#55(L) 6/25/65

Memorandum 65-37

Subject: Study No. 55(L) - Additur and Remittitur

At the June meeting, the Commission tentatively approved alternative approaches to the problems involved in this topic, not for the purpose of producing a tentative recommendation on this subject, but only for the purpose of transmitting an outline of the proposed alternatives for critical review and comment by the Judicial Council and other interested groups.

The staff was asked to prepare a letter soliciting such comment and transmitting the tentatively approved alternatives. Attached hereto are two copies of the requested letter and two exhibits that will be forwarded with the letter. Please mark your revisions on one copy and turn it in to the staff at the July meeting.

If we are to submit a recommendation on this subject to the 1967 session, the letter and the attachments should be sent to interested persons and groups as soon as possible. Note the December 31, 1965, deadline mentioned in the letter for the return of comments.

Respectfully submitted,

Jon D. Smock
Associate Counsel

Memo 65-37

EXHIBIT I

SUGGESTED CONSTITUTIONAL AMENDMENT

California Constitution, Article I, Section 7

7. The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court.

Nothing in this section precludes a court from ordering the remission of excessive damages or an addition to inadequate damages.

Comment. The constitutional right to jury trial was cited in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952), as the reason for declaring general additur practice unconstitutional in California. (See discussion of the Dorsey case in Exhibit II (attached pink pages).) Remittitur practice is, of course, well established in California even though it is only judicially recognized; it does not have the benefit of explicit statutory or constitutional authority. The language of the suggested constitutional amendment is sufficient to remove any doubt as to the constitutionality of both additur and remittitur practice in California.

Since the purpose of the amendment is simply to authorize additur and remittitur in California, the language purposefully lacks detailed instruction as to the manner in which additur and remittitur authority may be exercised at the trial and appellate court level. This leaves room for implementation of the consititutional authority by several different means. For example, the propriety and scope of existing remittitur practice is presently determined on a case by case basis. The practice might be continued on the same basis

or be subjected to specific legislation or court rule. Likewise, specific constitutional authorization of the logically similar additur practice without detailed instruction as to its exercise leaves open the means for implementing this authority. Thus, statutory rules governing both additur and remittitur might be fashioned to provide specific rules governing the exercise of this authority. On the other hand, the matter of specific implementation might be left to court decision or court rule. See, for example, Rule 24(b) of the California Rules of Court, governing both additur and remittitur authority as presently exercised.

EXHIBIT II

SUGGESTED STATUTE

In any civil action tried by jury where a new trial limited to the issue of damages is otherwise appropriate, the trial court may, as a condition of denying a motion for new trial on the ground of inadequate damages, order an addition of so much thereto as the court in its discretion determines if:

(a) The verdict of the jury is supported by any substantial evidence; and

(b) The party against whom the verdict has been rendered consents to such addition.

Comment. The significant features of the suggested statute are:

1. The first part of the introductory clause limits the applicability of the statute to civil actions tried by jury; excluded entirely from this statutory grant of additur authority are criminal actions and all actions tried by the court without a jury. Hence, the availability or unavailability of additur authority in the excluded actions is unaffected by this statute.

2. The remainder of the introductory clause restricts the exercise of additur authority under this statute to cases "where a new trial limited to the issue of damages is otherwise appropriate." This limitation excludes two distinct classes of cases from this statutory grant of additur authority. First, additur is not authorized by this statute where a new trial is appropriate on any issue other than damages; it is only where the amount of damages to be awarded is the sole issue that ought to be retried that this statute authorizes additur. Thus, if there is some other reason why a new trial ought to be granted, whether or not coupled with an inadequate award of damages, additur is not authorized under this statute. Second, it is only where a new trial would otherwise be appropriate that additur is authorized under the terms of this statute. Thus, if an error in the amount of damages

can be cured without the necessity of a new trial, whether or not the curative action actually results in increasing the amount awarded, a new trial limited to the issue of damages is not otherwise appropriate and the statute is inapplicable.

This statute, therefore, would not affect the existing practice of increasing awards in liquidated damages cases (where a new trial may not be appropriate because the proper amount to be awarded can be determined with certainty) or conditioning any increase in damages upon the consent of both plaintiff and defendant.

3. The statute grants additur authority to trial courts only. Hence, existing appellate additur practice is unaffected by this statute. Restriction of this statutory grant of additur authority to trial courts is in recognition of a distinctive difference between the trial and appellate functions. Extension to the appellate level of the additur authority granted to trial courts by this statute would require an appellate court to exercise discretion in the same manner as a trial court but without benefit of hearing the testimony or seeing the witnesses.

4. The specification of the ground of the motion for new trial as being "inadequate damages" is not technically accurate under existing statutory law, although, as a practical matter, it states the true basis for granting many new trials on the ground of insufficiency of the evidence to support the verdict. The statement of the ground as being "inadequate damages" is in contemplation of an amendment to Section 657 of the Code of Civil Procedure making inadequate damages a specific ground for granting a new trial, just as excessive damages is now a specific ground for granting a new trial.

5. The statute permits the trial court to fix damages in an amount determined to be appropriate in the exercise of the court's discretion. Rejected from the scheme of this statute are the arbitrary highest and lowest amounts supported by the evidence to which the courts in some other jurisdictions, notably Wisconsin, are bound.

6. Subdivisions (a) and (b) state the conditions to be satisfied before additur may be ordered. These conditions are designed to meet the constitutional objections to additur practice in unliquidated damages cases that were raised in the Dorsey v. Barba opinion.

Subdivision (b) requires the consent only of the party opposing the motion for new trial (herein referred to as the defendant). If the defendant fails to consent, the condition upon which the order denying a new trial is predicated will not have been satisfied; hence, the order granting a motion for new trial limited to the issue of damages would become effective as the order of the court. If the defendant consents to the addition, he is in no position to complain about the amount of the judgment entered on the basis of the additur order because he has consented to it. The defendant cannot complain of deprivation of jury trial because he waives the right to jury trial by consent.

Since the plaintiff's consent to additur is not required by the statute, the question is presented regarding his right to complain about the judgment entered on the basis of the additur order (so far as the issue of damages is concerned). The plaintiff may have two bases for complaint: (1) that the amount of damages reflected in the judgment is inadequate (i.e., the evidence is insufficient to support the amount of damages fixed by the court) and (2) that he has been deprived of a jury trial on the issue of damages. The

statute meets both of these objections by the condition in subdivision (a) that the verdict of the jury be supported by substantial evidence.

The amount of damages reflected in a judgment based upon an additur order necessarily exceeds the amount of the jury verdict. Because subdivision (a) requires that the verdict be supported by substantial evidence before the trial court is empowered to exercise additur authority, a larger judgment based upon an additur order made pursuant to this statute necessarily is for an amount that is supported by substantial evidence. Of course, nothing in the statute precludes the plaintiff from asserting that the condition specified in subdivision (a) was not satisfied and, hence, that the trial court exceeded its authority by ordering additur.

The second basis for complaint, and the primary basis upon which the plaintiff might be in a position to complain, concerns the asserted deprivation of his right to jury trial on the issue of damages. This was the problem involved in and decided by Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). In the Dorsey case, the jury returned a verdict for plaintiffs in an amount that was "insufficient to cover medical expenses and loss of earnings" (38 Cal.2d at 355); no allowance was made for pain and disfigurement. The trial court denied plaintiffs' motion for new trial upon defendant's consent to pay an additional $5,000 which resulted in judgment being entered for an amount that "exceeded the special damages proved and apparently included some compensation for pain and disfigurement" (38 Cal.2d at 355). Upon plaintiffs' appeal from the judgment entered on the basis of the additur order, the California Supreme Court held that the trial court's action violated plaintiffs' right to a jury trial on the issue of damages as guaranteed by Section 7 of Article I of the California Constitution ("The

right of trial by jury shall be secured to all, and remain inviolate . . . ."), saying:

> In support of the practice of denying a new trial over the plaintiffs' objection on condition that defendant consent to pay an increased amount, it has been said that the constitutional guarantee is satisfied when the plaintiff has had one jury trial and that the court's exercise of its power to grant or deny new trials will not be disturbed in the absence of an abuse of discretion. However, it is not the mere form of a jury trial to which one is entitled under the Constitution, but the fundamental right to have a jury determination of a question of fact. It is, of course, clear that there has been no denial of such right if a verdict is set aside and motion for new trial granted. But it does not follow that, in lieu of ordering a new trial, the court may itself assess damages on conflicting or uncertain evidence and modify the judgment with the assent of only one party. Neither can such procedure be justified as a proper exercise of the court's authority to prescribe terms in granting or denying motions for new trials. A court may not impose conditions which impair the right of either party to a reassessment of damages by the jury where the first verdict was inadequate, and the defendant's waiver of his right to jury trial by consenting to modification of the judgment cannot be treated as binding on the plaintiff. [38 Cal.2d at 358 (Citations omitted).]

Mr. Justice (now Chief Justice) Traynor, the only member of the Dorsey court remaining on the Supreme Court, vigorously dissented, noting particularly that "plaintiffs have already had their jury trial" (38 Cal.2d 363) and that "the right to a jury trial . . . does not include the right to a new trial" (38 Cal.2d at 560) involving "a reassessment of damages by a second jury" (38 Cal.2d at 365).

Although it is not entirely clear from either opinion, it seems reasonable to conclude that the fundamental difference between the majority and minority positions in the Dorsey case stemmed from differing views of the original verdict that was rendered in the case--the majority viewing the verdict as one not supported by the evidence so that plaintiffs never had a valid jury determination of the issue of damages and the minority viewing the verdict as one sufficiently supported by the evidence so as to satisfy plaintiffs'

constitutional right to a jury determination of this factual question. The original verdict was for an amount that was less than the proven "specials" and contained no award for pain or disfigurement. Hence, it is reasonable to conclude (as the majority must have concluded) that the verdict was not supported by the evidence because of its inadequacy, and that the plaintiff did not receive a jury determination of his damages for pain and disfigurement. Accordingly, the trial court could not enter a judgment based on its own determination of this question, upon which the plaintiff was entitled to have a jury determination, without violating the plaintiff's constitutional right to trial by jury. This interpretation of the Dorsey opinion is supported by the excerpt quoted above, particularly by the court's statement that "a court may not impose conditions which impair the right of either party to a reassessment of damages by the jury where the first verdict was inadequate" (38 Cal.2d at 358 (emphasis added)).

If this analysis of the Dorsey case is correct, an additur practice can be authorized by statute, without a supporting constitutional amendment, in those cases where there is substantial evidence to support the jury verdict and a judgment entered on the verdict could not be reversed for inadequacy. In such a case, the plaintiff could not successfully contend that he had been deprived of a jury determination of the issue of damages if judgment were entered on the verdict. Hence, he cannot possibly be injured by a judgment entered on an additur order in an amount that exceeds the verdict.

Subdivision (a), therefore, is drafted with a view to distinguishing the situation where the verdict is supported by substantial evidence and the situation where it is, as a matter of law, for an inadequate amount. Where the verdict is not supported by the evidence, the trial court is granted no

authority under this statute to substitute for the verdict its own determination of a question of fact upon which the parties are entitled to a jury's determination; even though the defendant may consent to an increase in the amount to be awarded and thereby waive his right to complain of deprivation of jury trial on this issue, his consent can in no way bind the plaintiff to forgo his constitutional right to have the issue properly decided by a jury. However, where a verdict is supported by substantial evidence, both parties' right to a jury determination of the issue of damages has been satisfied; and subdivision (a) authorizes the court, in lieu of granting a motion for new trial limited to the issue of damages, to increase the jury's assessment of damages.

Since the statute grants additur authority to trial courts only in cases where the jury verdict is supported by substantial evidence, the plaintiff's right to jury trial is logically and constitutionally satisfied. No injury is perceived in awarding to the plaintiff more than he has a constitutional right to obtain.

In 1957, the Legislature directed the California Law Revision Commission to make a study to determine whether the practice of additur at the trial court level should be authorized in California, i.e., whether a trial court should have the power to require, as a condition of denying a motion for a new trial, that the party opposing the motion stipulate to the entry of judgment for damages in excess of the damages awarded by the jury. Senate Concurrent Resolution No. 80, adopted by the 1965 Legislature, extends the scope of this topic to include remittitur as well as a more general additur practice. The Commission plans to submit its recommendation on this subject to the 1967 Legislature.

In the course of its preliminary consideration of this subject, the Commission has wrestled with several fundamental questions relating to the effect of both trial and appellate additur and remittitur practice on the basic right to jury trial on the issue of damages. Although there is no specific constitutional or statutory basis for its application, remittitur practice at both the trial and appellate level is, of course, well established in California. Additur practice similarly is only judicially recognized, but it is much more limited in scope and, in some cases, is constitutionally prohibited. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

Because of the logical similarity of the two practices, any consideration of authorizing an expanded additur practice naturally leads to questioning the desirability of maintaining any difference in the scope of the two practices. Hence, questions arise as to the desirability of either or both practices, their preferred scope, and the best means by which to authorize any such practice. Suggestions range from a constitutional amendment granting broad authority as to both practices at the trial and appellate level to a restrictive statute authorizing only a limited additur practice at the trial level in narrowly defined circumstances (leaving remittitur practice to its current common law status). The difficulties inherent in securing approval of a constitutional amendment lends some support to a statutory alternative, whereas the probable limitations on what can be achieved by legislation lends support to the desirability of a constitutional amendment to solve the problems directly.

The variety of possible solutions to the problems involved in this subject has led the Commission to conclude that, before proceeding further with its consideration of this topic, the full range of alternative courses of action should be submitted to critical review and comment by various interested persons and organizations. We solicit your consideration of this general subject and, in particular, would appreciate knowing your views and the practical considerations that resulted in your conclusions with respect to the following specific questions:

1. Should additur practice be authorized for trial courts in California? For appellate courts? If it were authorized generally, should there be any different standard for the exercise of this authority at the appellate as distinguished from the trial court level?

2. Is a constitutional amendment required to authorize additur practice in unliquidated damages cases?

3. If additur practice at either the trial or appellate level were authorized by statute or constitutional amendment, is it necessary or desirable to make any specific provision for remittitur practice? Should there be any difference in the scope of the two practices?

4. What change, if any, is either necessary or desirable in existing remittitur practice in California?

Attached as Exhibit I (yellow pages) is a draft of a suggested constitutional amendment designed to grant broad additur and remittitur authority; an appended comment explains briefly the purpose of the amendment. If this amendment were adopted, should legislation also be enacted to define the scope and limitations on additur and remittitur authority?

As an alternative to a constitutional amendment, Exhibit II (attached pink pages) is a draft of a suggested statute designed to grant limited additur authority at the trial level only; the appended comment explains the function of the statute and contains a summary of the argument in support of the constitutionality of such a statute.

We will appreciate your consideration of and comment on these drafts in connection with your general review of this subject. Of course, the Commission will appreciate receiving any other comments or suggestions you may wish to make concerning the subject of additur and remittitur.

All comments received will be carefully considered by the Commission in connection with its formulation of a recommendation on this subject to the Legislature. In order to meet its schedule on this project, the Commission would appreciate receiving your views by December 31, 1965.

To assist in your review of this subject, we also enclose a copy of the research study prepared for the Commission on this topic. Please let us know if you need additional copies of this or other material enclosed.

Very truly yours,

John H. DeMoully
Executive Secretary