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## Appellate Remittitur

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# Comments

## APPELLATE REMITTITUR

### I. INTRODUCTION

The power of the trial court to reduce an excessive verdict has long been conclusively established both in Missouri and the federal courts.<sup>1</sup> This discussion is limited to the practice of remittitur by appellate courts. When an appellate court remits an excessive judgment it does not set aside the lower court judgment and enter judgment for a lesser amount. Instead the court conditions its affirmance on the plaintiff consenting to remit that amount by which the judgment in his favor is deemed excessive. If he does not consent, the judgment of the lower court is reversed and the case is remanded for a new trial. Appellate remittitur has the obvious advantage of avoiding the delay and expense usually inherent in a new trial. Nevertheless, the procedure has not been universally accepted and its opponents have consistently argued that it violates state and federal constitutional provisions.

### II. APPELLATE REMITTITUR IN MISSOURI

The earliest Missouri cases sanctioning the use of appellate remittitur involved voluntary remissions by the plaintiff. In some cases<sup>2</sup> the plaintiff would anticipate, and avoid, reversal of an excessive judgment by offering to remit a specific portion of that judgment before arguments in the appellate court. In other cases the plaintiff would attempt, sometimes unsuccessfully, to avoid remand by asking the supreme court to determine the amount by which a judgment was excessive, agreeing in his argument before that court to remit that amount.<sup>3</sup> The defendant's response to either of these approaches was invariably to argue that the appellate court had no power to reduce the judgment and that a new trial was required. This process

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1. Missouri: *See, e.g.*, Dale v. St. Louis, K.C. & N. Ry., 63 Mo. 455, 460 (1867); Loyd v. Hannibal & St. J. R.R., 53 Mo. 509, 514 (1873). Federal courts: Blunt v. Little, 3 Fed. Cas. 760 (No. 1578) (C.C.D. Mass. 1822) was the first decision to uphold the use of remittitur by a federal trial court. The Supreme Court adopted the same view in Northern Pac. R.R. v. Herbert, 116 U.S. 642, 646-47 (1885), and reiterated it, with little attempt at constitutional justification, successively in Arkansas Cattle Co. v. Mann, 130 U.S. 69, 73 (1889); Kennon v. Gilmer, 131 U.S. 22, 29 (1889); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41, 52 (1895); German Alliance Ins. Co. v. Hale, 219 U.S. 307, 312 (1911); Gila Valley G. & N. Ry. v. Hall, 232 U.S. 94, 103-05 (1914). A reasoned judicial sanction for trial court remittitur was finally supplied in Demick v. Schiedt, 293 U.S. 474, 483 (1935).

2. *See, e.g.*, Smith v. Wabash, St. L. & Pac. Ry., 92 Mo. 359, 4 S.W. 129 (1887); Waldhier v. Hannibal & St. J. R.R., 87 Mo. 37 (1885).

3. *See, e.g.*, Gurley v. Missouri Pac. Ry., 104 Mo. 211, 16 S.W. 11 (1891).

of voluntary remittitur soon led appellate courts to reduce excessive verdicts even in situations where the plaintiff had not consented in advance to remit a certain portion. This is usually termed enforced remittitur.

In 1890 the Missouri Supreme Court held in *Furnish v. Missouri Pac. R.R.*<sup>4</sup> that it could remit an excessive judgment even though the plaintiff had not consented to remit any sum. This case represents the first clear endorsement of enforced remittitur by our supreme court. Two decades and several conflicting opinions were to transpire before the practice became conclusively established. In 1891 division two of the supreme court held that it had no power to reduce a judgment by remittitur.<sup>5</sup> In 1894 the supreme court reversed itself in *Burdick v. Mo. Pac. R.R.*,<sup>6</sup> and decided en banc that it had the power to remit an excessive judgment. In two separate and lengthy opinions, three dissenting judges argued that enforced remittitur violated the constitutional guarantee of trial by jury and that the appellate court by reviewing the amount of unliquidated damages awarded, was involving itself in the determination of a factual question which historically was reserved to the trial court.

The views of the dissenters prevailed in the next case involving remittitur. In *Rodney v. St. Louis S.W. Ry.*,<sup>7</sup> Division One, relying upon the decision in *Burdick*, entered a remittitur. The case was transferred to the court en banc, and by a four to three vote, the Missouri Supreme Court decided it had no power to remit.<sup>8</sup> In 1897 division two followed the decision in *Rodney* by reiterating, in *Hollenbeck v. Mo. Pac. R.R.*,<sup>9</sup> that appellate courts have no power to remit.

*Hollenbeck* was the last Missouri decision denying the power to remit. Division one, beginning with its decision in *Chitty v. St. Louis, I.M. & S. Ry.*,<sup>10</sup> has consistently held that the supreme court could reduce an excessive judgment.<sup>11</sup> Division two, in *Phippin v. Missouri Pac. R.R.*,<sup>12</sup> likewise upheld the power of remittitur in the supreme court.

Authority for appellate remittitur was conclusively established in the decision of the Supreme Court En Banc in *Cook v. Globe Printing Co.*<sup>13</sup> Plaintiff had sued a St. Louis newspaper for libel. The jury verdict was for \$75,000 actual and \$75,000 punitive damages, and the lower court entered judgment thereon. The supreme court, citing the more recent decisions in both divisions, decided that the

4. 102 Mo. 438, 13 S.W. 1044 (1890).

5. *Gurley v. Missouri Pac. Ry.*, 104 Mo. 211, 16 S.W. 11 (1891).

6. 123 Mo. 221, 27 S.W. 453 (En Banc 1894).

7. 127 Mo. 676, 28 S.W. 887 (1894).

8. 127 Mo. 676, 30 S.W. 150 (En Banc 1895).

9. 141 Mo. 97, 38 S.W. 723 (1897).

10. 148 Mo. 64, 49 S.W. 868 (1899). The court did not actually order a remittitur, since it believed the excessiveness in this case was the result of the passion and prejudice of the jury, and hence could not be cured by a remittitur at the appellate level.

11. *Devoy v. St. Louis Transit Co.*, 192 Mo. 197, 91 S.W. 140 (1905); *Reynolds v. St. Louis Transit Co.*, 189 Mo. 408, 88 S.W. 50 (1905).

12. 196 Mo. 321, 93 S.W. 410 (1905).

13. 227 Mo. 471, 127 S.W. 332 (En Banc 1910).

practice of appellate remittitur had become established, that such procedure was within the power of the court, and reduced the judgment to \$25,000 actual and \$25,000 punitive damages. Since *Cook*, decisions of Missouri courts have upheld appellate remittitur without exception.<sup>14</sup>

Since the earliest remittitur cases in Missouri, the practice of appellate remittitur has been attacked primarily on two grounds. The most frequent contention of those opposing it is that it violates the plaintiff's right to trial by jury. Article II Section 28 of the 1875 Missouri Constitution guaranteed this right and Article I Section 22(a) of the 1945 constitution is identical. The 1875 constitution was in effect when the Missouri Supreme Court rendered the series of decisions, culminating in *Cook v. Globe Printing Co.*,<sup>15</sup> which first sanctioned appellate remittitur. All of these decisions upholding the use of remittitur impliedly rejected the argument that such process violated the constitutional right to a trial by jury, and in *Chitty*<sup>16</sup> the court expressly held that Article II Section 28 was not violated. The equivalent provision of the 1945 Constitution (Article I Section 22(a)) provides "that the right of trial by jury as heretofore enjoyed shall remain inviolate." It has been argued that since appellate remittitur was an established practice before the adoption of the 1945 Constitution, "the right of trial by jury 'as heretofore enjoyed' . . . is subject to the condition that an appellate court can remit an excessive judgment."<sup>17</sup>

There is much logic in holding that the plaintiff is not denied his right to a jury trial because the essence of remittitur is the choice offered the plaintiff—he can either consent to a judgment for the reduced amount or have a new trial before a different jury.

The second primary argument against remittitur is that an appellate court, by reducing the size of an excessive judgment, is reviewing a finding of fact by the lower court. No constitutional provision prohibits an appellate court from reviewing questions of fact,<sup>18</sup> but Missouri courts have often expressed the view that an appellate court ought not, as a matter of policy, interfere with the determination of facts made by the trial court.<sup>19</sup> The procedure of appellate remittitur, however, is not a reexamination of factual issues determined by the jury or trial court, because an appellate court will remit an excessive judgment only when that is the sole error shown by the record.<sup>20</sup> Furthermore, the amount of the judgment will

14. *Smiley v. St. Louis-S. F. Ry.*, 359 Mo. 474, 484, 222 S.W.2d 481, 486 (En Banc 1949). See Coburn, *The Missouri Remittitur Practice*, 1958 Mo. BAR J. 214, 215-16, for an excellent discussion of the development of appellate remittitur in Missouri.

15. 227 Mo. 471, 127 S.W. 332 (En Banc 1910).

16. 148 Mo. 64, 49 S.W. 868 (1899).

17. Coburn, *The Missouri Remittitur Practice*, 1958 Mo. BAR J. 214, 217.

18. *Smith v. Baer*, 166 Mo. 392, 406, 66 S.W. 166, 170 (1901).

19. See, e.g., *Widener v. St. Louis Pub. Serv. Co.*, 360 Mo. 761, 766, 230 S.W.2d 698, 700 (1950); *King v. Kansas City Life Ins. Co.*, 350 Mo. 75, 88, 164 S.W.2d 458, 465 (En Banc 1942).

20. *Olian v. Olian*, 332 Mo. 689, 700-01, 59 S.W.2d 673, 678 (1933).

be reviewed only "as a question of law presented on the cold record,"<sup>21</sup> and the court will interfere only if there is not substantial evidence to support the award.<sup>22</sup> Thus the appellate court is merely applying the same standards to the issue of damages which it applies to the issue of liability when determining, as a matter of law, whether a submissible case has been made.

Even though Missouri courts accept appellate remittitur without qualification, they apply it only in limited situations. Missouri decisions state that the amount of damages is not to be interfered with by an appellate court unless the award is "so large as to offend against all sense of right,"<sup>23</sup> or "shockingly excessive,"<sup>24</sup> or "is shocking to the judicial conscience."<sup>25</sup>

Appellate courts are especially reluctant to order a further reduction of the award if the trial court has considered the matter and already reduced the amount substantially.<sup>26</sup>

In determining whether the judgment is so excessive as to warrant appellate remittitur, the courts will consider each case on its own facts.<sup>27</sup> Such factors as changing economic conditions and reduced purchasing power of the dollar will also be weighed in the determination.<sup>28</sup> The court will also consider the size of verdicts rendered in similar cases with a view toward maintaining "reasonable uniformity of awards for similar injuries."<sup>29</sup> This rule of uniformity is based on the supposition that the amounts awarded by juries will vary greatly, because they are in no position to compare the verdicts they render to those in similar cases. The courts, however, are able to contrast the verdict in a particular case with those handed down by juries in similar cases, and thus equalize the results.<sup>30</sup>

A court which has decided to reduce an excessive judgment must determine

21. *Riley v. St. Louis Pub. Serv. Co.*, 245 S.W.2d 666, 674 (St. L. Mo. App. 1952).

22. *Daniels v. Brown*, 266 S.W.2d 680, 688 (Mo. 1954).

23. *Mollman v. St. Louis Pub. Serv. Co.*, 192 S.W.2d 618, 626 (St. L. Mo. App. 1946). See also *Silsby v. Hinckey*, 107 S.W.2d 812, 819 (St. L. Mo. App. 1937).

24. *Marshall v. St. Louis Union Trust Co.*, 196 S.W.2d 435, 437 (St. L. Mo. App. 1946).

25. *Ibid.*

26. See, e.g., *Cruce v. Gulf, M. & O. R.R. Co.*, 361 Mo. 1138, 238 S.W.2d 674 (1951); *Cook v. Kansas City*, 358 Mo. 296, 214 S.W.2d 430 (1948); *Orr v. Shell Oil Co.*, 352 Mo. 288, 177 S.W.2d 608 (1943); *Shaefer v. Transamerican Freight Lines*, 173 S.W.2d 20 (Mo. 1943); *Gieseking v. Litchfield & M. Ry.*, 344 Mo. 672, 127 S.W.2d 700 (1939).

27. *Berry v. Emery, Bird, Thayer Dry Goods Co.*, 357 Mo. 808, 823, 211 S.W.2d 35, 44 (1948); *Burriss v. Kansas City Pub. Serv. Co.*, 226 S.W.2d 743, 752 (K.C. Mo. App. 1950).

28. *Williamson v. Wabash R.R. Co.*, 355 Mo. 248, 256, 196 S.W.2d 129, 134 (1946); *Clader v. City of Neosho*, 198 S.W.2d 523, 530 (Spr. Mo. App. 1946).

29. *Berry v. Emery, Bird, Thayer Drygoods Co.*, 357 Mo. 808, 823, 211 S.W.2d 35, 44 (1948). See also *Sanders v. Illinois Central R.R.*, 364 Mo. 1010, 270 S.W.2d 731 (En Banc 1954).

30. The fault in this reasoning is that Missouri courts have thus far been generally unwilling to apply the procedure of additur which would raise to the "standard of uniformity" those judgments which are regarded as inadequate.

what amount to remit. Three different approaches have been suggested. Wisconsin courts have adopted the standard that the amount remitted should reduce the judgment to the lowest amount the jury could reasonably have found as its verdict.<sup>31</sup> The apparent rationale for this theory is that courts should give the foremost consideration to the interest of the defendant, since he has no alternative but to accept the remitted verdict; whereas the plaintiff if not satisfied can choose to submit to a new trial. The Missouri Supreme Court explicitly rejected the Wisconsin view in *Clark v. Atchison & E. Bridge Co.*<sup>32</sup> The defendant had urged the court to fix the amount of the reduced judgment at the "minimum which the evidence would justify,"<sup>33</sup> since the plaintiff is not forced to accept the remittitur while the defendant has no choice except to pay the amount left after the remittitur. The court rejected the defendant's reasoning:

. . . [the defendant's] argument loses sight of the fact that it is the defendant who is seeking relief from the alleged excessive verdict, and that a remittitur is allowed only in cases where the defendant has already had a fair and impartial trial, free from error and, the plaintiff is entitled to the affirmance of the entire verdict and judgment except to the extent the judgment is shown to be excessive.<sup>34</sup>

Other courts have adopted an approach which is the antithesis of the Wisconsin view. Their decisions hold that the excessive judgment should be reduced only to the maximum which the court can uphold as not excessive.<sup>35</sup> The theory is that the jury intended to award the plaintiff as much as is legally permissible, and that for an appellate court to reduce the amount below that point would constitute an invasion of the jury's province.

The majority of state and federal courts have adopted neither standard, apparently preferring to set the amount of the reduced judgment at a sum which the court believes a properly functioning jury would have found.<sup>36</sup> Although the Missouri Supreme Court has never explicitly adopted this intermediate approach, the language of recent decisions supports this view. In *Crane v. Northrup*,<sup>37</sup> the

31. *Swanson v. Schultz*, 223 Wis. 278, 270 N.W. 43 (1936); *Reykdal v. Miller*, 216 Wis. 561, 257 N.W. 604 (1934); *Lehner v. Kelley*, 215 Wis. 265, 254 N.W. 634 (1934).

32. 333 Mo. 721, 62 S.W.2d 1079 (1933).

33. *Id.* at 732, 62 S.W.2d at 1083.

34. *Id.* at 732, 62 S.W.2d at 1083-84.

35. At least three federal courts of appeals have adopted this view. See, e.g., *Covey Gas & Oil Co. v. Checketts*, 187 F.2d 561 (9th Cir. 1951); *Boyle v. Bond*, 187 F.2d 362 (D.C. Cir. 1951), *Texas Co. v. Christian*, 177 F.2d 759 (5th Cir. 1949).

36. 6A MOORE, FEDERAL PRACTICE § 59.05[3] (2d ed. 1953). Although many of the decisions asserting this approach have been concerned with remittitur in the trial court, see, e.g., *Fornwalt v. Reading Co.*, 79 F. Supp. 921 (E.D. Pa. 1948); *Grobengieser v. Clearfield Cheese Co.*, 94 F. Supp. 402, 405 (W.D. Pa. 1950), the same general rules apply to both trial and appellate remittitur. 6A MOORE, FEDERAL PRACTICE § 59.05[3] (2d ed. 1953).

37. 413 S.W.2d 190 (Mo. 1967). See also *Parlow v. Carson-Union-May-Stern Co.*, 310 S.W.2d 877, 885 (Mo. 1958).

court declared that "the ultimate test of excessiveness or of inadequacy of an award is what will fairly and reasonably compensate for the injuries sustained."<sup>38</sup>

This approach appears just and feasible. Defendant profits from the court's experienced judgment as to what award is adequate and yet entirely fair. The plaintiff, while preserving his option to refuse, is given an incentive to accept the remittitur, thus avoiding the delay and expense of a new trial. Any other approach places one of the parties at a severe disadvantage. If the court fixes as the reduced judgment the lowest amount that the jury could reasonably find, it has intruded considerably into the jury's function. More importantly, the plaintiff's incentive to accept the remittitur is virtually nil.

If the court espouses the antithetical view and remits only that portion of the judgment which is beyond the maximum recovery legally permissible, the plaintiff is provided with a strong incentive to remit; but the defendant, who has no option, is not benefited by the court's experienced determination as to what amount a jury would have found if functioning properly.

### III. APPELLATE REMITTITUR IN THE FEDERAL COURTS

The Missouri procedure of appellate remittitur is not followed by the federal courts sitting in this state. The Eighth Circuit Court of Appeals has declared that "the assignment of error that the verdict is excessive is not properly addressed to this court."<sup>39</sup> As support for its position the court has referred to the Seventh Amendment of the United States Constitution and to the common law as it existed in 1791 when that amendment was adopted.<sup>40</sup>

A number of recent decisions indicate that the excessiveness of the judgment may be reviewed at the appellate level if there has been a "manifest abuse of discretion,"<sup>41</sup> or if the award is "so excessive as to be monstrous or to shock the judicial conscience."<sup>42</sup> In *Missouri K.T. R.R. v. Ridgeway*,<sup>43</sup> judgment was reversed partially because the verdict was "so excessive as to shock the conscience" and "not fairly supported by the evidence."<sup>44</sup> Despite these intimations, it is safe to say that the Eighth Circuit will review a judgment on the ground of excessiveness

38. 413 S.W.2d at 194.

39. *New York, C. & St. L. R.R. v. Affolder*, 174 F.2d 486, 493 (8th Cir. 1949), *rev'd on other grounds*, 339 U.S. 96 (1950). *See also* *Railway Express Agency v. Epperson*, 240 F.2d 189 (8th Cir. 1957); *National Alfalfa Dehydrating & Mill Co. v. Sorensen*, 220 F.2d 858 (8th Cir. 1955); *Glendenning Motorways v. Anderson*, 213 F.2d 432 (8th Cir. 1954).

40. *Myra Foundation v. United States*, 267 F.2d 612 (8th Cir. 1959); *Agnew v. Cox*, 254 F.2d 263 (8th Cir. 1958).

41. *Cutter v. Cincinnati Union Terminal Co.*, 361 F.2d 637, 639 (8th Cir. 1966); *Boston & M. R.R. v. Talbert*, 360 F.2d 286, 291 (8th Cir. 1966); *Commercial Union Ins. Co. v. Gonzalez Rivera*, 358 F.2d 480, 484 (8th Cir. 1966).

42. *Chicago, R. Is. & Pac. R.R. v. Williams*, 245 F.2d 397, 406 (8th Cir.), *cert. denied*, 355 U.S. 855 (1957). *Louisville & N. R.R. v. Botts*, 173 F.2d 164 (8th Cir. 1949).

43. 191 F.2d 363 (8th Cir. 1951).

44. *Id.* at 368.

only in very rare situations. Furthermore, when the court does find the judgment so excessive as to warrant review, it is far more likely to reverse outright than apply the doctrine of appellate remittitur.<sup>45</sup>

The United States Supreme Court has not directly decided this issue. Its decisions indicate that a power to review exists<sup>46</sup> under the statute creating appellate powers in the federal courts of appeals,<sup>47</sup> but the court has never determined whether the Seventh Amendment precludes this type of appellate review "as a 'reexamination' of the 'facts' otherwise than 'according to the rules of the common law.'"<sup>48</sup> The Supreme Court has set apart this latter question for a later decision.<sup>49</sup>

Other federal courts of appeals have not agreed with the reasoning of the Eighth Circuit. The discernible trend is toward greater review. Every other circuit has decided that the excessiveness of a judgment is a proper basis for review.<sup>50</sup> Many of the decisions upholding review have ignored the Seventh Amendment issue.<sup>51</sup>

The federal courts of appeals have not always determined the applicability of appellate review under the same formulas, but differences are more semantical than fundamental.<sup>52</sup>

45. See *Missouri K.T.R.R. v. Ridgeway*, 191 F.2d 363 (8th Cir. 1951). Also those decisions merely intimating that reviewability is possible under some circumstances seem to speak in terms of reversal. See cases cited note 41 *supra*.

46. See, e.g., *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96 (1950); *Fairmount Glassworks v. Cub Fork Coal Co.*, 287 U.S. 474 (1933).

47. 28 U.S.C. § 2106 (1959) provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order or require such further proceedings to be had as may be just under the circumstances."

48. *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797 (2d Cir. 1961).

49. *Neese v. Southern Ry.*, 350 U.S. 77, (1955).

50. First Circuit: *Ballard v. Forbes*, 208 F.2d 883 (1st Cir. 1954). Second Circuit: *Wicks v. Henken*, 378 F.2d 395 (2d Cir. 1967); *Lanfranchi v. Tidewater Oil Co.*, 376 F.2d 91 (2d Cir. 1961); *Moore-McCormick Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961); *Dagnello v. Long Is. R.R.*, 389 F.2d 797 (2d Cir. 1961); *Alexander v. Nash Kelvinator Corp.*, 271 F.2d 524 (2d Cir. 1959). Third Circuit: *Wooley v. Great Atl. & Pac. Tea Co.*, 281 F.2d 78 (3rd Cir. 1960); *Tebbs v. Alcoa S.S. Co.*, 241 F.2d 276 (3rd Cir. 1957); *Trowbridge v. Abrasive Co.*, 190 F.2d 825 (3rd Cir. 1951). Fourth Circuit: *Virginia Ry. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948). Fifth Circuit: *Silverman v. Travelers Ins. Co.*, 277 F.2d 259 (5th Cir. 1960); *Phoenix Indem. Co. v. Givens*, 263 F.2d 858 (5th Cir. 1959); *Whiteman v. Pitrie*, 224 F.2d 914 (5th Cir. 1955). Sixth Circuit: *Flame Coal Co. v. UMW*, 303 F.2d 29 (6th Cir.), *cert. denied* 371 U.S. 891 (1962); *Sebring Trucking Co. v. White*, 187 F.2d 486 (6th Cir. 1961); *Consumers Power Co. v. Nash*, 164 F.2d 657 (6th Cir. 1947). Seventh Circuit: *Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953). Ninth Circuit: *Siebrand v. Gosnell*, 234 F.2d 81 (9th Cir. 1956); *Baldwin v. Warwick*, 213 F.2d 485 (9th Cir. 1954); *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir. 1951). D.C. Circuit: *Hulett v. Brinson*, 229 F.2d 22 (D.C. Cir. 1956); *Ball v. Bond*, 187 F.2d 362 (D.C. Cir. 1951).

51. 6A MOORE, FEDERAL PRACTICE § 59.08[6] (2d ed. 1953).

52. See *Dagnello v. Long Is. R.R.*, 289 F.2d 797, 802 (2d Cir. 1961).

When a federal court intervenes to correct an excessive judgment it usually awards a new trial, but there are numerous cases where the actual process of appellate remittitur has been applied.<sup>53</sup>

#### IV. CONCLUSION

Remittitur can be a useful tool for appellate courts. In Missouri where the general verdict is used and is almost immune from attack at the appellate level, it seems particularly important that both trial and appellate courts have some control over the size of the verdict.<sup>54</sup>

In any court, appellate remittitur is an indispensable aid in bringing litigation to an early and expedient termination. It promotes the desirable goal of uniform awards in similar cases. It does not represent an interference with the hallowed right to a jury trial, nor does its use constitute appellate interference on factual issues. Appellate remittitur should continue in use in those courts which presently employ it, and be adopted by those few courts, like the Eighth Circuit, which do not.

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53. See, e.g., *Wicks v. Henken*, 378 F.2d 395 (2d Cir. 1967); *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91 (2d Cir. 1967); *Texas Co. v. Christian*, 177 F.2d 759 (5th Cir. 1949); *Flame Coal Co. v. UMW*, 303 F.2d 39 (6th Cir. 1962), cert. denied, 371 U.S. 891 (1962); *Baldwin v. Warwick*, 213 F.2d (9th Cir. 1954); *Covey Gas and Oil Co. v. Checketts*, 187 F.2d 561 (9th Cir. 1951).

54. See Coburn, *The Missouri Remittitur Practice*, 1958 MO. BAR J. 214, 219 (1958).