419, 429, 143 P. 561, 564, 15 AM. JUR., *Damages* §§205, 206.

[18]The "shocked conscience" test, used almost universally in the cases for determining the excessiveness of the damages, may be stated either subjectively or objectively. As originally developed and applied this test was stated objectively: "The damages, therefore, must be so excessive as to *strike mankind, at first blush*, as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagent, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess." (Italics supplied) Chancellor Kent in Coleman v. Southwick (1812) G Johns (N. Y.) 45, 52, 6 Am. Dec. 253, 258. Where this objective form is used in stating the rule there should be a requirement of unanimity on the part of the court. In Montana the test has been consistently stated subjectively in terms of the "court's conscience" and where this is the case it would seem that a finding of such excessiveness as to shock the conscience of the majority of the court would be sufficient. White v. Chicago, Milwaukee, St. Paul & Pacific Railway Co. (1914) 49 Mont. 419, 143 P. 386. Montana has consistently followed this rule. Wise v. Stagg (1933) 94 Mont. 321, 22 P. (2d) 308; Tanner v. Smith (1934) 97 Mont. 229, 33 P. (2d) 547; Ashley v. Safeway Stores, Inc., (1935) 100 Mont. 312, 47 P. (2d) 53; Keller v. Safeway Stores, Inc., (1940) 111 Mont. 28, 108 P. (2d) 605. However, see Simpson v. Miller (1934) 97 Mont. 328, 340, 34 P. (2d) 528, 533, and Justice Angstman

This became the test as to whether there was passion and prejudice in the deliberations of the jury, thus entitling the court to grant a new trial under the code provision.[19]

With this strong presumption against the use of remittitur so strictly followed in the cases during the second period it is the more surprizing that it should have been so completely abandoned in the third period. But in the Case of *Wise v. Stagg*,[20] when the court was of the opinion that "the award of the jury in this instance, considered in the light of the testimony in the record, was so liberal as to shock the conscience and understanding of the court, and the verdict (was) clearly excessive" we would have expected the court to send the case back for a new trial on the ground that the verdict was so excessive as to shock the conscience and understanding of the court, thereby indicating that it was reached as a result of passion and prejudice. Instead, however, it applied the doctrine of remittitur on the ground that its conscience had been shocked.[21]

In light of the earlier decisions, which hold that mere excessiveness of a verdict, without a showing of passion and

in his dissenting opinion in Keller v. Safeway Inc., *supra*, where he quotes from Lord Camden in Huckle v. Money (1763) 2 Wils., K. B. 205, 207, 95 Eng. Rep., Reprint 768, 769: " . . . it must be a glaring case indeed of outrageous damages in tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." This results, in Montana, in this highly interesting and somewhat perplexing paradox. On the one hand the majority of the court, though stating the test subjectively, uniformly applies an objective standard. They are shocked as reasonably prudent men. Justice Angstman, on the other hand, though stating his rule objectively in form, in terms of *all mankind*, insists that the "mankind" shocked be a highly trained jurist who raises an almost conclusive presumption as to the intrinsic correctness of the jury's verdict, a presumption conditioning the layman's conscience not one tittle, and to find the amount of the verdict excessive, he requires such a finding to come from a jurist setting up his highly trained conscience.

[19]R. C. M. 1935, §9397 (5). This is the rule generally applied where there is no extrinsic showing of passion and prejudice. 1 GRAHAM & WATERMAN, NEW TRIALS, 451, cited in White v. Chicago, Milwaukee, St. Paul & Pacific Railway Co. (1914) 49 Mont. 419, 429, 143 P. 561, 564.

[20](1933) 94 Mont. 321, 332, 22 P. (2d) 308, 312.

[21]Though in this case there was no statement which clearly indicated that the holding was under the CODE provision, it is submitted that the court, if not consciously, at least through "judicial intuition," granted the remittitur under R. C. M. 1935, §9397 (5). The net result of the holding, at any rate, is that the court may avoid all mention of passion and prejudice, but upon its conscience being shocked by the amount of the verdict, grant a remittitur, thus avoiding the issue of passion and prejudice altogether, though applying the same test as had previously been used to determine the presence of passion and prejudice in the deliberations of the jury.

prejudice, will not entitle defendant to a new trial,[22] this holding in the Wise case represents a definite refusal to apply the rule followed in Montana for thirty years.[23] In *Tanner v. Smith*,[24] the defendant's appeal for a new trial was bottomed upon R. C. M. 1935, §9397 (5), and the court specifically refers to it in its decision. Nevertheless, it applies the doctrine of remittitur[25] to the case on the ground that the verdict was so excessive, *as a result of passion and prejudice,* as to shock its conscience. In *Simpson v. Miller*,[26] the defendant had moved for a new trial in the court below under both Subsections 5 and 6. Although, there is concrete evidence that the court recognizes that there are some constitutional limitations on remittitur, yet it is implicit in the case that the court understands these limitations to apply only to *compulsory* remittitur, since they unhesitatingly affirmed the action of the trial court in granting conditional remittitur, making no distinction between an appeal based on one or the other of the code sections. This rule is carried on in *Ashley v. Safeway Stores Inc.*,[27] where the defendant appealed from the judgment of the court below under Subsection 5., and in granting remittitur the Supreme Court stated:

> "In this case we are convinced, after carefully studying the record, *that the evidence in its most favorable aspects* may be said only to be sufficient to support a verdict not exceeding $10,000.'"[28] (Italics supplied).

[22]Kelley v. John R. Daily Co. (1919) 56 Mont. 63, 181 P. 326.

[23]However, it should be remembered that the court was applying the shocked conscious test to determine whether the verdict was excessive. Since mere excessiveness of a verdict does not entitle one to a new trial unless "the evidence does not support the verdict" it may be argued that the position taken by the court in this case is justified under the first line of cases in the second period, but this view is contra to the general inference that where the conscience is shocked there is passion and prejudice. 1 GRAHAM & WATERMAN, NEW TRIALS, 451, cited in White v. Chicago, Milwaukee, St. Paul & Pacific Railway Co. (1914) 49 Mont. 419, 429, 143 P. 561, 564. And this inference has been strong in Montana.

[24](1934) 97 Mont. 229, 33 P. (2d) 547.

[25]The Court relies upon Allen v. Bear Creek Coal Co. (1911) 43 Mont. 269, 115 P. 673, but this case was one in which remittitur was denied because the excessive verdict was reached as a result of passion and prejudice; and Forquer v. North (1910) 42 Mont. 272, 112 P. 439, where the verdict "was not so excessive as to indicate passion and prejudice on the part of the jury."

[26](1934) 97 Mont. 328, 34 P. 528.

[27](1935) 100 Mont. 312, 331, 47 P. (2d) 53, 62.

[28]Ashley v. Safeway Stores, Inc. (1935) 100 Mont. 312, 331, 47 P. (2d) 53, 62. The wording used here represents the tendency of the court to take the case away from the basis upon which the appeal was made: an excessive verdict resulting from passion and prejudice, and to base its decision on grounds upon which the Court assumes it has the right to grant remittitur: insufficiency of the evidence to support the verdict.

The result of this recent line of cases is that, whereas for years if there was evidence of passion and prejudice so as to shock the conscience of the court, defendant was entitled to a new trial but there could be no remittitur, today if the court's conscience is shocked thus sufficiently indicating passion and prejudice in the verdict, remittitur follows "as the night the day". May not the result in many instances be an infringement of the defendant's Constitutional rights?

The *cause* for the change in this rule may appear to be the corruption of the "shocked conscience" rule originally formulated and used only as the basis for determining when a new trial should be granted, into a rule for stating when remittitur will be utilized. In fact, however, rather than being the real cause, this corruption is very likely the *result* of the merger and confusion of the two lines of decisions, the first using remittitur almost as a matter of course when there were excessive damages not supported by the evidence, and the other almost without exception refusing to apply remittitur where there was a showing of passion and prejudice.

It may be insisted, however, that these recent cases differ from earlier cases much more in the form in which they state the rule for using remittitur than in the actual results obtained. (But the form given the rule is what will be looked to as precedent for future cases, rather than the actual facts that may have justified remittitur in those particular cases.) Presumably, the Court assumed in each case that the plaintiff was entitled to a verdict, forcing the conclusion that, if passion and prejudice be shown, it must be only as to the amount. Hence these recent cases might be said simply to modify Judge Brantley's strong presumption that any passion and prejudice present affects the entire judgment, requiring affirmative evidence to the contrary; so that under the later cases there is a strong presumption that it goes *only* to the size of the verdict. Numerous cases support this rule.[29] In *Fulton v. Chouteau County Farmers' Co.*[30] the Court itself has attempted to explain these cases on

[29]Bull v. Butte Electric Ry. Co. (1923) 69 Mont. 529, 223 P. 514 and cases cited.

[30](1934) 98 Mont. 48, 37 P. (2d) 1025. This case might be more persuasive had it not been followed by Ashley v. Safeway Stores, Inc. (1935) 100 Mont. 312, 47 P. (2d) 528. It purports to distinguish Wise v. Stagg (1933) 94 Mont. 321, 22 P. (2d) 308, and Tanner v. Smith (1934) 97 Mont. 229, 33 P. (2d) 547 on the ground that there was extrinsic evidence of fraud in them, while not in the Fulton case. In a concurring opinion, Judge Angstman very properly points out that nothing was said about any such extrinsic evidence in those cases themselves, and he further subscribes unequivocally to the doctrine that extrinsic evidence is not at all necessary; that, if the

still a different ground—the shift being in regard to the very presence of passion and prejudice itself. Thus explained, passion and prejudice will never be presumed from the mere size of the verdict, but there must be affirmative evidence of passion and prejudice.[31] However, it would not be easy to harmonize the recurrent use in all of the cases, of the "shocked conscience" test, with that rationalization of the cases. These two alternative explanations may be combined and applied to a single case to the effect that the use of remittitur would be unavailable only in the rarest instance.

However these cases may be interpreted, the fact that the court has assumed that "compulsory" remittitur is the only form restricted by the Constitutional guarantee of trial by jury;[32] conflicting statements as to whether extrinsic evidence of passion and prejudice is a prerequisite to a new trial,[33] and the repeated confusion of the grounds for granting a new trial with those determining whether remittitur should be used, all add up to a feeling of uncertainty as to just what the present rules governing remittitur in Montana may be. Is the "shocked conscience" test still a criterion for testing whether passion and prejudice exists or is it now the sole criterion for determining whether a new trial may be granted? This conclusion suggests that it would be helpful if our Supreme Court would make a careful and penetrating examination of the law that "has been" to determine whether they wish, as a considered conclusion of the Court, to affirm the greatly relaxed use of remittitur as exemplified by these recent cases, so as to expedite the administration of justice within the framework of current ideas of a "fair trial" under our constitution. If it were clear that these decisions were an integral part of a comprehensive program to adapt the hitherto existing law to pressing current needs, one might be much less inclined to quarrel with them.

However, in deciding whether these "third period" decisions should be affirmed, no doubt the Court will give careful

size of the verdict is so large as to "shock the conscience" a new trial must follow as a matter of law. Fulton v. Chouteau County Farmers' Co. (1934) 98 Mont. 48, 75, 37 P. (2d) 1025, 1034. However, in Keller v. Safeway Stores, Inc. (1940) 111 Mont. 28, 108 P. (2d) 605, 615, he readily accepts the *extrinsic evidence* basis for distinguishing and limiting those cases. In the above Fulton case, though, the facts of themselves supported the verdict even though it was very large. In fact, it was almost a simple matter of mathematical computation.

[31]McCormick, Damages (1935) §19, p. 80, declares that some states have such a rule.

[32]Simpson v. Miller (1934) 97 Mont. 328, 34 P. (2d) 528.

[33]Fulton v. Chouteau County Farmers' Co. (1934) 98 Mont. 48, 37 P. (2d) 1025. Note 30 *supra.*

consideration to the accepted proposition that both parties are entitled to a "fair" trial under the Constitution. They may well hold constantly before themselves the injunction that, wherever there is any reason to believe that passion and prejudice may have influenced the jury in determining liability itself, then a new trial should follow as a matter of course.[34] Also, they may be troubled with the question of whether there are not different kinds of "passion and prejudice" warranting different conclusions as to the use of remittitur. This is illustrated by the question, "Is the 'passion and prejudice' almost certain to be induced in *any* jury solely by the sympathy provoking facts of some cases, the same *kind* of 'passion and prejudice' as that induced deliberately by the inflamatory arguments of counsel?[35] Do the Constitutional requirements of 'fair trial' equally prohibit the use of remittitur in the one case as in the other?" Again, they might consider more carefully the deceptive qualities of that phrase "shocking the conscience", as revealed elsewhere in this comment.[36] And finally, they might explore the possibility of other techniques for expediting justice, alternative to remittitur, such as remanding for a retrial on the single issue of damages.[37]

In the recent case of *Keller v. Safeway Stores Inc.*[38] there is welcome evidence that the Montana Supreme Court already has recognized the objection to an unrestrained use of remittitur and that it is determined to use it more discriminatingly hereafter. Although both parties requested that remittitur be applied, the Court sent the case back for a new trial, observing, however, that the parties should have little trouble effecting a compromise without resorting further to legal action. It can hardly be said that this action was predicated on a feeling that either party's Constitutional right to a fair trial would otherwise be abridged, because both parties waived any such right here. Rather it shows a commendable reluctance to substitute the Court's judgment in any degree for that of a jury where it had no standard by which to determine with any precision the amount of damages due plaintiff. However, whenever the parties do join in asking the Supreme Court to use remittitur it might well use the technique of inducing the parties to reach an agreed verdict at that moment, affirmed by the Supreme

[34]Probably all of the cases of this third period justified the finding that defendant should be liable in some amount.
[35]McCormick, Damages (1935) §19, pp. 80, 81.
[36]Note 18 *supra.*
[37]McCormick Damages (1935) §19, p. 93. 16 Minn. L. R. 185, 195 (1932).
[38](1940) 111 Mont. 28, 108 P. (2d) 605.

Court as agreed upon. The principal alleged basis for damages in the *Keller* case was mental anguish resulting from certain alleged slanderous statements, which might possibly be used as a basis for explaining the Court's action therein in contrast with many previous cases.[39] Actually, however, it has used remittitur in many cases where the damages were no more certain.[40] It should further be noted that the case does not specifically modify any of the rules as to the conditions under which remittitur *may* be applied, laid down in the recent cases discussed above. It is therefore impossible to determine whether this case augurs still a fourth period in the use of remittitur in Montana.

—Harrington Harlow.

DAMAGES: LIQUIDATED DAMAGES FOR DELAY IN AN ABANDONED CONSTRUCTION CONTRACT

In a recent Federal case, the plaintiff contractor entered into a contract to build a road for the defendant district. The agreement provided that the contractor was to pay $500 per day as liquidated damages for every working day elapsing between the agreed and the actual completion dates. Twenty days after the agreed date the plaintiff abandoned the work; new bids were advertised and a new contractor started work after a delay of 149 days and completed the work in 264 days. The court allowed the defendant, under its cross-complaint, damages for the 20 and 264 day periods at the stipulated rate but not for the 149 day period that the employer was looking for a new contractor.[1]

In holding that the liquidated damage provision is applicable even where there has been a total abandonment of work by the contractor, the principal case rejects the view of the earlier cases and Williston's original view.[2] Under the old theory as

[39]" . . . the amount of an award in a slander case depends so greatly upon the effect of the slander on the plaintiff . . . " Keller v. Safeway Stores, Inc. (1940) 111 Mont. 28, 108 P. (2d) 605, 614.

[40]In fact in most of the cases the court itself frankly admits the impossibility of definitely determining the *effect* of the injury on the plaintiff. Tanner v. Smith (1934) 97 Mont. 229, 33 P. (2d) 547; Ashley v. Safeway Stores Inc., (1035) 100 Mont. 312, 47 P. (2d) 53.

[1]Six Companies of California v. Joint Highway District No. 13 of State of California (1938) 24 F. Supp. 346, affirmed 110 F. 2d 620, reversed on other grounds 311 U. S. 180, 85 L. Ed. 114, 61 S. Ct. 186.

[2]WILLISTON, CONTRACTS (Rev. Ed. Vol. 3, 1935) §785, P. 2210. But see 1941 Cum. Supp. §785, P. 44 wherein the rule of the principal case is approved as preferable to the old, apparently not recognizing still another possible alternative use of the clause.