# 55(L) 5/7/65

Memorandum 65-19

Subject: Study No. 55(L) - Additur

Accompanying this memorandum is a research study on this topic that was prepared in 1960 by Professor Pickering of the Hastings College of Law. Please read the study; it raises significant issues and presents sufficient background pertinent to a solution.

As presented in the study, the California law is epitomized by the Supreme Court decision in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952), in which it was held that the trial court's denial of plaintiff's motion for new trial conditioned upon defendant's consent to increased damages as fixed by the court contravenes plaintiff's right to a jury trial as guaranteed by the California Constitution (Art. I, § 7: "The right of trial by jury shall be secured to all, and remain inviolate . . . ."). Dorsey is a tort case involving unliquidated damages. This is significant to a consideration of the problems involved in this topic, for the court notes that:

> The assessment of damages by a court where they are speculative and uncertain constitutes more than a technical invasion of the plaintiff's right to a jury determination of the issue. Despite the fact that he has apparently benefited by the increase, the plaintiff has actually been injured if, under the evidence, he could have obtained a still larger award from a second jury. [38 Cal.2d at 358 (emphasis added).]

It is thus possible that the Dorsey case does not preclude the availability of additur (1) in a liquidated damages case (see the Study, pages 20-22), (2) in an unliquidated damages case where the amount of damages fixed by the court is the maximum amount that could be supported by the evidence (since it would then be impossible for plaintiff to obtain "a still larger award from a second jury"), and (3) in any case where additur is conditioned upon the consent of both plaintiff and defendant.

Two recent cases are of significance in determining the scope of the Dorsey rule (and, hence, the present law). In Morgan v. Southern Pacific Company, 173 Cal. App.2d 282, 343 P.2d 330 (1959), an FELA case, the trial court conditioned denial of plaintiff's motion for new trial upon defendant's consent to pay $800 in addition to the $1,200 verdict and defendant consented; upon plaintiff's appeal, the court affirmed on the ground that the plaintiff failed to sustain his burden of showing prejudicial error in the denial of the new trial motion. Plaintiff furnished only a clerk's transcript; he furnished "nothing by which to test the accuracy of his asserted right to a new trial." The court specifically notes that:

> This [decision] does not mean that we approve of additur. It means merely that plaintiff-appellant has not, by the appeal record furnished, shown a basis for reversal. He has shown that the trial court increased the amount of the judgment. He has not furnished a record from which we may determine that he was injured or aggrieved by such increase. [173 Cal. App.2d at 285.]

(The court had earlier noted that: "We might accommodate [plaintiff] by reducing the judgment to $1,200, the amount of the jury award, and then affirm it. But this is not what he desires.")

It seems reasonable to infer from the Morgan case that denial of a new trial conditioned upon additur is not prejudicial per se; hence, additur is not necessarily improper as a matter of law. Indeed, in Hall v. Murphy, 187 Cal. App.2d 296, 9 Cal. Rptr. 547 (1960), the court affirmed an order granting a new trial that was conditioned upon the consent of both parties to an increase in the amount of damages; defendant refused to consent to the increase and appealed from the order granting a new trial. The court noted that, "[P]laintiff was under no obligation to waive his right to have a jury again determine the amount of his damage, and defendant likewise was under no obligation to forego his right to resist plaintiff's claim before

jury." Decisions upholding additur in cases where the amount of damages is uncontested or ascertainable by a fixed formula are discussed but distinguished in the Dorsey opinion; they were not overruled.

It seems likely that a court does not usurp a jury function when it disregards a jury verdict and fixes damages at the only amount any jury would be allowed to find (or conditions acceptance of damages fixed by the court upon consent of both parties). If this conclusion is correct, the Dorsey case presently stands as a hurdle only in cases where damages are contested and uncertain in amount and the trial court fixes damages in an amount less than the maximum amount justified by the evidence. Presumably, this covers the bulk of litigated cases; therefore, it is appropriate to consider the advisability of providing general authority to condition new trial orders on additur.

It should be noted that the additur problem does not concern the power of a trial court to review a jury verdict and grant or deny a new trial. Nor does it concern the discretion of a court to grant a new trial based upon an excessive or inadequate award of damages. The principal issue involved in the additur topic concerns the power of a court to condition its order regarding a new trial upon additur--an increase in damages to an amount fixed by the court dependent only upon defendant's consent thereto and without regard to plaintiff's nonconsent. Logically, it is simply the converse of remittitur--plaintiff's consent to accept a lesser amount of damages without regard to defendant's nonconsent--which is a well-established practice.

With these considerations in mind, it is appropriate to consider the following questions of policy.

(1) Should a court be specifically authorized to condition an order for a new trial upon consent to an increase in damages? (See discussion of policy in the Study, pages 37-40.) The research consultant concludes that "the trend of modern advances in the administration of justice certainly includes additur, along with the endorsement of remittitur. There is no question that a clear and adequate grant of power to the courts to enter additur, as well as remittitur, orders will add much to the efficiency and will speed the administration of justice." Relevant to this question is the question of whether appellate review affords sufficient protection to a nonconsenting plaintiff.

(2) If additur is to be authorized, is a constitutional amendment required to accomplish this result? The constitutional bar to additur as declared in the Dorsey case might be avoided simply by requiring consent of both parties. See Hall v. Murphy, supra. However, this would avoid the issue for this is not true additur where the problem of jury trial is squarely met by ignoring plaintiff's nonconsent. Absent an overruling of the Dorsey case, it seems clear that a constitutional amendment would be required to grant additur authority. (The present membership of the Supreme Court contains only one member from the Dorsey era, Chief Justice Traynor, who as Justice Traynor vigorously dissented in Dorsey. Absent speculation as to the chances of reversing Dorsey, it seems clear that a constitutional amendment would be required to effect a change.) If the prospect of a constitutional amendment does not dampen the spirit for desirable reform (the Commission's average is one for two on constitutional amendments), the Commission should consider Professor Pickering's draft (see the Study, pages 40-41) and the following alternative draft of an amendment to Article I, Section 7, of the California Constitution:

In any civil action tried by jury, the trial or appellate court may, as a condition of denying a motion for new trial on the ground of excessive or inadequate damages, by whatever error induced, require that the party opposing the motion consent to the remission of a portion thereof, in the case of an excessive verdict, or to an addition thereto, in the case of an inadequate verdict, in such amount as the court [in its discretion] may determine.

To complete the effectuation of additur authority, subdivision 5 of Section 657 of the Code of Civil Procedure should be revised as suggested in the Study (page 40), to read:

657. The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

* * * * *

5. Excessive or inadequate damages ~~,-appearing-to-have been-given-under-the-influence-of-passion-or-prejudice~~ ;

[As to the reasons for deletion of the "passion or prejudice" language, see the Study, page 36.]

* * * * *

If needed, a new section (657.5) might be added to the Code of Civil Procedure in terms like the constitutional amendment suggested above but which might also provide for the extent of appellate review, i.e., whether review of trial court's discretion or independent review of sufficiency of the evidence.

Respectfully submitted,

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(#55(L)) 3/25/60

# A STUDY TO DETERMINE WHETHER A TRIAL COURT SHOULD HAVE THE POWER TO DENY A NEW TRIAL ON THE CONDITION THAT DAMAGES BE INCREASED*

*This study was made for the California Law Revision Commission by Professor Harold G. Pickering of Hastings College of Law. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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# A STUDY TO DETERMINE WHETHER A TRIAL COURT SHOULD HAVE THE POWER TO DENY A NEW TRIAL ON THE CONDITION THAT DAMAGES BE INCREASED*

## PRELIMINARY STATEMENT

The technical name of the subject of the study is additur. If the power is to be conferred, it was settled in Dorsey v. Barba[1] that, as respects unliquidated damages at least, it must be done by constitutional amendment. This conclusion rests upon the premise that an additur order in such cases violates the constitutional guarantee of the right to a jury trial. The drafting of an appropriate and adequate amendment requires a thorough study of the many ramifications of the problem.

The opposite of additur is remittitur - an order for a new trial unless the opposing party consents to an increase of the verdict.

Additur and remittitur are incidents of the power of the court to grant a new trial. Some authorities consider that, in the light of the constitutional guarantee, it should be held that both are valid or that both are invalid. Yet in California, and elsewhere, remittitur has been accepted for years, and decisions with respect to additur have been

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* This study was made at the direction of the Law Revision Commission by Professor Harold G. Pickering of Hastings College of Law.

inconclusive. The Dorsey case was no help. Although recognizing remittitur as a fixture, it cast doubt upon its validity, and the status of additur was rendered more uncertain than before.[2] Hence, it has been suggested that the study include clarification of the power of the court as to both.

It also has been suggested that the question of the power of the appellate courts be included.

In granting or denying new trials some courts have distinguished between excessive and inadequate verdicts insofar as the role of passion or prejudice is concerned. Others question the validity of the distinction. This raises a question as to whether the two should be put on a parity. A possible amendment to subdivisions 5 and 6 of Section 657 of the Code of Civil Procedure is involved.

The study stems from the decision in the Dorsey case. That was a personal injury suit in which the decision was reached on the authority of a United States Supreme Court decision in a similar case, Dimick v. Schiedt.[3] The Dimick case held that an additur order in a tort case exceeded the constitutional power of the court. The result is an emphasis on the propriety of additur in tort and other unliquidated damage cases. Nevertheless, the study is directed to the overall application of both remittitur and additur.

## ADDITUR AND REMITTITUR

### In General

Additur is effected by a conditional order designed to relieve a plaintiff from an inadequate verdict. A plaintiff moves for a new trial on the ground that the verdict is inadequate. The court issues an order for a new trial unless the defendant consents to a judgment in an increased amount determined by the judge to be adequate and designated in the order.[4] By court decision it is proscribed or limited in at least eight jurisdictions, sanctioned in five, authorized by statute in two states and possibly in a third.[5]

The obverse is remittitur, which is effected by a conditional order designed to relieve a defendant from an excessive verdict. On a defendant's motion for a new trial on that ground, the court issues an order for a new trial unless the plaintiff consents to judgment in a smaller amount, determined by the judge to be appropriate and designated in the order. It is sanctioned in most jurisdictions,[6] although limitations are imposed in a minority.[7]

Any question of the power of the court respecting additur or remittitur revolves around the constitutional guarantee of a jury trial.[8] There is respectable authority for the view that there is no real distinction between the two in this regard, and that both are unconstitutional. Remittitur deprives the defendant and additur deprives the plaintiff of his right to a jury trial.[9]

The fact is, however, that remittitur is accepted in spite of its unconstitutionality, whereas additur is rejected or limited because of it in most of the relatively few courts in which the problem has arisen.

## Dimick and Dorsey Cases: Majority Opinions

The knell of additur "where damages are at large" was sounded in the federal courts by Dimick v. Schiedt,[10] with a strong minority dissenting; and in California by Dorsey v. Barba,[11] with a vigorous dissent by Mr. Justice Traynor. Both were personal injury cases. In each the trial judge entered an order denying plaintiff's motion for a new trial unless the defendant would consent to an increase in the damages awarded by the jury, the defendant consented, a judgment was entered for the increased amount, the plaintiff appealed and the judgment was reversed. The order was held invalid as invading the plaintiff's constitutional right to a jury trial. In neither case did the majority have any doubt that additur was unconstitutional. But before ruling out additur both courts found it necessary to deal with remittitur. The argument to be met was that remittitur, although obviously tainted with the same vice, had been "accepted as the law for more than a hundred years and uniformly applied in the federal courts."[12] It also has been allowed in California for over a hundred years.[13] By a parity of reasoning additur should be accorded like recognition.[14]

It was thought that the answer turned on "the scope and meaning" of the constitutional guarantee of a jury trial, for the determination of which resort must be had to history.[15] Attention, therefore, was directed to the common law status of remittitur and additur "at the time of the adoption of that constitutional provision in 1791,"[16] and at the time of the adoption of the California Constitution in 1849.[17]

The historical approach did not prove to be satisfactory. For one thing, the different history of the two turned out to be merely an historical accident.

As to remittitur all is confusion. It is necessary to dig a bit deeper than was done in the Dimick case. Viewed from any approach remittitur and additur are enlargements of the power of the court to grant a new trial in a jury case. A motion for a new trial either on the ground of an excessive or of an inadequate verdict is based upon the claim that the verdict is not supported by the evidence. In the beginning this was not a ground for a new trial at common law. New trials were granted only for misconduct of the jury. The first departure from this rule involved a case of excessive damages, and to justify its order the court characterized the excessive verdict as misconduct. Excessiveness itself eventually came to be a ground for granting new trials, but it was limited to cases of liquidated or definitely ascertainable damages.[18] It seems not to have been extended to tort cases until 1792 to 1793.[19] This is but a wink of time after the adoption of the Seventh

Amendment, but a full half century before the adoption of the California Constitution. Inadequacy of damages was not recognized as a ground for a new trial by the English courts until the middle of the 19th century.[20]

So long as the court was without power to grant a new trial because of excessive or inadequate damage there was no room for remittitur or additur. The excessive verdict, as above noted, was the first to be recognized as warranting a new trial. Apparently this occurred in 1655 in Wood v. Gunston.[21] Recognition of an inadequate verdict as a ground for a new trial was much longer in coming.[22]

The growth of the practice of granting new trials where the damages were either excessive or inadequate was "slow and halting," but was well established by the end of the 18th century, as respects excessive damages, in contract cases and to a limited extent in tort cases.[23] It is clear that this development paced the development of remittitur and additur. Although remittitur came first, its extent and scope in 1791 seem to be in doubt.[24]

Merely as straws in the wind two nisi prius cases may be noted: Incledon v. Crips[25] and Baskerville v. Brown.[26] In each the correct amount of recovery could be determined by "matter extrinsic" the verdict, i.e., on the evidence. In the first case remittitur was advanced as a solution, the question being raised before trial, and in the second the entry of a remittitur was directed after verdict.

Much of the discussion in the Dimick case relates to remittitur and additur in their general application, that is, without reference to the type of case involved. Nevertheless, the objective was to determine the common law status of remittitur and additur in 1791 in tort cases, and the opinion is so directed.

Reference to text books and to the case of Beardmore v. Carrington[27] indicated that neither remittitur nor additur was authorized in tort cases in 1791.[27a]

The majority opinion next turns to cases subsequent to 1791. It notes the 1884 case of Belt v. Lawes,[28] a tort case, in which remittitur was expressly approved, and which contained a suggestion that additur might also be in order. It emphasized that this case had been overruled in 1905 by the House of Lords in Watt v. Watt.[29] The significance of the Watt case, decided 114 years after 1791, is not that it proscribed both remittitur and additur but what it had to say about the practice at common law. It said:[30] The notion that remittitur was proper "arose from the fact that in the old cases the courts had 'adopted the somewhat unconstitutional proceeding of refusing to give the plaintiff judgment unless he would consent to reduce his claim to what ought to be considered reasonable.'" It said further: "It was conceded in the opinions delivered to the House that there had been a certain amount of practice in accordance with the course complained of, but in principle, it was said, this practice was indefensible, and that no reasoned vindication of it had been found."

The Dimick majority, via the historical approach, arrived at the conclusion that in tort cases "while there was some practice . . . in respect of decreasing[31] damages" - "the practice of some of the English judges" - "it has been condemned by every reasoned[32] English decision, both before and after" 1791.

In the light of its historical review the majority commented: "if the question of remittitur were now before us for the first time,"[33] it might be held unconstitutional.

But the question was not before the court for the first time. The long line of precedents approving the practice in the federal courts still was to be coped with. They began with a decision of Mr. Justice Story in 1822.[34]

It may be that in anticipation of this the majority tended to minimize the prevalence of remittitur in tort cases at common law. Certainly they do not give the emphasis that was accorded to it in the Belt case. The Watt case in overruling the Belt case merely changed the law, it did not impeach the appraisal of history in the Belt case, which was: "I see nothing in principle against reducing the damages under such circumstances, and it has certainly for years been the invariable practice of the Courts to do so."[35]

In any event, the opinion criticizes the decisions by stating that neither in the opinion of Mr. Justice Story, nor in any of the cases which adopted the rule, was any attempt made

"to seek the common law rule . . . by an examination of the English decisions or of the English practice prior to the adoption of the Constitution."[36]

However, faced with the common law history of remittitur, unconvincing as it was deemed to be, and the established practice in the federal courts, the Dimick majority was constrained to concede that "the doctrine would not be reconsidered or disturbed at this late day."[37]

Thus remittitur received the grudging blessing of the United States Supreme Court, which has been characterized as a "formal approval to the practice which the whole tenor of its opinion shows that its conscience repudiates."[38]

Dorsey was decided on the authority of the Dimick case. It follows pretty much the same line. The majority thought there was considerable doubt whether remittitur was recognized at common law, that it apparently had been taken for granted that it was, and that as a result it had been approved in this country "through what appears to have been a misconception of common law procedure."[39] Nevertheless, it concluded that remittitur is "too firmly established in this state . . . to be now questioned."[40]

The historical approach to additur does not yield much better results.

The majority in the Dimick case was of the opinion that additur was forbidden at common law.[41] The majority in the Dorsey case stated: that in 1849 "apparently there was no

recognized common law practice allowing the court to increase a jury's award in a case involving unliquidated damages,"[42] and that additur had "even less basis in the common law" than remittitur.[43]

In the terms of a recognized practice this statement is perhaps strictly accurate, but there are other views of history which should not be overlooked. Speaking of additur the Yale Law Journal states:[44] ". . . the practice was not unknown in English common law, which is the 'common law' of the Seventh Amendment." And, since the "common law" of the California Constitution is the common law prior to 1849, it is worthy of note that in 1843 in the case of Armytage v. Haley[45] an additur order was "entered."

The accident of history, alluded to earlier, is described by Mr. Justice Traynor in his dissent in the Dorsey case:

> There is nothing unusual in the fact that early cases permitting remittitur are to be found whereas additur precedents are both few and recent. Courts undertook to grant new trials for excessive damages many years before similar action was taken on the ground of inadequacy. . . The issue of additur, therefore, was not presented until modern times.[46]

On the crucial question of whether, in view of the unequivocal acceptance of remittitur in both jurisdictions, in spite of its dubious validity, a similar rule should be adopted in respect of additur, the two courts are in accord. The Dimick majority held that it would not extend a doubtful precedent by mere analogy.[47] The majority in the Dorsey case wrote:

> Like the United States Supreme Court in the Dimick case, we are reluctant to extend the precedent of the remittitur cases, by analogy or otherwise, to the present situation, since it would result in an impairment of the right to a jury trial.[48]

To bolster its bifurcated decision, accepting remittitur and rejecting additur, the Dimick majority tenders a distinction between the two which is deemed to purge remittitur of the charge of invading the right to a jury trial.

The absolution is as follows:

> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess - in the sense that it has been found by the jury - and that the remittitur has the effect of merely lopping off the excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict . . . To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury.[49]

In a completely objective analysis[50] Professor Carlin exposes the fallacy of the asserted distinction. He comments:

> Again with all deference, it is submitted that to assume that the jury found the reduced amount, merely because it found a larger amount from which the reduced amount could be subtracted, is to make a false application of the mathematical formula that the whole includes the part. The amount is divisible, but there is only one verdict and it, as a verdict, is not divisible. If the jury in any proper sense found the amount fixed by the remittitur, it also in the same sense, with equal effect, found numerous other less amounts, any one of which might have been selected by the court as the basis for a remittitur, or might be found by a properly functioning jury on a new

trial. When the court is compelled to select the amount which the jury could properly have found, because the jury itself has proved an unreliable finder of amounts, it would seem to be reasoning somewhat in a circle to say that the court can resort to anything that the jury did to justify the amount fixed by the court. In truth, the jury found only one amount - the amount which it thinks the defendant ought to pay, if not what it thinks the plaintiff is entitled to recover. The mere fact that this amount is mathematically divisible or separable into different amounts does not establish that the verdict itself is divisible into separate verdicts. If the jury had actually found, as a measure of recovery, that the plaintiff was entitled to recover the reduced amount, its verdict would have been for that amount without the excess.

. . . if the practice of granting new trials, even under the hazard of the court's absolute discretion, is recognized at all as a method of relieving the defendant from the consequences of an excessive verdict, it would seem to be something a little short of justice and consistency to tell the defendant that he is entitled to a new trial because the jury has not treated him fairly, and then to tell him that he must forego the privilege because the court and the plaintiff have agreed upon a scheme for disposing of the case without the aid of a jury.[51]

The majority in the Dorsey case is content to face the facts without resort to an attempted distinction. It says:

There may be no real distinction between the powers to increase and decrease an award of damages, but it does not follow that because the practice of remitting damages over the defendant's objection has been approved through what appears to be a misconception of common law procedure, we must allow the court to assess increased damages over the plaintiff's objection, a practice which has even less basis in the common law.[52]

## Dimick and Dorsey Cases: Minority Opinions

The minority in the Dimick case is formidable - Chief Justice Hughes, and Justices Stone, Brandeis and Cardozo.

The dissenting opinion rejects the historical approach as a "search of the legal scrap heap of a century and a half ago . . . which leads to an incongruous position."[53] It undertakes to demonstrate that remittitur does not invade the province of the jury. The premise is that the constitutional guarantee was not "intended to perpetuate in changeless form the minutiae of trial practice as it existed at common law."[54] It points out that the Supreme Court had sanctioned the appointment of auditors to report on issues of fact as an aid to the jury, setting aside a general verdict and directing a verdict on the basis of special findings, and the acceptance of a verdict as to liability and ordering a new trial on the issue of damages, none of which procedures was known to the common law.[55] On this analogy it concludes that remittitur does not curtail the jury's function,[56] and that, on "the like principle of decision" additur cannot be said to impair the function of the jury.[57]

Professor Carlin points out[58] that the procedures relied upon as analogous are not analogous because in each of them "the court after all enters judgment on a definite finding by the jury . . . and not on an amount found by the auditor or fixed by the court.[59]

The tenor of Mr. Justice Traynor's dissent is: That there never has been an absolute right to a new trial; that granting or refusing a new trial always has been a matter of judicial discretion; that orders granting a new trial frequently have been conditional; that a conditional order in cases of excessive or inadequate verdicts is not a reversal of the jury's verdict, but merely a modification; that there is no distinction between remittitur and additur as respects their validity and that to hold remittitur constitutional and additur unconstitutional is both illogical and unfair.[60]

Justice Traynor finds ample support in his view that as respects constitutionality there is no distinction between remittitur and additur; but his view that neither invades the province of the jury met with vigorous dissent long before his opinion was written.[61]

Justice Traynor also thought that textual differences between the jury trial provisions of the United States Constitution and the California Constitution furnished ground for distinguishing the Dimick case.[62] Numerous other authorities are in agreement,[63] but the majority in the Dorsey case definitely thought otherwise,[64] and Professor Carlin rejects the argument.[65]

The strength of the dissenting opinions in the two cases lies not in the argument for the technical validity of additur, but in the presentation of its salutary effects in the administration of justice. This is a consideration of policy and will be discussed under that heading.

## Constitutional and Statutory Provisions

### Constitutional Provisions

United States: Dimick v. Schiedt[66] expressly held that an additur order, in cases where the damages are unliquidated, violates the constitutional guarantee of a jury trial. The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.[67]

It was the second clause which was held to preclude additur.

The Several States: In the states in which the question has arisen the state constitutions, although guarantying a jury trial, did not include a provision similar to this second clause. This fact has sometimes been seized upon as a basis of distinction between federal and state law. Where the distinction is recognized additur is sometimes said to be permissible; where it is not recognized, additur is said to violate the state constitution.[68]

Louisiana: There being no constitutional guarantee of jury trial in this state, remittitur and additur are common practice.[69]

Statutory Provisions

Massachusetts: "A verdict shall not be set aside solely on the ground that the damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable." [Emphasis added.] [70] This statutory provision obviously does not authorize additur as defined in this study because both parties are required to consent to the addition, but it is pertinent. Furthermore, the same section in providing for remittitur omits the word "solely," requires the consent only of "the prevailing party," and the amount remitted is so much of the verdict "as the court adjudges excessive."

Rhode Island: Additur is expressly authorized by statute. ". . . A verdict shall not be set aside as excessive, or inadequate, by the supreme or superior court until the prevailing party has been given an opportunity to remit so much thereof as the court adjudges excessive, or the losing party consents to such additur as the court may order."[71]

Washington: Both additur and remittitur are expressly authorized by statute where the verdict is "so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice."[72]

Where the power of the court to grant a new trial for inadequate damages is negatived or limited by statute, additur clearly would be unauthorized, or correspondingly limited. Such situations are severally found in the statutes of three states.

Nebraska: At one time Section 315 of the Code of Civil Procedure provided that a new trial could not be granted on account of the smallness of the verdict. This statute was repealed. The present section now provides that a new trial may be granted where a verdict is "too large or too small where the action is upon a contract, or for the injury or detention of property." [Emphasis added.][73] But this is limited to cases where the size of the verdict is "such as to indicate passion or prejudice."[74] No additur case has been found, but this change in policy indicates a favorable climate for such a development, within the indicated limits.

Kentucky: This state at one time prohibited new trials grounded upon inadequate verdicts in actions "for an injury to the person or reputation, or in any other action in which the damages equal the actual pecuniary injury sustained." This statute was repealed and the Civil Code of Practice amended to provide for new trials in the case of excessive or inadequate damages due to passion or prejudice. [Emphasis added.][75] This would seem to open the door, but no additur case has been found.

Oklahoma: "A new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained."[76] This provision would preclude additur in the cases named. No additur cases have been found, although remittitur seems to be indulged.

## Court Decisions

### Additur Rejected

Michigan: Additur was held to be beyond the power of the court in Lorf v. Detroit.[77] This was a personal injury case, but the opinion appears broad enough to outlaw additur in toto. The court noted that remittitur is "well settled."

Ohio: Re Ohio Turnpike Com.[78] on authority of the Dimick case rejected additur in a condemnation case. Conceding that the Ohio Constitution differed from the United States Constitution, it held that additur denied the plaintiff "the right of having a jury determine his actual damages."[79] It further held that in this respect additur is distinguished from remittitur.

### Additur Approved

#### Where Damages are Unliquidated[80]

Minnesota: Additur was approved in a personal injury action, in spite of a wide disagreement among the authorities, on the grounds that it was supported by the better authority, by a reasonable appraisal of the state constitution, and because it was in the interest of the sound administration of justice.[81]

New Jersey: Additur was sustained as constitutional in a personal injury action.[82]

New York: A judgment entered upon an additur order in a personal injury action was affirmed in O'Connor v. Papertsian.[83] The court said: "the trial court may deny a motion for a new

trial on condition that the party, other than the movant, stipulate to pay a greater amount or accept a lower amount, as the case may be."[84] "The nature of the power which resides in the trial court and the appellate division to raise an inadequate verdict or to reduce an excessive one is exactly the same."[85] Although the case was not cited, the Court of Common Pleas on an appeal from Special Term in the case of Richards v. Sanford,[86] decided in 1854, entered an additur order in a personal injury case, citing Armytage v. Haley.[87]

Pennsylvania: The law in this state is not clear. In 1891 the Supreme Court in Bradwell v. Pittsburgh & W. E. Pass. R.R.[88] reversed an additur order in a personal injury case. This case was followed in 1939 in Lemon v. Campbell.[89] However, in 1938 and 1939, respectively, two lower courts held that additur was authorized in personal injury cases. The Dimick case was distinguished on the difference between the United States and the Pennsylvania constitutions. The Bradwell case was not cited.[90]

Utah: Additur was approved in Bodon v. Suhrmann,[91] in a personal injury case.

Wisconsin: In the event of an inadequate verdict a new trial will be denied the plaintiff upon the defendant's agreement to pay the highest amount which an impartial jury could reasonably have given.[92]

Where Damages are Certain and Ascertainable

Alabama: Additur is allowed as to items of damage definitely established by the evidence but omitted from the verdict.[93]

Delaware: Where a verdict for special damages, in a personal injury case, omitted an item which had been proved and was unquestioned, additur of the omitted item was allowed.[94]

Georgia: Additur was allowed, on defendant's counterclaim, to include definite and specific amounts to which the defendant was manifestly entitled to credit, and which the plaintiff agreed to pay, but which the jury had failed to include.[95]

Illinois: Additur is limited to cases where the inadequacy of the verdict is due to the omission of some specific, definitely calculable item, and may not be extended to tort actions for recovery of unliquidated damages.[96]

Kansas: Additur is authorized when the deficiency can be ascertained by a mathematical calculation.[97]

California Decisions

In California remittitur has been allowed for over a hundred years,[98] but additur has a dubious status.

Where the amount of the damages is definitely ascertainable from the evidence and the verdict is for a lesser amount the court may resort to additur to correct the error.[99]

In an action for breach of promise to marry the jury returned a verdict for the defendant. On the theory that the

verdict was not supported by the evidence the trial court ruled that plaintiff's motion for a new trial should be denied unless the defendant consented to the entry of judgment for the plaintiff in the sum of $1,500. The defendant consented, and judgment was entered accordingly. This was reversed on the ground that plaintiff had been deprived of her right to a jury trial.[100]

In Secreto v. Carlander,[101] the court made the broad statement that: "The law is established in this state that as a condition for denying a motion for a new trial the court has the power to require the opposing party to consent to an increase of the amount of the jury's verdict to bring the amount of the verdict in conformity with the evidence." The Adamson case, supra, was cited. That case, however, was one in which the damages were ascertainable mathematically, the factors being unequivocally established by the evidence. In the Secreto case the damages were unliquidated and indeterminate. The Supreme Court, in the Dorsey case discredits the Secreto holding. It does not point out the fallacy above indicated. It merely refers to the case as distinguishable, probably because the additur was not availed of. The defendant refused to consent and a new trial was ordered.

Blackmore v. Brennan[102] was a clear-cut case of additur. But the defendant appealed, and the court was obliged to hold that by consenting to the additur the defendant had waived

any objection which he might have had. Nevertheless, the court gratuitously stated that "the trial court has a right" to condition an order for a new trial on the consent of the opposing party to "an increase or reduction of the amount of damages awarded by the jury."[103] In the Dorsey case this opinion was labeled as distinguishable on procedural grounds.

Prior to the Dorsey case the only word from the Supreme Court was in Taylor v. Pole,[104] in which it said: "There is a conflict of authority as to the extent of the power of a trial court to assess damages or increase the amount of an inadequate award by jury verdict, as a condition of denial of motion for new trial." But the court found it unnecessary to decide the question.

## TYPE OF ERROR CURED BY ADDITUR OR REMITTITUR

An excessive or an inadequate verdict may be the result of an error of the court or it may be solely the result of an error of the jury. Whether the former may be cured by an order of remittitur or additur is open to doubt. As to the latter the law is beset with conflicts and uncertainties.

### Error of the Court

Perhaps the amount of the verdict is due to the error of the court in admitting or excluding evidence, in the giving of instructions, in the submission of issues unsupported by evidence or in some other particular which may have misled the

jury. As to whether error of this character can be cured by additur or remittitur the courts are in disagreement. But, "the more reasonable view would seem to be that, since excessive verdicts caused by the jury's error of judgment may be cured by a . . . remittitur . . . the same principle should apply when the excess is due to error of the court."[105] A remittitur was ordered in a California case where the excess was due to an erroneous instruction.[106]

Error of the Jury

Perhaps the dollar verdict is the result of a compromise by the jurors of differences among them on some or all of the issues. Perhaps the dollar verdict is due to the misconduct of a juror or jurors. On these aspects of the problem there is singularly little comment in the decisions or texts. However, the question of whether these types of error may be cured by remittitur or additur would seem to be subject to most, if not all, of the considerations which obtain with respect to the error most frequently encountered - passion or prejudice.

Perhaps the verdict, whether large or small, is so far out of line as to indicate that it was influenced by passion or prejudice. As to the effect of this error the conflict in the law is irreconcilable.

Oddly enough, here, some courts draw a distinction between large and small verdicts. It is held that a new trial may be granted for an excessive verdict influenced by passion

or prejudice, but a new trial may not be granted on that ground where the verdict is inadequate. This probably stems from the tardiness of the courts, based on precedent rather than reason, in recognizing inadequacy as a ground for a new trial.

Since remittitur and additur are conditioned by the law respecting the granting of new trials, it becomes necessary to examine the effect ascribed to passion and prejudice by statute and decision in the various jurisdictions.

In California, Section 657.5 of the Code of Civil Procedure provides: A new trial may be granted on the ground of "Excessive damages, appearing to have been given under the influence of passion or prejudice." There is no code provision specifically authorizing a new trial on the ground of inadequate damages. However, new trials are granted for inadequacy under the authority of subdivision 6: "Insufficiency of the evidence to justify the verdict."[107]

It has been remarked that, "To say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it." Hence, whether a new trial is granted for excessive or inadequate damages the essential criterion is the sufficiency of the evidence to support the verdict.[108] Nevertheless, the distinction persists. It has been held that passion or prejudice will support an order for a new trial in a case of excessive damages, but is not proper as an independent ground for setting aside an inadequate verdict.[109] It has been held that in California the trial court

may set aside an excessive verdict as not supported by the evidence, even though it does not find passion or prejudice;[110] although the Supreme Court earlier had held that a verdict could be set aside as excessive only where passion or prejudice was present.[111] It is also held that if a trial judge denies a motion for a new trial made on the ground of excessive damages, the ruling will not be disturbed on appeal unless the verdict is so grossly excessive as to indicate passion or prejudice.[112]

On this subject the courts in other jurisdictions are completely at loggerheads.

In many jurisdictions remittitur may not be ordered where it appears that the verdict was actuated by passion or prejudice.[113] The reasoning is that if passion or prejudice is present it may have tainted, and probably did taint, the whole verdict, including the issue of liability.[114] In other jurisdictions it is held that the trial court should not grant a new trial where the verdict is excessive or inadequate unless passion or prejudice appears.[115]

In some states the only remedy for an inadequate verdict is a new trial; in others even a new trial will not be granted unless the smallness of the verdict indicates bias and prejudice; and in still others new trials for inadequacy are forbidden by statute in certain cases.[116] In an Ohio case the writer of the opinion, expressing his own views, thought that additur was proper where the amount of the verdict did not indicate passion or prejudice.[117]

Whether it be remittitur or additur the court orders a new trial unless the opposing party consents to a judgment for an amount which differs from the amount of the verdict. The amount must be fixed by the court and designated in the order. The numerous criteria prescribed by the courts for determining such amount are strangely incongruous.

## Remittitur

One rule is that the verdict should be reduced to the highest amount which the court would allow to stand.[118]

It has been held that the verdict should be reduced to the lowest amount which the court would sustain.[119]

Neither of the last cited cases tells the whole story. In an earlier Arkansas case[120] the appellate court ordered a remittitur to an amount which it characterized as not the exact amount to which the plaintiff was entitled, but one which it was willing should stand; and, in a later case there was a remittitur to the highest amount which the court would approve.[121]

Wisconsin has added another condition. If the plaintiff refuses to consent to a judgment for the least amount, the defendant is then given the option to consent to a judgment for the highest amount that an unprejudiced jury probably would find.[122]

In Ohio the verdict may be reduced to any amount supported by the evidence.[123]

California has adopted no standard for fixing the amount of a remittitur.[124] In one case, however, it rejected the rule requiring a reduction to the lowest possible sum which another jury would award.[125]

## Additur

Since additur is a later development and has been less frequently considered by the courts, it is not surprising that there are few cases dealing with the amount of the increase. There is, however, convincing indication that eventually the standards adopted by the courts may vary as widely as in the case of remittitur.

In Wisconsin it was held that the court in an additur order may enter a judgment for the "least amount" that an unprejudiced jury probably would find, upon consent of the plaintiff. The typical additur order, of course, is conditioned on the defendant's consent. Here the court said the defendant may not object because the increase results in a verdict for the least amount which it would permit to stand.[126]

Dictum in the Rudnick case (Delaware)[127] is to the effect that an additur order should fix a sum which is the minimum to which the plaintiff is entitled.

In an Ohio case, one judge expressing his own opinion was of the view that additur was proper where it increased the verdict to an amount which was more than the least that a reasonable jury would award.[128]

A writer in the California Law Review sees in the Dorsey case an indication that the California courts might approve an additur "on condition that defendant consent to the highest award a jury could be allowed to find."[129]

## THE PROBLEM

The decision in the Dorsey case recognizes the century long sanction of remittitur. It also casts aspersions on its legitimacy.

Until the Dorsey decision it was assumed that additur was available in California, at least where the damages were liquidated or definitely ascertainable.[130] Having said previously, in Taylor v. Pole,[131] that a conflict of authority existed as to the power of a trial court with respect to additur, the Dorsey opinion, specifically referring to the earlier California decisions merely states that they are distinguishable on procedural or factual grounds.[132] This does not serve to resolve the conflict. It should be said, of course, that the court was properly concerned with the issue immediately before it, and gratuitous dicta on the larger problem was not in order.

However, as to the issue immediately before it, i.e., the power of a trial court to issue an additur order in tort cases the decision has been criticized as equivocal. In that case the additur order itself fixed an amount which was

obviously inadequate. The California Law Review deems it probable that the Dorsey case leaves it open to the California courts to enter an additur order fixing the damages at the "highest award a jury could be allowed to find."[133]

With these uncertainties in view, and having in mind the confusion in the law of other jurisdictions concerning both remittitur and additur[134] the potentials of future decisions in these fields in California are unpredictable. What errors may be cured, and in that connection what is to be the impact of passion or prejudice? What measure of damages is to be used?

If remittitur and additur are to be authorized definitively an earnest effort should be made to resolve these uncertainties. There are reasonable suggestions which emerge fairly clearly from the foregoing resume of decisions and texts.

## Errors Which May Be Cured

Whether the error is that of the court or of the jury a single criterion is determinative, i.e., is the error reflected solely in the dollar amount or does it vitiate the whole verdict?

A key to the solution is found in a few cases which hold that even where passion or prejudice is indicated the verdict may be corrected by remittitur so long as this influence is not found to have affected the verdict on the merits.[135] On this premise it also is argued that additur should be permitted where passion or prejudice is indicated but does not contaminate the whole verdict and permeate the issue of liability.[136]

If this concession may be made where passion or prejudice is present, there certainly is no obstacle to extending it to all other error.

Whatever the error, if its scope is such that it even might have contaminated the whole verdict it cannot be said that it is cured by an additur or a remittitur. The ultimate inquiry is, did the error affect the jury's verdict on any issue in the case other than damages?[137] If not, obviously it may be cured by an additur or a remittitur.[138]

In a given case the jury has returned a verdict for the plaintiff. The damages are too large or too small. Let the trial, or the appellate, court put the amount of the verdict out of view for a moment. Let it then pose this question: On the record should the verdict on the merits be set aside on the ground that there is no substantial evidence to support it?

If the answer is "No," the conclusion is that another jury, not infected with the germ of compromise or the virus of bias or prejudice, would be warranted in returning a verdict for the plaintiff. All of which is by way of saying that the error, whether the court's error or the jury's error of judgment in appraising the damages, has not permeated the issue of liability or contaminated the whole verdict.

If the case is a close one, if the conflict in the evidence is sharp, the picture is changed. The court concludes that an impartial jury might return a verdict for either the plaintiff or the defendant; that in either event there is

substantial evidence in the record to support the verdict. Neither verdict would be set aside. But, if the verdict is for the plaintiff he is entitled only to damages fairly assessed according to the pertinent rules.

In the close case it is pertinent, therefore, to look again at the item of damages. If the figure is grossly inapt it is a clear indication that the jury was misled by some error of the court or was actuated by something dehors the record. It makes no difference whether the mistake stemmed from an error of the court, from a disposition to compromise, or from bias or prejudice. The error vitiates the entire verdict. The only recourse is a new trial.

But if there is nothing wrong with the verdict except the amount of the damages, or, to lift a happy phrase from the opinion in Belt v. Lawes,[139] if the verdict "cannot be otherwise impeached," then remittitur or additur is in order.

The same criterion is equally adequate to resolve the conflict as to the impact of passion and prejudice on a motion for a new trial. There certainly is no logical basis for distinguishing between the large and the small verdict on this issue. The influence of passion or prejudice is equally vicious in both cases. If passion or prejudice is indicated the rule should be same whether the verdict is inordinately large or inordinately small. It is high time to ignore the historical accident which bred the anomaly, and to put the large and the small verdict on a parity.

The question is whether, where passion or prejudice is indicated, the sole remedy should be a new trial or should remittitur or additur be authorized?

That brings us back to the original inquiry: Did the indicated passion or prejudice affect only the amount of damages awarded, or did it also affect the verdict on the merits?

Again closing its eyes to the dollar verdict for the moment, if the court can find no ground for disturbing the verdict on the merits the answer is clear - remittitur or additur should be permissible. If there is doubt as to the verdict on the merits a new trial is the only remedy.

Any suggestion for the authorization of remittitur and additur should be broad enough and clear enough to empower the courts to employ either when the verdict is vulnerable only because of its amount,[140] whether the error be that of court or jury.

## Measure of Damages

As to the measure of damages there is a common sense rule which at least has been thought of in some quarters.

In Ohio a remittitur order may specify any amount supported by the evidence.[141] This is a bit indefinite, but at least it does not prescribe an arbitrary highest or lowest. In Tennessee an excessive verdict may be reduced to "an amount that the court believes to be fair and reasonable."[142]

By statute in Massachusetts an inadequate verdict may not be set aside until the parties have been given an opportunity to accept an addition of "such amount as the court adjudges reasonable."[143]

Professor Carlin, speaking of remittitur, states: "most courts, however, seem to pursue an intermediate course and fix the amount of the residue at what the plaintiff is considered justly entitled to recover; or, what amounts to the same thing, which the court thinks a proper functioning jury would have found." He adds in a footnote, however, that cases cited for this proposition are not very satisfactory.[144]

Whether it is a case of remittitur or additur it is perfectly sound to authorize the court, in its conditional order, to name a figure which in its judicial discretion appears to be fair and reasonable. This may be demonstrated by an analysis of the Wisconsin rule as respects remittitur.

Suppose a verdict for $10,000. The defendant moves for a new trial on the ground that the verdict is excessive. The court agrees that it is excessive, and concludes that there should be a remittitur. The court's view is that if the verdict had been for $6,000 it could not have been set aside as inadequate; and that at any figure up to $7,000 it could not be said that it was excessive. Under the Wisconsin rule the court is obliged to condition its order on the acceptance by the plaintiff of a judgment for $6,000.

Suppose in the same case a verdict for $3,500. Plaintiff moves for a new trial on the ground of inadequacy. Again the court's view is that if the verdict had been for $6,000 it could not have been set aside as inadequate, and that at any figure up to $7,000 it could not be said that it was excessive. The court is obliged to condition its order on the acceptance by the defendant of a judgment for $7,000.

The $6,000 figure is illusory. The $7,000 figure is illusory. Why penalize the plaintiff in the one case and the defendant in the other? There is no magic in either figure, and the result is incongruous. No one can say precisely what verdict a reasonable jury should have returned. The high and the low guesses are of no significance.

A figure of some significance, at least, would be the amount which the court considers the plaintiff is justly entitled to recover; or, to phrase it differently, which the court believes to be fair and reasonable.

Suppose in the assumed case that figure is $6,250. Had the jury returned a verdict for that amount it could not have been set aside either as excessive or inadequate. Hence, it is a proper figure upon which to condition the court's order, whether for remittitur or additur.

To be sure, the $6,250 figure is illusory. Another judge might have made it $6,500, and a third judge might have put it at $6,750. But it does not have the vagaries of a range of values, with the lower figures reserved for the plaintiff and

the higher figures reserved for the defendant. At least, the definitive figure eliminates the incongruity and the discrimination.

The conclusion is that the court should be empowered to specify in its remittitur or additur order an amount which it determines would constitute a fair and reasonable verdict.

## THE APPELLATE COURTS

The question originally posed was whether additur should be authorized in the trial court. It later was extended to include the appellate court.

In California the appellate courts may reverse and remand for a new trial.[145] Remittitur and additur, where permissible, are mere adjuncts of the power to grant a new trial. They are, therefore, as much within the province of the appellate courts as they are within that of the trial courts.

As a matter of fact, the entry of remittitur orders by reviewing courts has been established practice for many years.[146] It began at least as early as 1859.[147]

In the earlier cases remittitur was ordered where the error consisted of excessiveness alone:[148] where the amount was not supported by the evidence;[149] where the amount was due to a miscalculation;[150] where the amount exceeded the prayer;[151] where the excess was due to an erroneous instruction;[152] and where the excess indicated passion or prejudice.[153]

Later the blight of confusion as to the impact of passion or prejudice crept in. In a number of cases the appellate courts have ordered a remittitur, or increased a remittitur ordered by the trial court, where passion or prejudice appeared.[154] In 1931, midway in the chronology of these cases, it was held that an excessive verdict could be set aside, by either the trial or appellate court, "only where the excess appears as a matter of law," or where "it is the result of passion, prejudice, or corruption."[155] Along with this came the rule that a trial court's denial of a new trial on the ground of excessive damages will not be disturbed on appeal unless passion or prejudice is present.[156]

Discretionary rulings of the trial court will only be disturbed where there has been an abuse of discretion. If passion or prejudice is reflected in a verdict a trial judge's denial of a new trial is obviously an abuse of discretion. In other words the presence or absence of either is but one factor in determing the issue of abuse. Many other factors are equally cognizable. It is illogical, and leads only to confusion to put passion and prejudice in a separate category, where they stand as a dubious limitation on the power of the appellate court.

Additur in the reviewing courts, following its historical pattern elsewhere,[157] and no doubt for the same reasons, does not appear on the scene except by way of passing references.

Evidently the Judicial Council assumed that the appellate courts were invested with the power to issue both remittitur and additur orders. Effective July 1, 1943, Rule 24(b) of the Rules on Appeal prescribed procedures governing remittitur and additur orders in those courts.[157a]

In view of the constitutional problem involved the Rules on Appeal are of no avail, but the view of the Judicial Council implicit in Rule 24(b) is a persuasive answer to the question concerning the appellate courts.

As of today remittitur and additur appear to have about the same status in the reviewing courts as in the trial courts, and are subject to the same uncertainties and confusion.

Since the appellate courts have the power to grant new trials, it would be an anomoly to invest the trial courts with power to issue orders of remittitur and additur, and to withhold it from the appellate courts, or to leave the power of the latter in doubt. Whatever changes in the law are suggested they should apply to both courts.

## POLICY

Whether the power in question should be granted presents considerations of policy. If they be debatable, they have not been debated. Contra considerations seem never to have been presented. On authority remittitur, in spite of its doubtful

constitutionality, is accepted on the basis of precedent and the outright refusal of the courts to disturb an established practice which conforms to every dictate of sound public policy. Additur is unanimously accorded the like sanction so far as policy is concerned, but is reluctantly rejected or limited solely because of the historical accident which leaves it without precedent to support it.

One outstanding drag on the wheels of justice is the plethora of new trials. As the Yale Law Journal commented: "The efficiency of judicial administration is hampered by the granting of new trials, with their concomitant delays and increased costs to litigants. Courts and legislatures have sought to avoid these evils by eliminating retrials for both excessive and inadequate damages."[158]

An eminent authority writes: "New trials . . . are extravagantly wasteful of time and money, so that judges and lawyers have constantly sought to minimize this waste by modifying the form of the judge's intervention on the application for a new trial."[159]

Remittitur and additur are the prime examples of this effort. Despite the confusion and conflict in the law they are without doubt the most effective. If demonstration is needed to establish the obvious parity of additur with remittitur in eliminating the blight of new trials it may be found in the Dimick and Dorsey opinions. In each of them remittitur and additur are subjected to rigid scrutiny, and

the salutary effect of both in the administration of justice is taken for granted.

The majority in both cases, with traditional propriety, blindfolding itself against the vision of anything dehors the law, holds additur unconstitutional. But the majority in the Dorsey case peeks under the blindfold long enough to see and say: "Arguments to the effect that courts should be permitted to increase awards without the plaintiff's consent because such procedure is more expeditious and would constitute an improvement over established practice might be persuasive if addressed to the people in support of a constitutional amendment, but they are not appropriate here."[160]

Mr. Justice Stone, writing the dissent for Justices Hughes, Brandeis, Cardozo and himself, reluctantly dons the blindfold and confines the opinion to "the question of power," but not without first recording his observation of the policy behind additur: "Accordingly, I address myself to the question of power without stopping to comment on the generally recognized advantages of the practice as a means of securing substantial justice and bringing the litigation to a more speedy and economical conclusion than would be possible by a new trial to a jury."[161]

Mr. Justice Traynor in a vigorous plea for additur, in his dissent in the Dorsey case, supports his view by noting the emphasis given to its advantages by Mr. Justice Stone, and quotes the above excerpt.[162]

The trend of modern advances in the administration of justice certainly includes additur, along with the endorsement of remittitur. There is no question that a clear and adequate grant of power to the courts to enter additur, as well as remittitur, orders will add much to the efficiency and will speed the administration of justice.

## CONCLUSION

To confer the power in question upon trial and appellate courts the following changes in the law are suggested.

The repeal of subdivision 5 of Section 657 of the Code of Civil Procedure, and the enactment of a new subdivision 5 to read as follows:

"5. Excessive or inadequate damages."

Amendment of Article I, Section 7 of The Constitution of The State of California by adding thereto the following provision:

> "In civil actions tried by jury the trial court, or any court of appellate jurisdiction, shall have the power as a condition of denying a motion for a new trial on the ground of excessive or inadequate damages, by whatever error induced, and where the error assigned affects only the issue of damages, to require that the party opposing the motion consent to the remission of a portion thereof in the case of an excessive verdict,

or to an addition thereto in the case of an inadequate verdict. The court in its order shall specify as the amount of remission or addition such amount as it determines would constitute a fair and reasonable verdict. No distinction shall be made between verdicts affected by passion or prejudice and verdicts affected by other error."

FOOTNOTES

1. 38 Cal.2d 350, 240 P.2d 604 (1952). Comment, 40 Calif. L. Rev. 276, 287 (1952).

2. Comment, 40 Calif. L. Rev. 276, 277 (1952).

3. 293 U.S. 474 (1935).

4. This approach makes for clarity. Actually, but less frequently, the issues may be such that the verdict will impose a liability on the plaintiff. In that event the plaintiff would challenge an excessive verdict, and the defendant an inadequate verdict by motions for a new trial. See Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921); E. Tris Napier Co. v. Gloss, 150 Ga. 561, 104 S.E. 230 (1920). Furthermore, while the increase or decrease is usually in the terms of money, it may consist of the inclusion or exclusion of property. See Johnson v. Duncan, 90 Ga. 1, 16 S.E. 88 (1892); Honaker v. Shrader, 115 Va. 318, 79 S.E. 391 (1913); Fry v. Stowers, 98 Va. 417, 36 S.E. 482 (1900); 66 C.J.S. 523; and cf. Eaton v. Jones, 107 Cal. 487, 40 Pac. 798 (1895) and Engle v. Farrell, 75 Cal. App.2d 612, 171 P.2d 588 (1946).

5. See p. 15 et seq. infra.

6. Dorsey v. Barba, 38 Cal.2d 350, 367, 240 P.2d 604 (1952); McCormick, Damages, 76 (1935); Comment, 40 Calif. L. Rev. 276 (1952); Carlin, Remittiturs and Additurs, 49 W. Va. L. Rev. 1, 2, 7 (1942); Comment, 44 Yale L.J. 318, 319 (1934).

7. Carlin, supra note 6, at 4, 5, 7, 29-32.

8. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952); Dimick v. Schiedt, 293 U.S. 474 (1935); Comment, 40 Calif. L. Rev. 276, 284 (1952); Carlin, supra note 6, at 2, 14.

9. Dorsey v. Barba, supra note 8, at 359, 240 P.2d at 609; Id. at 367-68, 240 P.2d at 609 (Traynor, J., dissenting); Blackmore v. Brennan, 43 Cal. App.2d 280, 289, 110 P.2d 723 (1941); Werner v. Bryden, 84 Cal. App. 472, 258 Pac. 138 (1927); Dimick v. Schiedt, 293 U.S. 474, 496-97 (dissenting opinion); Comment, 40 Calif. L. Rev. 276, 283, 285 (1952); Case Note 14 So. Cal. L. Rev. 490, 491 (1941); Carlin, supra note 6, at 24-25; Comment, 44 Yale L.J. 318, 324 (1934).

10. 293 U.S. 474 (1935).

11. 38 Cal.2d 350, 240 P.2d 604 (1952).

12. Dimick v. Schiedt, 293 U.S. 474, 484-85 (1935).

13. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

14. Dimick v. Schiedt, 293 U.S. 474, 482 (1935).

15. Id. at 476.

16. Id. at 476, 487.

17. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

18. Comment, 40 Calif. L. Rev. 276, 277 (1952).

19. Dorsey v. Barba, 38 Cal.2d 350, 352 note 4, 240 P.2d 604, 611 (1952) (dissenting opinion).

20. Ibid.

21. Style 466, 82 Eng. Rep. 466 (1655). It is noteworthy that this was a slander case.

22. Dorsey v. Barba, 38 Cal.2d 350, 368, 240 P.2d 604, 615 (1952)(Traynor, J., dissenting); McCormick, Damages 26-27 (1935).

23. McCormick, Damages 26-27 (1935).

24. Dorsey v. Barba, 38 Cal.2d 350, 368, 240 P.2d 604, 615 (1952)(Traynor, J., dissenting). The course of development is reflected in the California Code of Civil Procedure. Section 657.5, enacted in 1872, listed excessive damages as a ground for new trial. It did not, and does not now, list inadequacy. In 1882 it was suggested that inadequacy might be a ground for new trial under subdivision 6, "Insufficiency of the evidence to justify the verdict," in Benjamin v. Stewart, 61 Cal. 605, 608. In 1895 it was so held in Koebig v. So. Pac. Co., 108 Cal. 235, 41 Pac. 469 (1895). The rule is now firmly established. Torr v. United Railroads, 187 Cal. 505, 202 Pac. 671 (1921); Bauman v. San Francisco, 42 Cal. App.2d 144, 108 P.2d 989 (1940); Donnatin v. Union Hardware & Metal Co., 38 Cal. App. 8, 175 Pac. 26 (1918).

25. 2 Salk. 658, 2 Raym. 814 (1702).

26. Tr. 1 G. 3, K.B. (1761).

27. 2 Wils. 244 (1764).

27a. Dimick v. Schiedt, 293 U.S. 474, 479-80 (1935).

28. L.R. 12 Q.B. Div. 356 (1884).

29. L.R. /1905/ A.C. 115.

30. Dimick v. Schiedt, 293 U.S. 474, at 481, quoting the Watt case, supra note 29.

31. Dimick v. Schiedt, supra note 30, at 482.

32. Id. at 482, 484. A very neat way of disposing of contra cases.

33. Id. at 484.

34. Blunt v. Little, 3 Mason 102, 3 Fed. Cas. 760, No. 1, 578 (S.D. Mass. 1822).

35. Belt v. Lawes, L.R. 12 Q.B. Div. 356 (1884).

36. Dimick v. Schiedt, 293 U.S. 474, 484 (1935).

37. Id. at 485.

38. Carlin, Remittiturs and Additurs, 49 W. Va. L. Rev. 1, 28 (1942).

39. Dorsey v. Barba, 38 Cal.2d 350, 359, 240 P.2d 604, 609 (1952).

40. Ibid.

41. Dimick v. Schiedt, 293 U.S. 474, 482 (1935).

42. Dorsey v. Barba, 38 Cal.2d 350, 356, 240 P.2d 604, 607 (1952).

43. Id. at 359, 204 P.2d at 609.

44. Comment, 44 Yale L.J. 318, 323 (1952).

45. 4 Q.B. 917, 114 Eng. Rep. 1143 (1843).

46. Dorsey v. Barba, 38 Cal.2d 350, 368, 204 P.2d 604, 615 (1952)(Traynor, J., dissenting).

47. Dimick v. Schiedt, 293 U.S. 474, 485 (1935).

48. Dorsey v. Barba, 38 Cal.2d 350, 359, 240 P.2d 604, 609 (1952).

49. Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935).

50. Carlin, supra note 6, at 28, referring back to pp. 15-18.

51. Id. at 15-18.

52. Dorsey v. Barba, 38 Cal.2d 350, 359, 204 P.2d 604, 609 (1952).

53. Dimick v. Schiedt, 293 U.S. 474, 495 (1935)(Stone, J., dissenting).

54. Id. at 490.

55. Id. at 491.

56. Id. at 492.

57. Id. at 497.

58. Carlin, supra note 6, at 23.

59. Ibid.

60. Dorsey v. Barba, 38 Cal.2d 350, 366-69, 240 P.2d 604, 613-15 (1952)(Traynor, J., dissenting).

61. Dimick v. Schiedt, 293 U.S. 474, 485 (1935); Carlin, supra note 6, at 36-37.

62. Dorsey v. Barba, 38 Cal.2d 350, 204 P.2d 604 (1952).

63. Comment, 44 Yale L.J. 318, 324 (1934).

64. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

65. Carlin, Remittiturs and Additurs, 49 W. Va. L. Rev. 1, 24 (1942).

66. 293 U.S. 474 (1935).

67. U.S. Const. amend. VII.

68. Dorsey v. Barba, 38 Cal.2d 350, 369-71, 240 P.2d 604, 615-16 (1952)(Traynor, J., dissenting); Re Ohio Turnpike Com., 101 Ohio App. 474, 140 N.E.2d 328 (1955); Valentine v. Fisher, 55 Montg. C.L.R. 192 (1939); Svoboda v. Pittsburg, 34 Pa. D. & C., 86 Pittsb. Leg. J. 573 (1938); Carlin,

Remittiturs and Additurs, 49 W. Va. L. Rev. 1, 24 (1942); Comment, 44 Yale L.J. 318, 324 (1934).

69. 56 A.L.R.2d Verdict-Power to Increase 256; Comment, 44 Yale L.J. 318, 320 note 10 (1934).

70. Mass. Ann. Laws ch. 231, § 127 (1956).

71. R.I. Gen. Laws § 9-23-1 (1956).

72. Wash. Rev. Code § 4.76.030 (1951).

73. Neb. Comp. Stat. § 20-1142 (1929); Preston v. Farmers Irr. Dist., 134 Neb. 503, 279 N.W. 298 (1938).

74. Klein v. Wilson, 167 Neb. 779, 94 N.W.2d 672 (1959).

75. Carroll's Ky. Codes, 1932 Revision, §§ 340(4); Ky. Rev. Stat. 1959, 340(4), 341; Civil Proc. Rule 59.01(4).

76. Okla. Stat. tit. 12, § 652 (1951).

77. 145 Mich. 265, 108 N.W. 661 (1906).

78. 101 Ohio App. 474, 140 N.E.2d 328 (1955).

79. Id. at 477, 140 N.E.2d at 331.

80. Courts which approve additur in cases of unliquidated damages undoubtedly would approve it in cases where damages are certain and can be determined on the record.

81. Genzel v. Halverson, 248 Minn. 527, 80 N.W.2d 854 (1957).

82. Fisch v. Manger, 24 N.J. 66, 130 A.2d 815 (1957), citing Gaffney v. Illingsworth, 90 N.J.L. 490, 101 Atl. 243 (1917) and other authorities.

83. 309 N.Y. 465, 131 N.E.2d 883 (1956).

84. Id. at 471, 131 N.E.2d at 886.

85. Id. at 472, 131 N.E.2d at 887.

86. 2 E.D. Smith (1854).

87. 4 Q.B. 917, 114 Eng. Rep. 1143 (1843). Supra p. 10.

88. 139 Pa. 404, 20 Atl. 1046 (1891).

89. 136 Pa. Super. 370, 7 A.2d 643 (1939).

90. Valentine v. Fisher, 55 Montg. C.L.R. 192 (1939); Svoboda v. Pittsburg, 34 Pa. D. & C. 46, 86 Pittsb. Leg. J. 573 (1938).

91. 8 Utah 2d 42, 327 P.2d 826 (1958).

92. Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927).

93. Kraas v. American Bakeries Co., 231 Ala. 278, 164 So. 565 (1935).

94. Rudnick v. Jacobs, 9 W. W. Harr. 169, 197 Atl. 381 (1938).

95. E. Tris Napier Co. v. Gloss, 150 Ga. 561, 104 S.E. 230 (1920).

96. Yep Hong v. Williams, 6 Ill.2d 456, 128 N.E.2d 655 (1955); James v. Morey, 44 Ill. 352 (1867); Carr v. Minor, 42 Ill. 179 (1866).

97. Fall v. Tucker, 113 Kan. 713, 216 Pac. 283 (1923); Marsh v. Kendall, 65 Kan. 48, 68 Pac. 1070 (1902).

98. Dorsey v. Barba, 38 Cal.2d 350, 367, 240 P.2d 604, 614 (1952) (Traynor, J., dissenting); Hart v. Farris, 218 Cal. 69, 21 P.2d 432 (1933); Miller v. Atchison, T. & S. F. Ry., 166 Cal. App.2d 160, 332 P.2d 746 (1958); Gearhart v. Sacramento City Lines, 115 Cal. App.2d 375, 252 P.2d 44 (1953); Engle v. Farrell, 75 Cal. App.2d 612, 171 P.2d 588 (1946).

99. Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921).

100. Werner v. Bryden, 84 Cal. App. 472, 258 Pac. 138 (1927).

101. 35 Cal. App.2d 361, 364, 95 P.2d 476, 477 (1939).

102. 43 Cal. App.2d 280, 110 P.2d 723 (1941).

103. Id. at 290.

104. 16 Cal.2d 668, 674, 107 P.2d 614, 617 (1940).

105. Case Note, 13 Tenn. L.R. 134, 135-36 (1935).

106. Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 Pac. 292 (1908).

107. Franklin v. Bettencourt, 16 Cal. App.2d 511, 60 P.2d 1017 (1936).

108. 3 Witkin Cal. Proc. 2064-65 (1954).

109. Bakurjian v. Pugh, 4 Cal. App.2d 450, 452, 41 P.2d 175, 177 (1935).

110. Van Ostrum v. California, 148 Cal. App.2d 1, 306 P.2d 44 (1957).

111. Slaughter v. Van Winkle, 213 Cal. 573, 2 P.2d 789 (1931).

112. Mudrick v. Market St. Ry., 11 Cal.2d 724, 81 P.2d 950 (1938); Butler v. Peluso, 154 Cal. App.2d 624, 317 P.2d 57 (1957); Collins v. Jones, 131 Cal. App. 747, 22 P.2d 39 (1933).

113. Minn., St. P. & S.S.M.R. Co. v. Moquin, 283 U.S. 520 (1930); Gila Valley Ry. Co. v. Hall, 232 U.S. 94 (1914); Tunnel Mining and Leasing Co. v. Cooper, 50 Colo. 390, 115 Pac. 901 (1911); Chester Pork Co. v. Schulte, 120

Ohio St. 273, 166 N.E. 186 (1929); McAfee v. Ogden Union Ry. and Depot Co., 62 Utah 115, 218 Pac. 98 (1923); Smith v. Martin, 93 Vt. 111, 106 Atl. 666 (1919); E. I. Dupont De Nemours & Co. v. Taylor, 124 Va. 750, 98 S.E. 866 (1919); Comment, 44 Yale L.J. 318, 321 (1934).

114. Carlin, supra note 6, at 33.

115. Hart v. Farris, 218 Cal. 69, 21 P.2d 432 (1933); Yarbrough v. Mallory, 225 Ala. 579, 144 So. 447 (1932); Engleman v. Caldwell and Jones, 243 Ky. 23, 47 S.W.2d 971 (1932); Conroy v. Reid, 132 Me. 162, 168 Atl. 215 (1933); Klein v. Wilson, 167 Neb. 779, 94 N.W.2d 672 (1959); Hall v. Vakiner, 124 Neb. 741, 248 N.W. 70 (1933); Ky. Rev. Stat. Rules of Civil Procedure, Rule 59.01(4)(1959); Wash. Rev. Code § 4.76.030 (1951).

116. Comment, 44 Yale L.J. 318, 322 (1934).

117. Markota v. E. Ohio Gas Co., 154 Ohio St. 546, 97 N.E.2d 13 (1951).

118. Ark. Valley Land & Cattle Co., v. Mann, 130 U.S. 69 (1889); Dunton v. Hines, 267 Fed. 452 (D.C.Me.)(1920); Gila Valley, G. & N. R. Co. v. Hall, 13 Ariz. 270, 112 Pac. 845 (1910); Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 So. 714 (1899); Cooper v. Mills County, 69 Iowa 350, 28 N.W. 633 (1886); Comment, 40 Calif. L. Rev. 276, 286 n. 70 (1952).

119. Chicago, R. I. & P. Ry. Co. v. Batsel, 100 Ark. 526, 140 S.W. 726 (1911); West v. Johnson, 202 Wis. 416, 233 N.W. 94 (1930).

120. St. Louis, I. M. & S. Ry. v. Adams, 74 Ark. 326, 86 S.E. 287 (1905).

121. Interurban Ry. v. Trainer, 150 Ark. 19, 233 S.W. 816 (1921).

122. Risch v. Lowhead, 211 Wis. 270, 248 N.W. 127 (1933); Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927).

123. Chester Pork Co. v. Schulte, 120 Ohio St. 273, 166 N.E. 186 (1929).

124. Mudrick v. Market St. Ry. Co., 11 Cal.2d 724, 81 P.2d 950 (1938).

125. Hepner v. Libby, McNeill and Libby, 114 Cal. App. 747, 300 Pac. 830 (1931).

126. Risch v. Lowhead, 211 Wis. 270, 248 N.W. 127 (1933).

127. Rudnick v. Jacobs, 9 W.W. Harr. 169, 197 Atl. 381 (1938).

128. Markota v. E. Ohio Gas Co., 154 Ohio St. 546, 97 N.E.2d 13 (1951).

129. Comment, 40 Calif. L. Rev. 276, 285-86 (1952).

130. Id. at 276.

131. 60 Cal.2d 668, 107 P.2d 614 (1940).

132. Dorsey v. Barba, 38 Cal.2d 350, 356 n. 2, 240 P.2d 604, 608 (1952).

133. Comment, 40 Calif. L. Rev. 276, 285-86 (1952).

134. See p. 22 et seq. supra.

135. Birmingham R. Light and P. Co. v. Comer, 10 Ala. App. 261, 64 So. 533 (1914); St. Louis I. M. & S. R. Co. v. Brown, 100 Ark. 107, 140 S.W. 279 (1911); Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854 (1957); Kurpgeweit v. Kirby, 88 Neb. 72, 129 N.W. 177 (1910).

136. Note, 15 St. Louis L. Rev. 169, 172, n. 14, 175 (1930).

137. Note, 16 Minn. L. Rev. 185, 194 (1931).

138. Lightner Mining Co. v. Love, 161 Cal. 689, 120 Pac. 771 (1911).

139. L.R.Q.B. Div. 356 (1884).

140. Carlin, supra note 6, at 33.

141. Chester Pork Co. v. Schulte, 120 Ohio St. 273, 166 N.E. 186 (1929).

142. Reeves v. Catignani, 157 Tenn. 173, 175, 7 S.W.2d 38, 39 (1927).

143. Mass. Ann. Laws ch. 231, § 127 (1956).

144. Carlin, supra note 6, at 8.

145. Cal. Code Civ. Proc. § 53.

146. Bellman v. S. Francisco H. S. Dist., 11 Cal.2d 576, 81 P.2d 894 (1938); Estate of Carroll, 190 Cal. 105, 210 Pac. 817 (1922).

147. Page v. O'Neal, 12 Cal. 483 (1859).

148. Kline v. C. P. R.R., 39 Cal. 587 (1870).

149. Torbell v. C. P. R.R., 34 Cal. 616 (1868); Pinkerton v. Woodward, 33 Cal. 557 (1867).

150. Page v. O'Neal, 12 Cal. 483 (1859).

151. Hooper v. Wells, Fargo and Co., 27 Cal. 11 (1864).

152. Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 Pac. 292 (1908).

153. Kinsey v. Wallace, 36 Cal. 462 (1868).

154. Bellman v. San Francisco High School Dist., 11 Cal.2d 576, 81 P.2d 894 (1938); Livesey v. Stock, 208 Cal. 315, 281 Pac. 70 (1929); Babb v. Murray, 26 Cal. App.2d 153, 79 P.2d 159 (1938); Gockstetter v. Market Street Ry., 10 Cal. App.2d 713, 52 P.2d 998 (1935); Shaffer v. Arnaelstren, 54 Cal. App.719, 202 Pac. 946 (1921).

155. Slaughter v. Van Winkle, 213 Cal. 573, 2 P.2d 789 (1931).

156. See note 112 supra.

157. See pp. 10-12 supra.

157a. Cal. Code Civ. & Crim. Rules, Rule 24(b).

158. Comment, 44 Yale L.J. 318 (1934).

159. McCormick, 77 (1935); See also Comment, 40 Calif. L. Rev. 276, 285 (1952).

160. Dorsey v. Barba, 38 Cal.2d 350, 359, 240 P.2d 604, 609 (1952).

161. Dimick v. Schiedt, 293 U.S. 474, 489-90 (1935).

162. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952) . (dissenting opinion).