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the operation of sovereign immunity,⁵⁴ and the availability of damages.⁵⁵ Rules which always place the burdens of proof on the bailee have recently been adopted by several states in well-reasoned opinions.⁵⁶ The Missouri Supreme Court should consider the issue and do the same. Under such a rule, the outcome of bailment actions would depend more upon the merits and less upon artful pleadings.

JAMES L. MOELLER

CIVIL PROCEDURE— REMITTITUR—LIMITED RIGHT OF REMITTING PARTY TO CROSS-APPEAL

*Means v. Sears, Roebuck & Co.*¹

A trial judge may reduce a jury verdict he deems excessive, and avoid granting a new trial, by ordering a remittitur. This is a procedure whereby the defendant's motion for a new trial is denied by the trial court if the plaintiff agrees to accept a specified reduction in the jury's award. Under the common law rule, a plaintiff who accepts a remittitur to avoid undergoing a new trial is precluded on appeal from complaining of the insufficiency of the judgment awarded him.² This rule recently was modified in Missouri in *Means v. Sears, Roebuck & Co.*

In *Means* the plaintiff brought an action to recover for personal injuries and won a jury verdict of \$65,000. The trial judge ordered a remittitur of \$25,000, which the plaintiff accepted. The defendant appealed, raising the excessiveness of the judgment; the plaintiff cross-appealed, seeking reinstatement of the original verdict. The St. Louis District of the Missouri Court of Appeals affirmed the plaintiff's remitted recovery.

may have different statutory periods for the respective actions and rules may vary as to when the statute starts to run.

54. See *Jurisich v. Board of Levee Comm'rs*, 8 So. 2d 554 (La. App. 1942) (a contract action for damage to a bailed airplane was successfully pursued because the governmental bailee's sovereign immunity precluded an action in tort).

55. Punitive damages are much more likely in a tort action than in a contract action. For a recovery of punitive damages in a bailment situation, see *Brown v. Sloan's Moving & Storage Co.*, 296 S.W.2d 20 (Mo. 1956) (bailor joined action on bailment contract with claim for fraud; a successful claim for punitive damages was based on the latter).

56. See cases cited in note 8 *supra*.

1. 550 S.W.2d 780 (Mo. En Banc 1977).

2. See Annot., 16 A.L.R.3d 1327, 1329 (1967).

However, the court recognized the need to reconsider the Missouri rule which prohibits a plaintiff who has accepted a remittitur from arguing for a reinstatement of the original verdict and transferred the case to the Missouri Supreme Court for a reexamination of this rule. The supreme court affirmed the court of appeals decision but modified the common law remittitur rule and held that when the plaintiff has accepted a remittitur in the trial court and the defendant raises the issue of the excessiveness of the award on appeal, the plaintiff may then request review of the remittitur order, *i.e.*, may ask for reinstatement of the original verdict.³

The approach taken by Missouri courts prior to *Means* is illustrated in *Carver v. Missouri-K.-T. R.R.*⁴ The jury awarded \$67,500 for the wrongful death of the plaintiff's husband. The trial judge ordered a remittitur of \$15,000 as a condition to overruling the defendant's motion for a new trial. The plaintiff accepted the remittitur and judgment was entered for the remitted verdict. On appeal the defendant assigned as error the excessiveness of the damages awarded. The plaintiff also appealed and sought to have the jury verdict reinstated. He asserted that the remittitur was under the compulsion of a final order which would sustain the defendant's motion for a new trial.

The court sustained the defendant's motion to dismiss plaintiff's appeal and held that once a plaintiff has accepted a remittitur he cannot question its validity. In answering the plaintiff's assertion that the remittitur order was under compulsion, the court explained that remittitur orders are construed as effectively granting the defendant a new trial due to the excessiveness of the verdict. The plaintiff has the power, however, to surrender that part of the judgment considered excessive and thereby defeat the defendant's new trial. The exercise of this power by the plaintiff is a voluntary election to accept the remittitur. The court also noted, citing *Counts v. Thompson*,⁵ that the remittitur practice was instituted for the benefit of injured plaintiffs so that a judgment for a proper amount could be entered, and the delay and expense of a new trial thus could be avoided.

In *Carver* the court relied on the authority of United States Supreme Court cases,⁶ cases from other jurisdictions,⁷ and legal encyclopedias.⁸

3. 550 S.W.2d at 789. The court did not comment on a more liberal rule, also suggested by the plaintiff, whereby the defendant also would be required to consent upon the entry of a remittitur; if the defendant did not consent, the remittitur order would be vacated. The defendant then could take an appeal, but the appeal would be from the original verdict and not from the verdict after remittitur.

4. 362 Mo. 897, 245 S.W.2d 96 (1952). *See also* *Webb v. Rench*, 476 S.W.2d 570 (Mo. 1972).

5. 359 Mo. 485, 222 S.W.2d 487 (1949).

6. *Koenigsberger v. Richmond Silver Min. Co.*, 158 U.S. 41 (1895); *Kennon v. Gilmer*, 131 U.S. 22 (1889).

7. *Florida East Coast Ry. v. Ruckles*, 83 Fla. 599, 92 So. 159 (1922); *McDaniel v. Hancock*, 328 Mich. 78, 43 N.W.2d 68 (1950).

8. 4 C.J.S. *Appeal and Error* § 213 at 635 (1957); 39 AM. JUR. *New Trial* § 213 at 206, nn.8-11 (1942).

Although the court declined to comment on the reasoning behind these authorities, there is some logic in the common law rule. Whether the prohibition on appeal is couched in terms of waiver,⁹ estoppel,¹⁰ or lack of standing,¹¹ the basic idea is that one may not appeal from a judgment to which he has consented.¹² This logic, however, is not without limits. If the purpose behind allowing the plaintiff to remit a portion of the verdict is settlement of the issue of damages,¹³ this purpose of the remittitur procedure is negated when the defendant appeals the issue of damages. This was the concept adopted by the Missouri Supreme Court in *Means* when it reasoned that in acceding to a remittitur the plaintiff should be able to assume that the issue of damages is settled. When that issue is kept alive by the defendant's appeal, "the whole issue of what remittitur, if any, is required should be open for consideration by the appellate court."¹⁴

With the *Means* decision Missouri departs from the general rule that a plaintiff cannot challenge the propriety of a remittitur order after accepting it, and aligns itself with a significant minority of jurisdictions which allow some type of appellate review of a remittitur order. Although some of these other jurisdictions permit review by statute or procedural rule,¹⁵ some have provided for review through judicial decision.¹⁶

The decision in *Plesko v. City of Milwaukee*¹⁷ has been a substantial influence in jurisdictions which have reconsidered the common law rule. The jury in *Plesko* returned a \$9,950 verdict for the plaintiff. The trial court found the verdict excessive and ordered a remittitur of \$4,450 which plaintiff accepted. On appeal, the court held that a plaintiff who has accepted a remittitur is not precluded from obtaining appellate review of such remittitur when the defendant appeals. The plaintiff's right to cross-appeal was limited to instances where the defendant has appealed; it was not extended to allow a direct appeal by the plaintiff. However, *Plesko* would allow review of the remittitur order even though the defendant does not raise the issue of damages on appeal.¹⁸

9. *E.g.*, *San Bernardino County v. Riverside County*, 135 Cal. 618, 67 P. 1047 (1902); *Plinsky v. Nolan*, 65 Or. 402, 133 P. 71 (1913).

10. *E.g.*, *Florida East Coast Ry. v. Ruckles*, 83 Fla. 599, 92 So. 159 (1922); *McDaniel v. Hancock*, 328 Mich. 78, 43 N.W.2d 68 (1950); *Martin v. Jansen*, 113 Wash. 290, 193 P. 674 (1920).

11. *E.g.*, *Gough v. Halperin*, 306 Pa. 230, 159 A. 447 (1932).

12. Note, *Civil Procedure—Remittitur—Remitting Parties' Right to Cross-Appeal*, 49 N.C.L. REV. 141, 143 (1970).

13. *Worley v. Tucker Nevils, Inc.*, 503 S.W.2d 417 (Mo. En Banc 1973).

14. 550 S.W.2d at 789.

15. NEB. REV. STAT. § 25-1929 (1943); N.Y. CIV. PRAC. LAW. § 5501(a)(5) (McKinney 1963); TENN. CODE ANN. § 27-118 (1955); TEX. R. CIV. P. 328 (1975).

16. *Mulkerin v. Somerset Tire Serv., Inc.*, 110 N.J. Super. 173, 264 A.2d 748 (1970); *Plesko v. City of Milwaukee*, 19 Wis. 2d 210, 120 N.W.2d 130 (1963). For a review of federal court decisions, see Note, *Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts*, 1975 DUKE L.J. 1150.

17. 19 Wis. 2d 210, 120 N.W.2d 130, 16 A.L.R.3d 1315 (1963).

18. *Id.* at 220, 120 N.W.2d at 135, 16 A.L.R.3d at 1324.

Concurring in *Means*, then Chief Judge Seiler argued for the adoption of the *Plesko* rule in Missouri. The language quoted from *Plesko* illustrates that the purpose of remittitur in Wisconsin is to avoid the delay and expense of a new trial or appeal; when a defendant appeals, this purpose is neutralized. What is overlooked is the fact that the stated purpose of remittitur is not exactly the same in Missouri.¹⁹ Judge Finch commented on that point in a separate concurring opinion in *Means* where he argued against the adoption of the *Plesko* rule. In that opinion Judge Finch stated that “[t]he remittitur practice never was intended to serve as a complete answer to all objections raised by a defendant in a motion for a new trial after a plaintiff has obtained a verdict. It was intended to address only the assertion that the verdict is excessive.”²⁰ If, after the plaintiff has accepted a remittitur, the defendant appeals on issues other than the excessiveness of the damages, the remittitur still serves a useful function in settling the issue of damages. This function is not upset by the defendant’s appeal on other issues. Furthermore, as suggested by Judge Finch, to allow the plaintiff (a nonappealing party) to possibly recover the remitted portion of his original verdict when the issue of damages is not raised by the defendant’s appeal would serve to penalize the defendant for taking his appeal and would be unfair.²¹ If the remittitur has cured an excessive verdict in the trial court, it has served its function. The defendant still has a statutory right to appeal the issues he believes deserve attention which were not cured by the remittitur, and it would seem that he should be free to exercise this right without fear of penalty.

Therefore, as was approved in *Means*, to allow the plaintiff to cross-appeal the insufficiency of the damages award when the defendant has kept the issue of damages alive on appeal conforms to the basic purpose of the remittitur practice. Extending this rule further and allowing a cross-appeal of the damages issue when the defendant’s appeal does not concern damages may comport with the Wisconsin rationale of remittitur but not that of Missouri.

After *Means v. Sears* a plaintiff confronted with a remittitur order in the trial court will have a new element to consider. If the plaintiff decides to accept the remittitur, there are three possible courses of events.

First, the defendant could be satisfied with the remitted verdict and not appeal, thereby allowing the plaintiff immediate recovery.

Second, the defendant could decide to appeal and raise the issue of damages; the *Means* decision permits the plaintiff to seek review of the

19. See *Worley v. Tucker Nevils, Inc.*, 503 S.W.2d 417 (Mo. En Banc 1973) where it is noted that the remittitur doctrine is useful in keeping damages from exceeding an upper limit of reasonable compensation, and sometimes avoids the granting of new trials which result in delay, uncertainty, and additional expense.

20. 550 S.W.2d at 790 (Finch, J., concurring).

21. *Id.*

original remittitur order. The appellate court may approve the remittitur, as in *Means*; the court may order a new trial on damages alone or on all issues,²² with or without a power in the plaintiff to defeat the order for new trial by accepting further remittitur; or the court may order reinstatement of part or all of the original jury verdict.²³

Third, the defendant may appeal on issues other than damages, in which case the plaintiff cannot get review of the trial court's remittitur order.²⁴

If the plaintiff refuses the remittitur there are two possibilities.

First, the plaintiff could undergo a new trial hoping for a verdict which meets or exceeds the original damages award.

Second, the plaintiff may appeal the order granting a new trial.²⁵ If the plaintiff appeals this order and wins, the original verdict may be reinstated.²⁶ Otherwise, there is some indication that the appellate court could find that a remittitur was in order, but that the trial court abused its discretion as to the amount, and enter a new verdict.²⁷ If the plaintiff loses his appeal, a new trial is ordered.²⁸ In the case of a lost appeal, the plaintiff may not then decide to accept the remittitur, except in certain circumstances.²⁹

Each of these alternatives has a practical basis for existing, and the well-reasoned decision in *Means v. Sears* has not upset the logic underlying them. However, the suggested extension of remittitur practice to allow the plaintiff on cross-appeal to complain that the remittitur order was improper, even when the defendant has not raised the issue of damages on appeal, is not so well supported in reason. This consideration, coupled with the fact that the Missouri Supreme Court already has rejected a more liberal rule,³⁰ makes it likely that, if faced with the possibility of adopting the *Plesko* rule, the court will decline to do so.

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22. *DeMoulin v. Kissir*, 446 S.W.2d 162 (St. L. Mo. App. 1969).

23. This is the possibility added by *Means v. Sears*.

24. In this situation, then Chief Judge Seiler would allow review of the remittitur order. 550 S.W.2d at 792 (Seiler, C.J., concurring).

25. § 512.020, RSMo 1969.

26. *Sanders v. Illinois Central R.R.*, 364 Mo. 1010, 270 S.W.2d 731 (En Banc 1954).

27. C. WHEATON, *Civil Rules Practice*, 17 MISSOURI PRACTICE SERIES 562 n.37 (1976).

28. *Weis v. Wanstrath*, 149 S.W.2d 442 (St. L. Mo. App. 1941).

29. *Deaner v. Bi-State Dev. Agency*, 484 S.W.2d 232 (Mo. 1972) (the defendant's only argument in favor of sustaining the new trial order was the excessiveness of damages); *Greco v. Hendricks*, 327 S.W.2d 241 (Mo. 1959) (trial court's new trial order was on inconsistent grounds); *Nix v. Gulf Mobile & O.R.R.*, 362 Mo. 187, 240 S.W.2d 709 (1951); *Steuernagel v. St. Louis Public Service Co.*, 361 Mo. 1066, 238 S.W.2d 426 (En Banc 1951).

30. See note 3 *supra*.