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TEXAS REMITTITUR PRACTICE

by

*Eugene L. Smith**

IN TEXAS when a motion for new trial is predicated on the ground that the jury's verdict is excessive, the trial judge may do one of three things: (1) decide that the verdict is excessive and grant a new trial;[1] (2) determine that the verdict is not excessive and overrule the motion for new trial unconditionally; or (3) decide that the verdict is excessive but that any error of excess is curable by remittitur, and overrule the defendant's motion for new trial on the condition that plaintiff remit that part of the award deemed excessive.

The following hypothetical illustrates how remittitur works in its simplest, ideal form. Assume that a plaintiff sues for personal injuries sustained as the proximate result of the defendant's negligence. After a long and expensive trial the jury finds for the plaintiff, assessing damages in a very large amount. The defendant files a motion for new trial, alleging as his only ground that the verdict is "manifestly too large."[2] Research and thought by the trial judge lead him to the conclusion that the verdict is excessive and that a new trial should be granted for that reason. However, he also concludes that the error is curable by a remittitur of some amount. He then overrules the motion for a new trial on condition that plaintiff voluntarily reduce his recovery by that specified amount. Plaintiff does not wish to undergo another protracted trial for various reasons (he might even concur that the verdict was excessive), so he remits the specified part of his verdict, and the motion for new trial is then overruled.

In addition to the powers given trial courts, Texas law has for many years allowed the courts of civil appeals to suggest remittiturs in proper cases and, for fewer years, to review the actions of the trial courts.

Obviously there are numerous benefits in permitting a judge to issue a conditional order which, if complied with, prevents a new trial.[3] The administration of justice is promoted and money saved if costly new trials can fairly be prevented. Although remittitur is

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[1] The power of the trial judge to order new trials is the basis of the remittitur power. See Dimick v. Schiedt, 293 U.S. 474 (1935). This is important to an understanding of remittitur and should be borne in mind.

[2] See Tex. Rules Civ. Pro. Ann. rule 328 (1959); See pp. 161-62 infra.

[3] See Comment, 40 Calif. L. Rev. 276, 282 (1952).

difficult to reconcile with common-law and constitutional concepts of the right to trial by jury, its general utility warrants its preservation.

I. Background of Remittitur

Remittitur may best be defined as a procedural device which reduces a jury verdict by subtraction without the consent of the jury.[4] It has had a long career, originating in England before the adopting of the United States Constitution.[5] The federal courts have used it since 1822,[6] and one state, Virginia, has allowed it even longer.[7] This long history is somewhat checkered, however. The states have been anything but uniform in their treatment of the procedure. A few jurisdictions limit the suggestion of remittitur to cases in which the amount of the excess is ascertainable with certainty, but most permit it to be done in nearly any case of excessive damages.[8] Generally speaking, the diversity of treatment results from differing views on the extent to which a court may interfere with the constitutional, statutory, or common-law right to trial by jury.[9]

Early Texas cases subscribed to a rather strict policy, allowing the trial courts to suggest remittitur only in those instances in which there were "fixed rules and principles" prescribing the amount of damages and permitting an accurate computation of the excess.[10] This was a significant limitation of judicial power to correct verdicts by remittitur since it was permissible only where the damages were liquidated or definitely measurable; thus the rule precluded application of remittitur in personal injury-negligence suits, in which the jury operated within the limits of broad discretion.[11]

After the creation of the courts of civil appeals by the constitution of 1891,[12] the legislature enacted article 1029a.[13] This statute placed upon the newly-created courts the "duty" of suggesting remittitur

[4] This definition is favored by Professor Carlin. Carlin, Remittitur and Additurs, 49 W. Va. L. Rev. 1 (1942). For other discussions see also Comment, 40 Calif. L. Rev. 276 (1952); Comment, 21 Va. L. Rev. 666 (1935); Comment, 44 Yale L.J. 318 (1934); Note, 27 Marq. L. Rev. 86 (1943); Note, 32 Mich. L. Rev. 538 (1934).

[5] See Dimick v. Schiedt, 293 U.S. 474 (1935). The practice is now forbidden in England. Watt v. Watt, [1905] A.C. 115.

[6] Blunt v. Little, 3 Fed. Cas. 760 (No. 1578) (S.D. Mass. 1822).

[7] Hook v. Turnbull, 6 Call 85 (Va. 1806).

[8] Carlin, supra note 4, at 5-10; Comment, 44 Yale L.J. 318, 319-21 (1934); Annot., 11 A.L.R.2d 1217 (1950).

[9] Carlin, supra note 4, at 5-10.

[10] See, e.g., Nunnally v. Taliaferro, 82 Tex. 286, 18 S.W. 149 (1891); Thomas v. Womack, 13 Tex. 580 (1855).

[11] Thomas v. Womack, supra note 10.

[12] Tex. Const. art. 5, § 1.

[13] Tex. Rev. Civ. Stat. art. 1029a (1895).

as a condition of affirmance when the court was "of the opinion that the verdict and judgment of the trial court . . . [was] excessive, and for that reason only should be reversed."[14] *Texas & N.O.R.R. v. Syfan*[15] was the first case before the Supreme Court of Texas involving the questions of the meaning and validity of the statute.

The two holdings of the supreme court in the *Syfan* case are worth examination since it is on this case that present practice is based. The reasoning of the court in *Syfan* is typical of that employed elsewhere and furnishes a starting point for analysis of later decisions.

In that case, Syfan sued the railroad for unliquidated damages resulting from the railroad's negligence. The jury returned a verdict of $5,561 in Syfan's favor, and the defendant appealed. Finding the damages excessive by $2,061, the court of civil appeals affirmed the judgment of the trial court on condition that plaintiff remit that much of his verdict.[16] The remittitur was entered, the judgment was affirmed as reformed, and the railroad petitioned for writ of error.

The supreme court held that article 1029a "abrogated" the former rule of practice and empowered courts of civil appeals to suggest remittiturs in unliquidated damages cases.[17] In addition the court held that the exercise of this function did not violate the defendant's right to trial by jury, as guaranteed by the Texas Constitution.[18]

The holding that article 1029a removed the limitations previously placed on the use of remittitur in correcting verdicts was probably more a concession to progress than a strict construction of the statute. It would have been equally easy to decide that the article did no more than confer upon the courts of civil appeals a right coextensive with that of trial judges at that time, *viz.*, the power to order remittiturs only in cases in which the damages were more or less liquidated. Such a construction would have been permissible, but certainly the meaning attributed was in harmony with the words of the statute, which placed the duty in "all civil cases." Further, the effect of this construction was to align Texas with the majority of jurisdictions.[19]

In ruling that article 1029a constitutionally could be applied in cases of unliquidated damages, the court relied on the rationale of *Arkansas Valley Land & Cattle Co. v. Mann*,[20] in which the Supreme

[14] Ibid.
[15] 91 Tex. 562, 44 S.W. 1064 (1898).
[16] 43 S.W. 551 (Tex. Civ. App. 1897).
[17] 91 Tex. at 567, 44 S.W. at 1066.
[18] Tex. Const. art. 5, § 10.
[19] Carlin, supra note 4.
[20] 130 U.S. 69 (1889).

Court of the United States had held that the use of remittitur did not abridge the defendant's right to trial by jury under the United States Constitution. Of course the Texas court was not bound by the *Mann* case,[21] but it apparently thought that the case was properly decided.

In holding that the Texas Constitution did not proscribe the use of remittitur, the rationale of the courts rested upon the defendant's right to have the court of civil appeals decide whether the verdict was excessive, for the power to consider questions of deficiencies in the evidence is one which was conferred upon those courts by the legislature.[22] Upon that determination rested and depended the defendant's right to reversal. But there was an important qualification inserted by the legislature on the defendant's right to have this determination made. Invoking the power for one purpose, he could not deny it for the related purpose of remittitur. Article 1029a decreed that a court of civil appeals, finding an error of excess, could cure the error by remittitur.

The court's ratiocination was that if a court found a verdict excessive, it had decided upon an amount which was reasonable.[23] This being so, any difference between the amount which the court believed reasonable and that awarded was excess. Therefore if, as permitted by the legislature, the plaintiff remitted the "excess" the verdict would be cured of error; it would then be "purged . . . of the vice, leaving no ground for reversing the judgment."[24]

But did not this make jurors of judges (in the language of *Thomas v. Womack*[25]), thus violating the parties' right to trial by jury? Perhaps, but "the . . . [defendant] cannot complain that the court invaded the province of the jury, because it was done at its request. It cannot complain that . . . [the amount decided upon by the court as reasonable] is not a reasonable sum to be assessed against it, for upon that depends the right to reversal."[26]

The circuitous, somewhat specious reasoning of the court was in reality question-begging. Stripped of verbal trappings, it cannot be denied that a finding by either a trial or appellate judge that an award of some amount would be reasonable, whereas the award of the jury would not, is the substitution of the judge's judgment for

[21] Cf. Bell v. Hill, 123 Tex. 531, 74 S.W.2d 113 (1934).
[22] 91 Tex. at 568, 44 S.W. at 1066.
[23] See text accompanying note 27 infra. Carlin, supra note 4, at 19 levels a devastating attack at this line of reasoning.
[24] 91 Tex. at 568, 44 S.W. at 1066.
[25] 13 Tex. 580 (1855).
[26] 91 Tex. at 569, 44 S.W. at 1067.

that of the jury. When a remittitur is suggested as a condition to refusing a new trial, the right to trial by jury is limited. The *Syfan* court answered this by stating that the court of civil appeals did not discard the jury's finding of damages, but used only that part which was proper; the final judgment, after filing of the remittitur, was entered upon the finding of the jury.[27] Verdicts for damages, however, are not susceptible of easy division into a proper part and an improper part; only when such a division is possible will the supreme court's answer be correct.

A continued discussion of the court's artifices is vain. Better that the permissibility of the practice be considered in the contexts of convenience and fairness. Remittitur is not essentially different from those other areas in which we permit an "invasion of the jury's province," *e.g.*, directed verdicts and judgments *non obstante veredicto*. Any time a judge decides that there is insufficient evidence to support a verdict and orders a new trial the jury's "province" is invaded.

If it honestly can be said that remittitur, though an "intrusion" into the jury's "province," does not offend our sense of fairness and is reasonably useful and necessary, the rationalizations and half-truths used by the courts in their explanations and justifications are excusable. Accepting the legality of remittitur as established, we can look to the decisions to see how it may be used.

II. The Power of the Courts of Civil Appeals

The scope of the courts of civil appeals' power will be considered first. This is because, in general, the nature of their authority is more clearly defined than that of the trial courts and because it was upon the definition of the courts of civil appeals' power that the trial courts' power was broadened.

Rule 440[28] is the present source of the courts of civil appeals' power to suggest remittiturs. It is the lineal descendant of article 1029a, and is substantially the same in wording. The rule reads:

> In civil cases appealed to a Court of Civil Appeals, if such court is of the opinion that the verdict and judgment of the trial court is excessive and that said cause should be reversed for that reason only, then said appellate court shall indicate to such party, or his attorney, within what time he may file a remittitur of such excess. If such remittitur is so filed, then the court shall reform and affirm such

[27] 91 Tex. at 568, 44 S.W. at 1066.
[28] Tex. Rules Civ. Pro. Ann. rule 440 (1959).

> judgment in accordance therewith; if not filed as indicated then the judgment shall be reversed.

The interesting and important questions arising under this provision include the folowing: (1) What is the nature and extent of the courts of civil appeals' power under rule 440? (2) How is the rule 440 power invoked by a party against whom a verdict has been rendered? (3) In reviewing a trial court's suggestion of remittitur (under rule 328), does the court of civil appeals apply a different standard for determining the propriety of the order than it uses in determining whether to exercise its own power under rule 440?

The first two questions will be examined at this point; a consideration of the third is deferred.[29]

A. *The Nature and Extent of Rule 440 Power*

When faced with a contention that a verdict and judgment is excessive, what standard guides the appellate court in its decision that the award is, or is not, too large? Under the rule, this determination must be made before a remittitur is suggested.

1. *The Determination of Excess*

The supreme court has held that a determination of excess by a court of civil appeals is one of fact and, as such, is not reviewable.[30] Like most findings of fact, a determination of excess is largely subjective. Implicitly recognizing this, the supreme court has not defined specifically the procedure to be followed. The test generally enunciated is that of *Wilson v. Freeman*,[31] where it was said:

> All the Court of Civil Appeals can do, and all that is required of it to do . . . is to exercise its sound judicial judgment and discretion in the ascertainment of what amount would be reasonable compensation for the injury sustained, and treat the balance as excess. The court must first determine what amount would be reasonable, before it can determine what amount would be unreasonable . . . . [Having made this determination] it should authorize a remittitur of the excess above the amount which would be reasonable compensation for the injury, in accordance with its sound judgment.[32]

This is essentially the same process prescribed in the *Syfan* case. The language would apparently make the question of appropriateness

[29] See pp. 164-68 infra.

[30] Carter v. Texarkana Bus Co., 156 Tex. 285, 295 S.W.2d 653 (1956); Wilson v. Freeman, 108 Tex. 121, 185 S.W. 993 (1916). Cf. Adams v. Houston Lighting & Power Co., — Tex. —, 314 S.W.2d 826 (1958).

[31] 108 Tex. 121, 185 S.W. 993 (1916).

[32] Id. at 125, 185 S.W. at 994.

one of "discretion." "Discretion" was an unhappy word to choose, because it connotes a question of law. Rule 440 power is in many ways anomalous,[33] but many of the problems and much of the confusion would have been obviated had the courts carefully chosen their words and kept in mind the nature of the power.

To illustrate, recall the process by which a court of civil appeals is supposed to determine the fact, and amount, of excess. It must first decide upon a reasonable award, and then compare its idea with the jury's estimate. If the jury has awarded more, the jury's verdict is unreasonable. There is no comparable test to be found in the decisions prescribing the mental processes to be followed by courts of civil appeals in determining fact questions.[34]

Under the present standard, how is a judge to decide on a reasonable amount? The above quotation from the *Freeman* case is as specific as the supreme court has been. It suggests that the court is more than willing to let the courts of civil appeals set their own standards.[35] The judges of the courts of civil appeals, on the other hand, are not in agreement as to the method to be utilized in ascertaining a reasonable amount of damages. The course most often chosen is that of selecting an amount which the particular court believes will adequately compensate the plaintiff and which is in line with verdicts and judgments in similar cases.[36]

It is submitted that the present standard is unrealistic and does not conform to the true theory of remittitur. Consider how little the *Freeman* test aids a thoughtful appellate court faced with the following questions. What if there is nothing more than a conflict in the evidence of damages—should the verdict be affirmed regardless of the court's belief that it was too high? What if there is a great disparity in the amount of damages the jury could have found, and the highest figure possible under the evidence was found? Suppose further that this verdict, authorized under the evidence, was three times the largest amount awarded in cases involving like injuries. Is the practice of giving weight to verdicts in similar cases even proper?

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[33] See pp. 166-67 infra.

[34] The test for propriety of remittitur is unique. For comparison, imagine a court of civil appeals considering a contention that the jury's finding on liability is against the overwhelming weight and preponderance of the evidence. If it followed the approach of Wilson v. Freeman it would examine the evidence bearing on liability and then make its own findings. Should the jury's be different, the case would be remanded for a new trial.

[35] Cf. Adams v. Houston Lighting & Power Co., ___ Tex. ___, 314 S.W.2d 827, 830 (1958) ("[T]here is no rule prescribing the manner by which the court determines the amount of remittitur.").

[36] See, e.g., Texas & Pac. Ry. v. Crown, 220 S.W.2d 294 (Tex. Civ. App. 1949) error ref. n.r.e.,; Tri-County Elec. Co-op. v. Clair, 217 S.W.2d 681 (Tex. Civ. App. 1949) error ref. n.r.e.

Would it be fairer to the defendant to select as reasonable an amount which if awarded by a jury would be the minimum damages sustainable as adequate? Would it be fairer to the plaintiff to select as reasonable an amount which if found by the jury would be the largest amount affirmable as non-excessive?[37]

Whether or not remittitur should be allowed depends upon whether one believes the paths followed by the courts of civil appeals are fair to the parties. It is the writer's personal opinion that a court should not go beyond the record in deciding a question of excess. In holding a jury's verdict excessive, a court of civil appeals should not be allowed to use facts unknown to the jury. If the question of fact were one of evidence to sustain a finding of liability, the only value of decisions in other cases would be in deciding whether the verdict of liability were permissible as a matter of law.[38] The remittitur power is part of the courts' power to reverse and remand for a new trial; they should be limited to the record, as in other situations in which they must consider new trials.

Would it be possible to set forth standards which would insure that remittiturs are uniformly administered? Probably not, but we could create a semblance of order, and not hamstring the courts, if we were simply to require that excess be considered in the same manner that other fact questions are considered. This would mean that the court would look only at the evidence of damages which appears in the record.

The *Freeman* test would either have to be changed or reinterpreted. Instead of looking first at the amount which it believes reasonable, the court would look at the amount the jury found reasonable. An examination of the record would show whether there was sufficient evidence to support the damages awarded. If there was not, it would make no logical difference to its power to order remittitur that the damages were without support in the evidence, or were against the overwhelming weight and preponderance of the evidence, or were based on insufficient evidence, because in any of those cases the court would have made a determination of excess. Then so long as

[37] These last two questions are drawn from the Wisconsin practice. There, on motion for new trial because of inadequate or excessive damages, plaintiff as well as defendant must be given the option either to terminate litigation by consenting to the award most favorable to the other party that a jury could reasonably be allowed to find or to submit to a new trial. Comment, 27 Marq. L. Rev. 86 (1943).

[38] Carter v. Texarkana Bus Co., 156 Tex. 285, 295 S.W.2d 653 (1956).

the court could determine a reasonable amount from the record, remittitur should be used.[39]

Perhaps a change in doctrine would have no practical effect on the administration of remittiturs; the judges might well reach the same decisions they do now. Even so, it would still be desirable to articulate logical standards on which these decisions should be based.

2. *Passion and Prejudice*

After the court of civil appeals has determined (by whatever method) that the verdict and judgment is excessive, it must suggest remittitur in an amount which it feels will cure the error. It is well established in Texas that this duty is mandatory, and that on finding an excess, a case may not be sent back for a new trial without first making such a determination.[40] If the court wishes to remand the case, its action must rest on some other ground.

Despite the clear rulings of the supreme court, the judiciary has been preoccupied at times with what is said to be an additional requirement for remittitur. In *Galveston, H. & S.A. Ry. v. Hynes*,[41] the court of civil appeals refused to suggest a remittitur unless it appeared the excess in the verdict was the result of "passion or prejudice" on the part of the jury. The supreme court refused the application for writ of error; by allowing the language in the opinion to stand uncorrected, the court precipitated the most recurrent problem in Texas remittitur law. Although originally concerned only with the necessity of improper jury motivation as a condition to suggesting remittitur, the courts eventually came to worry about the extent to which a large verdict indicates improper motivation on the jury's part.

Any mingling of the two concepts is improper; remittitur and wrongful jury motivation are not obverse and reverse, nor in any way interdependent. They are founded on entirely different considerations.

A court is empowered to order remittitur upon satisfaction of the requirement of rule 440, that it be "of the opinion that the verdict and judgment of the trial court is excessive, and should be reversed for that reason only."[42] Neither the rule nor the statutes[43] before it

[39] The determination of the amount of the excess must be made regardless of the difficulty in determining a reasonable amount. See Wilson v. Freeman, 108 Tex. 121, 185 S.W. 993 (1916).

[40] See cases cited in note 30 supra.

[41] 50 S.W. 624 (Tex. Civ. App. 1899) error ref.

[42] Dallas Ry. & Terminal Co. v. Farnsworth, 148 Tex. 584, 592, 227 S.W.2d 1017, 1022 (1950).

[43] Tex. Rev. Civ. Stat. art. 1029a (1895); Tex. Rev. Civ. Stat. arts. 1861, 1862 (1925).

have mentioned a "passion or prejudice" requirement, and the supreme court has held specifically more than once that there need not be extraneous proof of passion or prejudice.[44] Although this should have disposed of the question, the terms still reappear.[45] Requiring that there be an ascertainable cause for an excessive verdict would take away most of the power the courts now have. This is because there is usually no way in which such error could be proved; it has been held by the supreme court that an inference of passion and prejudice does not follow from an excessive verdict.[46] The ability to order a new trial on the ground of jury misconduct[47] is independent of the power to order a new trial because of insufficiency of evidence or excess.

There are times, however, when allegations of error other than excess may properly be noticed in connection with allegations of excess.[48] On several occasions it has been held that errors of excess caused by wrongful influence of the jury may be cured by remittitur, so long as there is no reason to believe that the effect of the influence does not go beyond the question of damages.[49] However, where the wrongful influence results in harmful errors other than excess, the use of remittitur is inappropriate since it is ineffective to rectify such errors. Rule 440 is certainly broad enough to encompass this construction. But these cases should not be viewed as anything other than corrections of excessive verdicts.

More important, the courts should not be permitted to say that the excess indicates the existence of passion and prejudice or other improper motivation on the part of the jury. The supreme court has recognized that this would render useless the power given the courts. In *World Oil Co. v. Hicks*[50] the court said:

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[44] Flanigan v. Carswell, ___ Tex. ___, 324 S.W.2d 835 (1959); Dallas Ry. & Terminal Co. v. Farnsworth, 148 Tex. 584, 227 S.W.2d 1017 (1950); World Oil Co. v. Hicks, 129 Tex. 297, 103 S.W.2d 962 (1937).

[45] Flanigan v. Carswell, supra note 44, was the most recent case in which "passion or prejudice" and its absence were discussed. For a rather complete exposition of "passion or prejudice" theories, see Comment, 29 Texas L. Rev. 347 (1951). The conclusions in that article are at odds with those reached in this one.

[46] World Oil Co. v. Hicks, 129 Tex. 297, 103 S.W.2d 962 (1937).

[47] Rule 327 gives the power to order new trial for this cause.

[48] See cases cited in note 49 infra.

[49] International & G.N.R.R. v. Cooper, 1 S.W.2d 578 (Tex. Comm. App. 1928) (jury misconduct); National Biscuit Co. v. Lawrence, 152 S.W.2d 882 (Tex. Civ. App. 1941) error dism. (prejudicial evidence); Texas & Pac. Ry. v. Jefferson, 131 S.W.2d 175 (Tex. Civ. App. 1939) (improper argument). For cases in which the errors of excess were caused by jury mistake, but were curable by remittitur, see Adams v. Houston Lighting & Power Co., ___ Tex. ___, 314 S.W.2d 827 (1958); Texas Pipe Line Co. v. Hunt, 149 Tex. 33, 228 S.W.2d 151 (1950). But see Burchfield v. Tanner, 142 Tex. 404, 178 S.W.2d 681 (1944).

[50] 129 Tex. 297, 302, 103 S.W.2d 962, 964 (1937).

> It seems to have been assumed in some cases that the inference of passion and prejudice will follow as a necessary conclusion from any finding of excessive damages, and when present vitiates a verdict in its entirety. Such a holding would in effect invalidate our remittitur statutes, and make the vicious wrongdoer a favored child of the law.

Were we to accept the premise that an excessive verdict indicates that the jury acted improperly, it would be difficult to say that the error affected only damages. In the close cases there would be little choice but to award a new trial rather than order remittitur. It was this of which the court was speaking when it said that the inference of passion and prejudice would invalidate the remittitur statutes.

3. *"Shockingly Excessive" Verdicts*

Although the court in *World Oil* was correct in its holding as to "passion and prejudice," there is dictum in the opinion which creates a different type of uncertainty:

> There are cases where a shockingly excessive verdict, and the record as a whole, leave no room for doubt that the minds of jurors were so controlled and dominated by passion and prejudice as made them incapable of, or entirely unwilling, to consider a case on its merits. The remedy in such a case is to set the verdict aside, and refuse remittitur. . . . The following rule approximates a correct one, as nearly so, in our opinion, as can be found:
>
> "To bring a case within the rule prejudice or passion must be affirmatively shown; excessiveness of the verdict in itself does not establish it, unless it is so flagrantly excessive that it cannot be accounted for on any other ground. . . ."[51]

What cases the court believed would involve "shockingly excessive" verdicts is not clear since there is no decision in which a Texas court has been permitted to use excessiveness of the verdict as a means of granting a new trial.[52] A large verdict does not and should not of itself indicate impropriety, but there is justification for permitting the size of the verdict to be considered in determining whether a trial error should be considered harmless.

In order for excess to be used in this way the supreme court's words, "shockingly excessive verdict, and the record as a whole," would have to be read together. Remittitur must be used to correct excess if that is the only harmful error;[53] it follows that there would have to be other substantial errors appearing in the record to permit ordering a new trial without suggestion of remittitur. If the dictum in *World Oil* is interpreted to mean that the court of civil appeals may

[51] Ibid.
[52] See Comment, 29 Texas L. Rev. 347, 354 (1951).
[53] See cases cited in note 30 supra.

remand a case in which the error alleged on appeal is that of excess, but in which the record plainly indicates other prejudicial errors as well as an excessive verdict, the dictum may be fitted into the scheme of remittitur practice. Implicit in this meaning is the assumption that the reviewing court determines that the other errors in the record establish that the jury found improperly on liability as well as damages. This interpretation of the supreme court's words places a great deal of emphasis on the parenthetical phrase, "and the record as a whole," but any other explanation would do violence to the plain import of rule 440 and the decisions thereunder.

Further, this interpretation would allow a court to order a new trial even though the only assignment of error is that of excess, when there is gross error of some other type on the face of the record. Assuming the correctness of analysis it would be unnecessary even to consider the size of the verdict if the other errors were assigned. The cause would be remanded solely for the assigned prejudicial errors, and the size of the verdict would be immaterial.

Perhaps this makes the rule as expressed by the court no more than an "escape clause," but it is submitted that this is all it should be. Only the presence of error other than excess should permit vitiation of a verdict; under the rules, excess itself is not such an error unless the prevailing party is given opportunity to cure the error by remitting.

The theory of remittitur practice is that errors of excess are curable. Logically, this theory does not mean that some such errors may be cured but larger ones may not. In correcting excessive verdicts, degree of excess has little meaning.

B. *Invoking the Courts of Civil Appeals' Power*

The question which any practitioner must face is how properly to invoke the remittitur power of the courts of civil appeals.

Since there is some question about the true nature of rule 440 power, a prudent lawyer who wishes to attack a verdict as excessive would do well to include in his motion for new trial allegations that the verdict was "so excessive as to be manifestly unjust,"[54] "without support in the evidence," and "against the overwhelming weight and preponderance of the evidence."[55] Logically a mere assignment of an excessive verdict and a request for a new trial encompasses all

[54] See Tex. Rules Civ. Pro. Ann. rule 328 (1959).

[55] The last two assignments are suggested by Younger Bros. v. Hibbard, 201 S.W.2d 624, 626 (Tex. Civ. App. 1947).

of these, and more.[56] Until this is specifically recognized, though, caution dictates complete assignments.

When the defendant appeals after remittitur has been suggested in the *trial* court and the plaintiff wants to attack the trial court's remittitur, it is now clear under rule 328 that the only counter-assignment plaintiff must make is one alleging that the trial court's order "was manifestly unjust in the light of all the facts and circumstances."[57]

The defendant, if he wishes a new trial, would do well to assign other errors.[58] It would be unusual if this were not done as a matter of course under the Texas system, which liberally permits extensive assignments.

As a last note, it should be remembered that a remittitur in the trial court does not preclude further remittitur in the court of civil appeals.[59] A defendant appealing after a trial court remittitur will undoubtedly be faced with a counter-assignment alleging the remittitur was improper. There is nothing to prevent a request for further remittitur.[60] (Indeed, the whole appeal could be based upon such a point, but this would be risky unless the record were strongly in the defendant's favor.)

III. The Power of the Trial Courts

Rule 328 confers power on the trial courts of Texas to order remittiturs in proper cases. It reads:

> New trials may be granted whenever the damages are manifestly too small or too large, provided that whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to such remittitur.

Rule 315 provides the machinery by which a recovering party remits, and rule 319 states that tender of the remittitur corrects the error of excess.

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[56] See cases cited in notes 38, 49 supra.

[57] Flanigan v. Carswell, ___ Tex. ___, 324 S.W.2d 835, 841 (1959).

[58] See Comment, 29 Texas L. Rev. 347, 353 (1951).

[59] See World Oil Co. v. Hicks, 129 Tex. 297, 103 S.W.2d 962 (1937); cf. H. J. Heinz Co. v. Ashley, 291 S.W.2d 427 (Tex. Civ. App. 1956).

[60] At least this has been true in most cases. See, e.g., Red River Valley Pub. Co. v. Bridges, 254 S.W.2d 854 (Tex. Civ. App. 1953) error ref. n.r.e.; Thompson v. Clement, 202 S.W.2d 341 (Tex. Civ. App. 1947) error ref. n.r.e.; Phoenix Ref. Co. v. Morgan, 178 S.W.2d 175 (Tex. Civ. App. 1944) error ref. w.o.m.

The power to suggest remittitur as a condition of overruling defendant's motion for new trial is one which is a traditional part of the trial court's right to order new trial.[61] Before the enactment of article 1029a, as previously noted, the trial judge's power to order remittitur did not include cases in which there were unliquidated damages at issue.[62] However, the power of the trial courts, like that of the courts of civil appeals, now extends to *any* case in which the verdict is excessive.[63]

Although rules 328 and 440 prescribe slightly different tests for the ordering of a new trial on condition of remittitur, the considerations are essentially the same in both instances. The only real difference is that a trial judge has a greater power to order a new trial; this comes not from any difference in the authority conferred upon him by rule 328, but arises from his traditional right to order a new trial within his near-absolute discretion.[64] The difference is more than an academic one; unlike courts of civil appeals, the trial judge is under no *duty* to order remittitur in those cases in which the only error he can see is excessiveness of the verdict. Furthermore, since there is no review of the granting of a new trial at this level, a trial judge could draw an inference of passion and prejudice from a grossly excessive verdict and grant a new trial. However, it is not essential that such an inference be drawn; the judge could grant a new trial *solely* because of the error of excess, and there would be no review.[65]

It is altogether proper that there be a greater power in the trial judge. He is present at the trial, has observed the demeanor of the witnesses, and is generally in closer proximity to the case. These factors being present, it can well be argued that a suggestion of remittitur by a trial judge should be reviewed purely on the basis of abuse of discretion.[66] This traditionally greater discretion undoubtedly influenced the supreme court in limiting the court of civil appeal's power to review remittiturs in trial courts.

[61] See note 1 supra.

[62] See p. 151 supra.

[63] See World Oil Co. v. Hicks, 129 Tex. 297, 103 S.W.2d 962 (1937). This holding is remarkable since there had been no statutory change in the trial courts' power from 1893 until the World case was decided. It will be recalled that the adoption of article 1029a furnished the basis for the holding in the Syfan case that the courts of civil appeals could grant remittitur in unliquidated damages cases. See p. 152 supra.

[64] Lambert v. Gant, 290 S.W. 548 (Tex. Civ. App. 1926); McCaskey v. McCall, 226 S.W. 437 (Tex. Civ. App. 1920).

[65] An order granting a new trial is interlocutory, not final, and thus is not reviewable in the absence of express statutory authority. Lynn v. Hanna, 116 Tex. 652, 296 S.W. 280 (1927).

[66] Cf. Phoenix Ref. Co. v. Morgan, 178 S.W.2d 175 (Tex. Civ. App. 1944) error ref. w.o.m.

IV. Relationship of the Trial Courts and the Courts of Civil Appeals

Perhaps the most unusual feature of Texas remittitur practice is the provision of rule 328 permitting the courts of civil appeals to review a remittitur tendered by a plaintiff in accordance with the suggestion of the trial judge.[67] This right to contest the propriety of the trial court's order did not appear until the promulgation of the rules in 1941. The prior denial of review was in line with the federal courts' rule and the common law,[68] but the Texas rulemakers apparently decided that if a defendant was given the benefit of a remittitur,[69] he should be denied that benefit to some extent if he appealed the final judgment on the basis of other errors.

The wisdom of this policy is questionable; but the supreme court softened the effect of the innovation by its recent holding in *Flanigan v. Carswell.*[70]

In that case, the plaintiffs, Flanigan and Smith, were awarded damages of $30,000 and $5,000 respectively. The trial judge ordered Flanigan to remit $18,000 and Smith to remit $3,000. The defendants appealed on other grounds, and the court of civil appeals, upon plaintiff's counter-assignments, reinstated the original verdict of the jury, saying:

> In the absence of evidence to show that the jury verdict was improperly motivated and in the absence of any reason assigned by the trial court for requiring remittiturs and the verdict being within the bounds of reason we sustain appellees' . . . point and, in accordance with Rule 328, render judgment on the jury verdict.[71]

The supreme court reversed and remanded to the court of civil appeals, stating that the trial court was governed by the same standard as the court of civil appeals (this is the test used in *Wilson v. Freeman*).[72] But it did not stop there. It held that the court of civil appeals should not disturb the trial court's order unless the action taken below was manifestly unjust "in the light of all the facts and circumstances" of the record.[73]

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[67] See pp. 162-63 supra.

[68] See Dimick v. Schiedt, 293 U.S. 474 (1935).

[69] Query: Does the defendant benefit from an order of remittitur? Cf. Carlin, supra note 4.

[70] ___ Tex. ___, 324 S.W.2d 835 (1959).

[71] 315 S.W.2d 295, 311 (Tex. Civ. App. 1959).

[72] See the quotation from Wilson v. Freeman at p. 155 supra.

[73] 324 S.W.2d at 841.

A. *The Meaning of the Flanigan Case*

How did the supreme court reach its decision, and what could have influenced it in adopting a novel test?

The court of civil appeals, in its opinion in the case on remand, was disturbed by the test prescribed by the supreme court. The very able Judge Hughes, in a concurring opinion, strongly attacked the supreme court's construction of the rules. He used the following hypothetical situation in his opinion to point up the apparent paradox of the holding:

> If the trial court has ordered a remittitur of $25,000 of a $100,000 verdict when a $75,000 reduction of the verdict is sought and an appeal to this Court is made by the party in whose favor the remittitur was made and the adverse party contends, under the rule [328] that the remittitur should not have been required in whole or in part, and the appealing party contends that the judgment is still excessive by $50,000, then by what standards should these questions be resolved?
>
> If there is a distinction between the rule or standard enjoined upon us by the Supreme Court (manifestly unjust) in order to vacate the Trial Court's remittitur and the standards prescribed by the rules ("excessive" or "manifestly too large") then a discerning Court of Civil Appeals might find (1) that the action of the Trial Court in directing a $25,000 remittitur was *not* "manifestly unjust" (2) that the judgment is excessive by only $10,000 or that it is not excessive at all. This situation would present a judicial stalemate.[74]

This illustration is somewhat difficult to understand, but presumably Judge Hughes, when he says the court of civil appeals would find the "judgment" excessive by only $10,000, or not at all, is speaking of the verdict of the jury which was reduced by remittitur, and not the judgment entered. If this is his meaning, the solution to the problem is simple; the court of civil appeals cannot restore the remittitur even though it would have ordered a lesser reduction, because the remittitur was not manifestly unjust.

The supreme court did prescribe a different standard for the review of a trial judge's suggestion of remittitur and the initial determination of excess (under rule 440) in the court of civil appeals. It is a defensible distinction.

Before 1941, the courts of civil appeals were unable even to review such orders.[75] Remittitur was regarded as part of the trial

[74] Flanigan v. Carswell, 329 S.W.2d 902, 904 (Tex. Civ. App. 1960).

[75] No case is found in which the remittitur was attacked on appeal, and Texas was then in line with the common-law rule, which made remittitur a matter of the trial judges' discretion. See Dimick v. Schiedt, 293 U.S. 474 (1935).

court's broad discretionary power to order a new trial, and apparently no one bothered to contest the orders. In *Flanigan* the only question which faced the supreme court was the meaning to be attributed to rule 328's language conferring that authority. The rule says only that the party remitting "shall not be barred from contending in the appellate court that said remittitur should not have been required in whole or in part." There is no prescription of the standard to be followed in deciding propriety.

Since there was no standard expressed, the supreme court could have construed the rule as it wished. It could have said the clause should mean that abuse of discretion was the test,[76] or sufficiency of the evidence in support of the verdict,[77] or, as suggested by Judge Hughes,[78] that the original verdict was not manifestly too large. Instead, the court held that the remittitur must stand unless manifestly unjust.

Obviously the language used in prescribing the scope of the review is drawn from cases discussing the problem of verdicts "so contrary to the overwhelming weight and preponderance of the evidence as to be manifestly unjust."[79] When the supreme court used this test it obviously did not intend the courts of civil appeals to determine propriety by looking at sufficiency of evidence in support of the verdict *when the trial court had already made a determination.* If "manifestly unjust" is the test, the rational explanation is that a remittitur can be restored by a court of civil appeals under rule 328 only when it is determined that the verdict of the jury was supported by the overwhelming weight and preponderance of the evidence.

On the other hand, it is clear that the appellate courts can order remittitur under rule 440 power when they determine that the evidence was merely insufficient to support the verdict. If the interpretation of *Flanigan* here is correct, the supreme court effectively delineated the authority of the courts of civil appeals to review trial judges' actions in this area. The power of the trial courts and the courts of civil appeals to determine *initially* whether a remittitur is proper are the same, but when the trial court's order is under review the court of civil appeals must use a different standard in determining whether restoration is indicated.

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[76] Cf. Phoenix Ref. Co. v. Morgan, 178 S.W.2d 175 (Tex. Civ. App. 1944) error ref. w.o.m.

[77] Cf. Red River Valley Pub. Co. v. Bridges, 254 S.W.2d 854, 861 (Tex. Civ. App. 1953) error ref. n.r.e.

[78] 329 S.W.2d at 904.

[79] King v. King, 150 Tex. 662, 244 S.W.2d 660, 661 (1951).

Is the distinction justifiable? The supreme court apparently thinks so. Its holding is no more than a strict construction of the language of rule 328, leaving the great part of the pre-1941 power in the trial courts. The net result is that the trial judges do not have the authority they once possessed, but their rulings may not be attacked and set aside easily. Since rule 328 was in derogation of a common-law power, the test adopted is salutary, though unusual. (Remember, though, that the Texas concept of review of trial court remittiturs is unusual.)

Perhaps the net result is asymmetrical. The trial judge orders remittitur if he believes the evidence did not support the verdict. He can be reversed and the remittitur restored only if the judges of the reviewing court of civil appeals determine that the verdict of damages was supported by the overwhelming weight and preponderance of the evidence. Yet that same court of civil appeals might determine as a matter of first impression (under their rule 440 power) that a lesser remittitur would be proper. This is what Judge Hughes describes as a "judicial stalemate."[80] In his illustration, the court of civil appeals could not restore the remittitur in part, even though it would have suggested a lesser remittitur in the first instance.

B. *Why the Flanigan Case Was Needed*

The *Flanigan* case was the first pronouncement by the supreme court in definition and construction of rule 328. It was sorely needed; since 1941 the reviews of trial court remittiturs had been on an apparent *ad hoc* basis. Remittitur had been restored in cases in which the reviewing court thought the trial judge's order improper because the jury verdict was "authorized by the evidence,"[81] "not prima facie unreasonable, nor [did] . . . the evidence preponderate against it,"[82] and "fully supported by the evidence."[83]

On the other hand, suggestions of remittitur were sustained as proper where the trial court was "within its discretion" as determined from an examination of the record.[84] The term discretion recurred in those opinions in which it was found that the remittitur was proper; when the court of civil appeals wanted to restore a

[80] 329 S.W.2d at 904.

[81] Tarrant County Water Control & Improvement Dist. v. Fowler, 175 S.W.2d 694, 700 (Tex. Civ. App. 1943) error ref. w.o.m., 142 Tex. 375, 179 S.W.2d 250 (1944).

[82] Red River Valley Pub. Co. v. Bridges, 254 S.W.2d 854, 861 (Tex. Civ. App. 1953) error ref. n.r.e.

[83] Davis Transport, Inc. v. Bolstad, 295 S.W.2d 941, 956 (Tex. Civ. App. 1956).

[84] Western Union Tel. Co. v. Coker, 202 S.W.2d 710 (Tex. Civ. App. 1947), rev'd on other grounds, 146 Tex. 190, 204 S.W.2d 977; Phoenix Ref. Co. v. Morgan, 178 S.W.2d 175 (Tex. Civ. App. 1944) error ref. w.o.m.

remittitur they spoke of the evidence in the record sustaining the verdict, the failure of the trial court to assign reasons for its order, and the absence of circumstances indicating passion and prejudice. *Flanigan* classified the role the courts of civil appeals should play. It could well be that there will be no real change in their approach, but it is to be hoped that they will find it more difficult to say that the order of a judge was "manifestly unjust" in the light of the record than they found it to say that the evidence justified the verdict.

The last part of the opinion in the *Flanigan* case mentioned that there need be no assignment of reason by the trial judge for his order, and that there need be no evidence showing that the jury was improperly motivated. This is in line with true remittitur theory, that remittiturs are authorized only for cure of excessive verdicts, and a mere order of remittitur contains an implied finding of excess. Perhaps the ghost of passion and prejudice will be laid to rest now. Hitherto it has proved hardy, however, and there is no guarantee that it will not haunt us in the future.