WILLIAM G. HALE is Dean of the School of Law. He has been a frequent contributor to the pages of the REVIEW. His article on *The Use by a Witness of His Prior Testimony for the Purpose of Refreshing Recollection* is one of several dealing with the law of evidence. A previous article, *The Missouri Law Relative to the Use of Testimony Given at a Former Trial,* may be found in 14 ST. LOUIS L. REV. at page 375.

NORMAN BIERMAN is an alumnus of the School of Law in the class of 1929 and a member of the St. Louis Bar. His article on *Codification of International Law—A Basis of World Government* was awarded the prize for the best thesis submitted by a member of the graduating class of the School last year.

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## SAMUEL BRECKENRIDGE NOTE PRIZE AWARD

Joseph J. Chused's note on "Jurisdiction to Award Alimony in Missouri Where Defendant Is Not Personally Served" has been awarded the fifteen dollar prize as the best note in the first issue of the current volume.

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## THE SCHOOL OF LAW

The Washington University School of Law has recently become associated in the publication of THE JOURNAL OF AIR LAW, the first number of which is dated January, 1930, and has just come from the press. THE JOURNAL is edited by the Northwestern University School of Law, the University of Southern California School of Law, and the Washington University School of Law, in conjunction with the Air Law Institute. The Institute is located at Northwestern University, where a summer session will be held during the coming season. Issues of THE JOURNAL will be edited successively by the three schools. Mr. George B. Logan, Lecturer on Insurance at Washington University School of Law, is the School's representative on the editorial board and will have charge of the issues which are edited by the school. Mr. Logan is the author of a recent book, AIR LAW—MADE PLAIN.

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# Notes

## INCRESCITUR IN PERSONAL INJURY CASES

Courts in general have no power in personal injury cases to increase the damages as an alternative to a new trial, when the

award by the jury is clearly inadequate.[1] They do, however, possess the power to make a reduction of excessive damages a condition of refusing a new trial.[2] *Remittitur* and *increscitur*,[3] however, appear subject to identical criticism and justified by the same reason. If they are analogous powers possession by the courts of one should necessarily involve the possession of the other.

*Remittitur*, which is now well-established, tolerates an invasion by the court of the province of the jury through a substitution of the opinion of the former for that of the latter.[4] To logically reconcile this doctrine with the right in both parties to a jury trial, it is necessary to establish the power of the court to review the decision of the jury upon the question of damages. Damages in this type of case are unliquidated. They are composed of elements which cannot be accurately measured. It is difficult to find a theoretical justification for the court's review of damages where they are purely a matter of opinion. A review of identical cases in which a *remittitur* was ordered will reveal discrepancy in the damages indicated as not excessive.[5] A further illustration that courts are no more capable in this re-

[1] Mercado v. Nelson (1925) 118 Kan. 302, 235 Pac. 123; Osterholm v. Butte Electric Ry. Co. (1921) 60 Mont. 193, 199 Pac. 252; Fine v. Mayer (1916) 159 N. Y. S. 691. Many states, Missouri included, have had no occasion to adjudicate the question.

[2] Brashear v. Rogers Foundry & Mfg. Co. (Mo. A. 1928) 11 S. W. (2d) 1060; Crews v. Schumcke Hauling & Storage Co. (Mo. 1928) 8 S. W. (2d) 624; Lilly v. Kansas City Ry. Co. (Mo. A. 1919) 209 S. W. 969; Western U. Teleg. Co. v. North (1912) 177 Ala. 319, 58 So. 299; Finkelstein v. Chicago (1912) 168 Ill. App. 475; East Chicago v. Gilbert (Ind. App. 1915) 109 N. E. 404; Knowlton v. Des Moines Edison Light Co. (1902) 117 Iowa 451, 90 N. W. 818; Yard v. Gibbons (1915) 95 Kan. 802, 149 Pac. 422; Hamilton v. Great Falls Street Ry. Co. (1895) 17 Mont. 334, 42 Pac. 860; Gulf, C. & S. F. R. Co. v. Parby (1902) 28 Tex. Civ. App. 413, 67 S. W. 446; Pennsylvania Co. v. Sheeley (1915) 221 F. 901; St. Louis I. M. & S. R. Co. v. Adams (1905) 74 Ark. 326, 86 S. W. 287, 109 Am. St. Rep. 85; Gila Valley G. & N. R. Co. v. Hall (1910) 13 Ariz. 270, 112 Pac. 845. Heimlich v. Tabor (1905) 123 Wis. 565, 102 N. W. 10.

[3] Although the term *increscitur* has received little usage, its application to the judicial increase of insufficient verdicts seems to be more appropriate than the use made of the term *remittitur* to include not only a remission but also an increase of a verdict.

[4] Watt v. Watt (1905) A. C. 115; Savannah F. & W. R. Co. v. Harper (1883) 70 Ga. 119; See also Heimlich v. Tabor, above n. 2.

[5] Note (1905) 61 CENT. L. J. 286.

spect than juries is furnished by *Goetz v. Ambs*[6] which was before the appellate court twice because of alleged excessiveness of damages. The jury at the second trial awarded larger damages than those assessed at the first. The court affirmed the judgment in that amount notwithstanding the earlier reversal. However well taken the above objection may be, courts generally have the power to grant a new trial because of excessiveness of damages.[7] This is true even though the jury has been free from misconduct and uninfluenced by passion or prejudice.

*Remittitur* cannot, however, rest solely upon this power. In further support of this doctrine, it is contended that neither party is in a position to complain. The plaintiff is precluded by his consent, while the defendant is permitted to pay less than a jury has assessed.[8] In so far as the defendant is concerned, this proposition finds support, only if it be shown that the jury is in fact assessing the damages, and that it is impossible, had a new trial been granted, that the jury would have awarded smaller damages than those remaining after *remittitur*. Statements by the courts that damages after a remission are assessed by the jury are often made.[9] It is absurd to declare an award of five thousand dollars to have been made by a jury when ten thousand had been fixed upon by it. It is also submitted that the amount permitted to stand after remission is not the minimum amount which any impartial jury might award and yet be adequate, but that which is not excessive.[10] The rights of the defendant are clearly invaded. He is entitled to have a jury estimate the damages and if he is to remain unprejudiced, the amount he is compelled to pay must be the minimum that any impartial jury would assess without being in the opinion of the court inadequate.[11]

While the doctrine of *remittitur* remains unsupported by the contentions advanced above, it finds its justification in ex-

[6] (1885) 22 Mo. 170.

[7] Burdict v. Mo. Pac. Ry. Co. (1894) 123 Mo. 221, 27 S. W. 453; Cook v. Globe Printing Co. (1910) 227 Mo. 471, 127 S. W. 332; see cases n. 2 above.

[8] Koenigsberger v. Richmond Silver Min. Co. (1895) 158 U. S. 41; Colorado City v. Liafe (1901) 28 Colo. 468, 65 Pac. 630; Arkansas Val. L. & C. Co. v. Maim (1889) 130 U. S. 69; Gila Valley Ry. Co. v. Hall (1914) 232 U. S. 94; Pendleton Street R. Co. v. Ralimaum (1872) 22 Ohio St. 466; International & G. U. R. Co. v. Wilkes (1887) 68 Tex. 617, 5 S. W. 491.

[9] International & G. U. R. Co. v. Wilkes, n. 7 above; Florida R. & Nav. Co. v. Webster (1899) 25 Fla. 394, 5 So. 714; Young v. Cowden (1897) 98 Tenn. 577, 40 S. W. 1088.

[10] See cases in n. 2 above, especially Heimlich v. Tabor.

[11] Heimlich v. Tabor, n. 2 above.

pediency.[12] In *Rueping v. Chicago & N. W. R. Co.*,[13] it is said: "That rule . . . has been evolved . . . as a most valuable means of promptly and without delay terminating disputes between parties to the end that, so far as due course of law will permit, wrongs may be remedied or prevented without that financial exhaustion which tends to make men surrender valuable rights rather than to persist in efforts to secure them by legal means." The presence of this practice in almost every state is a testimonial to its practical value. Its operation is, however, prohibited in some states where the verdict is the result of passion or prejudice.[14] The courts are unable to designate a portion of the award as free from this influence.[15] It has been held, and it seems correctly so, that where there has been error in the instruction or improper evidence permitted to go to the jury upon the question of damages, *remittitur* will cure the error.[16] If the

[12] In Chitty v. St. L. I. M. & S. Ry. Co. (1902) 166 Mo. 423, 65 S. W. 959, it is said: "The cases which deny the power [of ordering a remittitur] concede the right of this court to attain the same end by the indirect route of setting aside judgments on the ground that they are on their face the result of passion, prejudice or misconduct of the jury until finally some jury is thus coerced into returning a verdict which this court does not think excessive. As long as the power is conceded to set aside a verdict otherwise proper, solely on the ground that it is excessive, it must be acknowledged that the proper, expeditious and economical administration of the law requires the error to be corrected in a direct way by remittitur instead of the indirect way above pointed out. Experience has demonstrated not only the propriety but the necessity for reaching a just and speedy correction of an otherwise unobjectionable verdict."

[13] (1915) 168 Wis. 284, 151 N. W. 795.

[14] Gila Valley G. & N. R. Co. v. Hall, n. 7 above; Tunnel Min. & Leasing Co. v. Cooper (1911) 50 Colo. 390, 115 Pac. 901; Seaboard Air-Line R. Co. v. Bishop (1908) 132 Ga. 71, 63 S. E. 1103. It has been held, however, that even where the verdict is so excessive as to indicate prejudice or passion, the error may be cured by *remittitur* so long as this influence is not shown to have affected the decision of the jury upon the merits. Birmingham R. Light & P. Co. v. Comer (1914) 10 Ala. App. 261, 64 So. 533; Kurpgeweit v. Kirly (1910) 88 Neb. 72, 129 N. W. 177; St. Louis I. M. & S. R. Co. v. Brown (1911) 100 Ark. 107, 140 S. W. 279.

[15] In Gurley v. Mo. Pac. Ry. Co. (1891) 104 Mo. 211, 16 S. W. 11, it is said: "We have no scales by which we can determine what portion is just and what part is poisoned with prejudice and passion." And in Harper v. St. L. & S. F. Ry. Co. (1914) 186 Mo. A. 296, 172 S. W. 55 it is stated: "It appears that in Missouri the reason that, if it is apparent that the verdict is the result of passion and prejudice, a new trial will be granted seems to be that one cannot tell that the same influenced the jury in its decision of guilt."

[16] Brown v. John M. Darr & Sons Planing Mill Co. (Mo. A. 1920) 217 S. W. 332; Warren v. Curtis & Co. (Mo. A. 1921) 234 S. W. 1029; Best v. Equitable Life Assur. Soc. (Mo. A. 1927) 299 S. W. 118; King v. Mann (1926) 315 Mo. 318, 286 S. W. 100. But see Perkin v. U. Ry. Co. of St. Louis (Mo. A. 1922) 243 S. W. 224.

court may indicate the excess where there are no guides surely when these are present, *remittitur* should be allowed.

*Increscitur* has received very little discussion and its operation is limited to a very few states.[17] The idea is not a new one; the English case of *Belt v. Lawes*,[18] decided in 1884 where *remittitur* was allowed and where it was insisted that if such were allowed, *increscitur* might also be used, states: "Suppose a case in which a new trial should be moved for on behalf of the plaintiff on the ground that the amount of damages which the jury had given was obviously unreasonably too small, I am far from saying that the court would not have the power in favor of the plaintiff and in his interest, to say that the damages are too small, but if the defendant will agree to their being increased to such a sum as may be stated a new trial shall be refused." *Increscitur* like *remittitur* must rest upon the power of the court to review the question of damages, consent by one party, and result entirely unprejudicial to the rights of the other. A few states have felt so adverse to a review by the court for inadequacy of damages, that prohibitions to this effect have been enacted by them.[19] However, the courts of a majority of the states possess this power.[20] In *increscitur* the consent is, of course, by the defendant, and he cannot complain. The plaintiff, however, is, as the defendant was in the operation of *remittitur*, prejudiced. He is forced to accept not the maximum any impartial jury would impose, but an amount which would appear to the court as adequate.

Thus far the two doctrines appear entirely analogous. But the contention that the amount remaining after remission was

[17] Gaffney v. Tilingsworth (1917) 90 N. J. L. 490, 101 Atl. 243; Marsh v. Minneapolis Brewing Co. (1904) 92 Minn. 182, 99 N. W. 630; Blume v. Ronan (1918) 141 Minn. 234, 169 N. W. 701; Aultman v. Thompson (1884) 19 F. 490; see also Carr v. Minner (1866) 42 Ill. 179; Marsh v. Kendall (1902) 64 Kan. 48, 68 Pac. 1070; Belts v. Bueter (1868) 1 Idaho 185. In Louisiana where no jury guarantee is found such power is exercised by the courts. Sherwood v. Tichel (La. App. 1929) 120 So. 107; Goodson v. Schuster's Wholesale Produce Co. (La. App. 1929) 120 So. 689.

[18] (1884) 12 Q. B. Div. 356, overruled by Watt v. Watt, n. 3 above.

[19] "A new trial shall not be granted on account of smallness of the damages in an action for injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained." Ind. Ann. Stat. (Burns, 1926) sec. 611; Ky. Code (Carroll, 1927) sec. 341.

[20] Ozen v. Spercer (Miss. 1928) 117 So. 117; Swartz v. Pyle (N. J. 1929) 144 Atl. 323; Tarr v. United Railroads of San Francisco (1922) 187 Cal. 505, 202 Pac. 161; Meyer v. Basta (1925) 102 Conn. 144, 128 Atl. 32; McLaughlin v. R. W. Fagan Peel Co. (1921) 121 Miss. 116, 87 So. 471; Miller v. Barker Rose & Clinton Co. (App. Div. 1916) 158 N. Y. S. 865.

in fact assessed by a jury, which can have no application to *increscitur*, is said to distinguish the practices.[21] This would be true if the contention had merit. The award after the operation of either is that of the court and not a jury.

If *increscitur* can be said to possess the same practical value in expediting justice through a speedy determination of cases, the analogy will be complete. It has been said that the tendency is for juries to award excessive rather than inadequate damages.[22] While this may be true numerous cases have been remanded because of inadequate damages.[23] Where inadequate damages have been assessed, the value of an *increscitur* can hardly be doubted.

It is contended that *increscitur* cannot operate or extend to cases in which all of the evidence was not before the jury or where erroneous instructions were given.[24] The jury, it is thought, had it been in possession of all the evidence or of the correct instructions, might have found more for the plaintiff than the court allowed by *increscitur*. This is an objection which strikes at the very foundation of *remittitur*. It has been stated above that in *remittitur* the defendant is injured because another jury might have assessed smaller damages than those permitted to stand by the court. If this objection does not invalidate *remittitur*, why should it defeat the operation of *increscitur*? The Wisconsin doctrine, however, is not susceptible to this criticism. The defendant is given the alternative of paying the maximum amount that any jury would assess without being excessive, or a new trial. The plaintiff, should the defendant refuse to pay such a sum, is given the alternative of accepting the minimum amount any jury would assess without being inadequate, or a new trial.[25] While the proposition is not subject to theoretical criticism, its operation is curtailed by the difficulty of gaining the consent of either party. In *Rueter v. Hickman, Breuner*

[21] Burdict v. Mo. Pac. Ry. Co., n. 6 above.

[22] In Baker v. Madison (1885) 62 Wis. 137, 22 N. W. 141, it is said: "Every lawyer and judge knows that the almost uniform tendency of successive trials in such cases is in the direction of an increase of damages."

[23] See cases n. 19 above.

[24] Lary v. City of Detroit (1906) 145 Mich. 265, 108 N. W. 661.

[25] Heimlich v. Tabor, n. 1 above; Gerlach v. Gruett (1921) 175 Wis. 354, 185 N. W. 195; Rueping v. C. & N. W. Ry. Co. (1904) 123 Wis. 319, 101 N. W. 710; Secard v. Rhinelander L. Co. (1914) 147 Wis. 614, 133 N. W. 45; Hana v. Chicago Ry. Co. (1914) 156 Wis. 626, 146 N. W. 878; Beach v. Bird & Wells Lumber Co. (1908) 135 Wis. 550, 116 N. W. 245; Katz v. Miller (1912) 148 Wis. 63, 133 N. W. 1091; West v. Bayfield Mill Co. (1912) 149 Wis. 145, 135 N. W. 478; Krawircki v. Kuckhefer Box Co. (1912) 151 Wis. 176, 138 N. W. 710; Poler v. Mitchell (1913) 152 Wis. 583, 140 N. W. 330.

*Co.*,[26] it is said: "Permitting a defendant to allow judgment against him for a maximum amount is usually not a consummation devoutly to be wished for by him." That the Wisconsin courts are careful to employ its practice in proper cases is indicated by the language found in *Rueter v. Hickman, Breuner Co.*[27] "But aside from that in a case like this where there is legitimately such a wide range in the amount of damages that may be properly assessed depending upon how the proof impresses the jury and the court, it is deemed a better administration of justice to let another jury assess the damages."

Thus to adopt a logical and theoretically justifiable practice is to decrease its utility through a limitation of its operation and application. The objection, however, which the Wisconsin doctrine seeks to avoid is perhaps not as serious as it appears. A second jury is not likely in case of *increscitur* to award larger damages than the court has fixed upon or in case of *remittitur*, smaller damages.

If the court possesses the power to order a *remittitur* there is no logical objection to its ordering an *increscitur*. It has been advanced by those judges of the Supreme Court of Missouri, who were out of sympathy with the exercise of the doctrine of *remittitur*, that to allow a remission of part of the verdict would also obligate the courts to allow an *increscitur*.[28] There can be little doubt that on principle the court occupies the same position as to both. *Increscitur* like *remittitur* is applicable or should be applicable to all cases where the award is not the result of passion or prejudice which contaminates the whole verdict and permeates the question of liability as well as damages, and where the evidence supports the finding of liability.

FRANK E. MATHEWS, '30.

## CONSANGUINEOUS MARRIAGES—A SCIENTIFIC APPROACH

Consanguineous marriages have been a problem for the human race as far back as the memory of man goes. Whether such unions should be favored, merely tolerated, prohibited, or actually made criminal is a question which has puzzled the lawmakers of every generation. Today despite the fact that both legal science and eugenics have advanced considerably, there is still grave question as to the advisability of first-cousin marriages especially, and to a lesser degree uncle-niece (or aunt-nephew) unions. This is shown in the present legal status of

[26] N. 12 above.
[27] N. 12 above.
[28] See dissenting opinions in Burdict v. Mo. Pac. Ry. Co., n. 6 above.