#55

11/3/65

Memorandum 65-69

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

At the July 1965 meeting, the Commission determined not to solicit comments on alternative means of providing additur authority (by constitutional amendment vs. by statute). Instead, the staff was directed to prepare a tentative recommendation based upon a statutory approach. Attached are two copies of the proposed tentative recommendation. Please mark any suggestions you may have for revision on one of the copies for return to the staff at the November meeting.

At the July 1965 meeting, the Commission discussed alternative means of stating the condition in subdivision (a)(1) of proposed Section 661.5 so that it would not appear so obvious that the court is setting aside a perfectly valid jury verdict. After considering several alternatives, the staff concluded that the direct approach is the most desirable one. Attempting to veil the precise effect of this condition not only clouds the issue but also makes it more difficult to explain the constitutionality of the proposal. However, as a substitute, the Commission might consider a requirement that "the court finds" that the jury verdict is supported by substantial evidence. This substitute has the merit of requiring a specific finding that the condition exists (which otherwise would be left to implication by the mere exercise of additur authority).

At the July 1965 meeting, the Commission also discussed the desirability of limiting the court's discretion in fixing damages by stating an affirmative standard in the statute, such as "damages in an amount justified by the evidence." We do not believe the defendant can appeal if he consents to the additur. On the other hand, we fear that such a statement would leave the way open to

the plaintiff to raise the issue of the correctness of the court determined damages on appeal notwithstanding the fact that the court has awarded him more than the valid jury verdict. In order to avoid appeals on this ground (which would apparently require the appellate court to review all the evidence), we have retained the statutory language in essentially the same form as previously considered and have "beefed up" the Comment on this point so as to clarify the intent of the statutory language.

Senate Bill No. 24 (Stats. 1965, Ch. 1749) amended Section 657 of the Code of Civil Procedure. The effect of the 1965 legislation is stated as follows in a recent report of the State Bar's Committee on Legislation:

> In its final form, S.B. 24 provides: (1) A new trial shall not be granted upon the ground of insufficiency of evidence unless, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the trier of fact should have reached a contrary verdict or decision. (2) If the motion is granted, the order must state the "ground or grounds relied upon" by the trial court. In addition, the trial court must give a "specification of reasons." Such "specification" may be in the order granting the new trial; if not, the court must, within 10 days after filing of the order, prepare, sign and file such written "specification" of reasons with the clerk. (3) On appeal, the order granting a new trial shall not be affirmed upon the ground of insufficiency of evidence, unless such ground was stated in the "order" and, as to the ground of insufficiency of evidence or the ground of excessive damages, it is to be conclusively presumed that the order granting the new trial was made only for the reasons specified in the "order" or in the "specification of reasons". As to the other grounds for a new trial, on appeal the order is to be affirmed if it should have been granted upon any ground stated in the motion for new trial. (4) The trial court shall not direct the attorney for a party to prepare either the "order" or the "specification of reasons". This latter provision was not included in the text prepared by the special committee, but was accepted by the Board of Governors, in connection with the amendment of S.B. 485 into S.B. 24.

We have accepted the policy decisions in the 1965 legislation and have made necessary conforming revisions to reflect the changes that are necessary in Section 657 to effectuate our decisions on additur. The staff also suggests

an additional revision of the language in Section 657(b) to substitute "The evidence does not justify the verdict or other decision" in place of "Insufficiency of the evidence to justify the verdict or other decision." The change makes no change in existing law. The reason for the change is indicated in the Comment to Section 657.

We believe it highly desirable that you read, prior to the meeting, the majority and minority opinions in each of the two Dorsey reports: 38 Cal.2d 350, 240 P.2d 605 (1952); 226 P.2d 677 (Cal. App. 1951)(opinion of District Court of Appeal vacated upon hearing granted by the Supreme Court). The DCA opinions are particularly informative in regard to the facts of the case and contain an excellent discussion of the other California cases bearing upon this problem as well as various theories advanced in support of additur.

Respectfully submitted,

John H. DeMoully
Executive Secretary

#55(L)

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

ADDITUR

BACKGROUND

In 1957, the California Law Revision Commission was directed by the Legislature to make a study to determine 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. This practice is commonly known as additur; it is the converse of remittitur, a practice whereby the court conditions the denial of a defendant's motion for a new trial upon the plaintiff's consent to the entry of judgment for damages in a lesser amount than the damages awarded by the jury. Additur, like remittitur, is never available as an alternative to granting a new trial unless the only ground upon which the new trial could be granted is the adequacy of the damages.

Because additur is a conditional exercise of the power of a court to grant a motion for new trial, any consideration of additur necessarily requires consideration of the court's function in ruling on motions for new trial and the effect of this judicial duty on the parties' right to a trial by jury on the issue of damages.

In California, the grounds for granting a new trial are set out in Section 657 of the Code of Civil Procedure. "Excessive damages, appearing

to have been given under the influence of passion or prejudice" and "insufficiency of the evidence to justify the verdict" are separately stated as independent grounds for granting a new trial. An inadequate award of damages is not explicitly recognized as a separate ground for granting a new trial. However, an inadequate award of damages constitutes a sufficient basis for granting a new trial on the ground of "insufficiency of the evidence to justify the verdict." Phillips v. Lyon, 109 Cal. App. 264, 292 Pac. 711 (1930); 3 WITKIN, CALIFORNIA PROCEDURE, Attack on Judgment in Trial Court § 20 (1954). See also Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954). Also, an excessive award of damages constitutes a basis for granting a new trial on the ground of "insufficiency of the evidence of justify the verdict," and neither passion nor prejudice need be shown. Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941 (1938). See Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3 (1949).

The right to a jury trial--guaranteed by Section 7, Article I, of the California Constitution--does not preclude a court from exercising its judicial authority to grant a new trial in appropriate circumstances. Estate of Bainbridge, 169 Cal. 166, 169, 146 Pac. 427, 428 (1915); Ingraham v. Weidler, 139 Cal. 588, 589-590, 73 Pac. 415, (1903)("The courts in this country, and in England since long before the time of Blackstone, had always exercised the power of granting a new trial after verdict, and for the causes, among others, of insufficiency of evidence, or that the damages were either inadequate or excessive . . . .").

In determining whether to grant a new trial on the ground of "insufficiency of the evidence to justify the verdict" (which includes excessive or inadequate damages), the trial judge acts as "a thirteenth juror" who has not only the power but the duty to review conflicting evidence, weigh its

sufficiency, judge the credibility of witnesses, and exercise his independent judgment in determining whether to set aside a jury verdict. See Tice v. Kaiser Co., 102 Cal. App.2d 44, 226 P.2d 624 (1951); Norden v. Hartman, 111 Cal. App.2d 751, 758, 245 P.2d 3, (1952). The California statute makes it clear, however, that a new trial should be granted only in cases where the judge is convinced the jury verdict is clearly excessive or clearly inadequate. CODE CIV. PROC. § 657 ("A new trial shall not be granted on the ground of insufficiency of the evidence to justify the verdict or other decision unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a contrary verdict or decision.").

The practice of remittitur has long been recognized as an alternative to granting a motion for new trial on the issue of damages in the case of an excessive award of damages by a jury. Draper v. Hellman Com. Trust & Sav. Bank, 203 Cal. 26, 263 Pac. 240 (1928). It does not violate a defendant's constitutional right to a jury trial on the issue of damages. See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

Additur is logically indistinguishable from remittitur insofar as each of these practices permits the trial court to substitute its judgment for the judgment of the jury. Logically, it might be said that unrestricted remittitur and additur practices do violate one or the other party's right to a jury determination of the issue of damages. Remittitur practice, however, is so well established that it is recognized as constitutionally permissible. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). On the other hand, additur is a lesser known procedure with an apparently more recent history. Accordingly, when the issue was squarely raised in California, the Supreme Court held in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952), that an

additur order based upon only the defendant's consent in an unliquidated damages case violated plaintiff's constitutional right to a jury trial on the issue of damages. The court distinguished but failed to overrule several earlier cases that had recognized additur as being permissible in several circumstances (38 Cal.2d at , note 2, 240 P.2d at 608).

It is clear from the Dorsey case that a constitutuional amendment would be required before additur could be used in a case where the verdict is inadequate as a matter of law, i.e., where the verdict is not supported by any substantial evidence. Whether additur may be used in other cases is somewhat uncertain. It seems reasonable to conclude, however, from the earlier cases as well as from the Dorsey opinion itself, that additur is not unconstitutuional per se and is permissible in the following cases:

(1) In any case where damages are certain and ascertainable by a fixed standard. In effect, the court by an additur order merely fixes damages in the only amount justified by the evidence and the only amount that the jury could find. Any variance in that amount would either be excessive or inadequate as a matter of law. See Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921).

(2) In any case where the court's conditional order granting a new trial requires the consent of both plaintiff and defendant. Failure of either party to consent will result in granting a new trial; hence, the plaintiff retains control over whether or not he will receive a second jury trial. Since consent of both parties operates to waive each party's right to a jury trial, there can be no complaint to this form of additur. Hall v. Murphy, 187 Cal. App.2d 296, 9 Cal. Rptr. 547 (1960).

(3) With only the defendant's consent in any case where it is the defendant who is complaining from the final judgment. His consent waives his right to complain about the judgment as entered. Blackmore v. Brennan, 43 Cal. App.2d 280, 710 P.2d 723 (1941). See also Dorsey v. Barba, 38 Cal.2d

350, 240 P.2d 604 (1952).

(4) In any case where the court fixes damages in the highest amount justified by the evidence even though only the consent of the defendant is obtained. Since any amount in excess of this sum would be excessive as a matter of law, no plaintiff could possibly receive a higher amount from any jury. Dorsey v. Barba, 38 Cal.2d 350, 358, 240 P.2d 604, 608 (1952)("the plaintiff has actually been injured if, under the evidence, he could have obtained a still larger award from a second jury"); Dorsey v. Barba, 226 P.2d 677, 690 (Cal. Dist. Ct. App. 1951).

In addition to the foregoing, additur appears to be permissible with only the defendant's consent in any case where a new trial is otherwise appropriate and the jury verdict is in fact supported by substantial evidence. However, California trial judges do not appear to be using additur as an alternative to ordering a new trial on the issue of damages in this type of case; and, in view of the holding in the Dorsey case, lawyers and judges alike will no doubt question whether it would be constitutional to permit the use of additur in such a case, even if such use were expressly authorized by statute. Because the use of additur under these circumstances presents a constitutional question of some substance, it merits full discussion.

No constitutional problem is presented so far as the defendant is concerned if additur is ordered in such a case. The use of additur under these circumstances does not deprive the defendant of any of his constitutional rights because the judgment will be entered in an amount in excess of the jury verdict only if the defendant consents. If he fails to consent, the condition upon which the court's order denying a new trial is predicated will not have been satisfied; hence, the order granting a motion for a new trial

limited to the issue of damages will become effective as the order of the court. See Secreto v. Carlander, 35 Cal. App.2d 361, 95 P.2d 476 (1939). If the defendant consents to the addition, he cannot complain of deprivation of jury trial because he waives the right to jury trial by his consent. Blackmore v. Brennan, 43 Cal. App.2d 280, 110 P.2d 723 (1941). See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). See also Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951 (1950). Consent of the defendant thus removes any grounds for objection the defendant may have regarding the amount of damages reflected in the judgment entered on an additur order.

Because the plaintiff's consent to additur is not required, he might attack the amount of damages awarded pursuant to such an additur order on two grounds. First, he might object that the amount of damages reflected in the judgment still is inadequate because the evidence is insufficient to support the damages fixed by the court. Second, he might object that he has been deprived of a jury trial on the issue of damages.

The first objection--that the amount of damages reflected in the judgment is inadequate because the evidence is insufficient to support the damages fixed by the court--is without merit. Although the trial court has power to grant a new trial, the plaintiff could not have upset a judgment entered upon the jury verdict if the trial judge had declined to grant a new trial. This is because the case is one where the jury verdict is supported by substantial evidence. Thus, the amount of damages reflected in the judgment based on the additur order necessarily exceeds the amount of the jury verdict which would have been upheld on appeal if the judge had declined to grant a new trial. Accordingly, the damages reflected in the judgment based upon an additur order made pursuant to such authority could not be considered as legally insufficient.

The second basis for the plaintiff's objection to additur is the possible deprivation of his right to a jury trial on the issue of damages. Here alone might it be thought that a constitutional question of some substance would be presented. Under the Dorsey case, it is clear that a constitutional amendment would be required to authorize additur in any case where there is no substantial evidence to support the damages awarded by the jury because in such a case neither the plaintiff nor the defendant has been accorded a proper trial by jury on the issue of damages. However, we are concerned only with the use of additur in cases where the jury verdict on the issue of damages is supported by substantial evidence. The constitutional problem presented in this situation requires a careful analysis of the Dorsey case.

In the Dorsey case, the jury returned a verdict for plaintiffs in amounts that were "insufficient to cover medical expenses and loss of earnings" (38 Cal.2d at 355, 240 P.2d at 607); no allowance was made for pain and disfigurement. The trial court denied plaintiffs' motion for new trial based on an inadequate jury award upon defendant's consent to pay additional sums that resulted in a judgment being entered for amounts that "exceeded the special damages proved and apparently included some compensation for pain and disfigurement"(38 Cal.2d at 355, 240 P.2d at 607). 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' constitutional right to a jury trial on the issue of damages.

After noting that "the evidence would sustain recovery for pain and disfigurement well in excess of the amounts assessed by the court," the court held 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, 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, 240 P.2d at 608-609 (emphasis added)).

Mr. Justice (now Chief Justice) Traynor vigorously dissented, noting particularly that "plaintiffs have already had their jury trial" (38 Cal.2d at 363, 240 P.2d at 612) and that "the right to a jury trial . . . does not include the right to a new trial" (38 Cal.2d at 360, 240 P.2d at 610) involving "a reassessment of damages by a second jury" (38 Cal.2d at 365, 240 P.2d at 613).

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 justice 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. Depending upon the view taken of conflicting evidence, the original verdict awarded damages in amounts that were less than the proven special damages and contained no awards for pain or disfigurement. See Dorsey v. Barba, 226 P.2d 677 (Cal. Dist. Ct. App. 1951). 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 plaintiffs did not receive a proper jury determination

on the issue of damages, particularly in regard to damages for pain and disfigurement. Accordingly, the trial court could not enter a judgment based upon its own determination of this question without violating plaintiffs' constitutional right to a trial by jury. This interpretation of the Dorsey opinion is supported 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, 240 P.2d at 609 (emphasis added)).

It seems reasonable to conclude, therefore, that 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. Lambert v. Kamp, 101 Cal. App. 388, 281 Pac. 690 (1929). Hence, he cannot possibly be injured by a judgment entered on an additur order in an amount that exceeds the verdict.

It is essential, therefore, to distinguish 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 could not constitutionally be granted authority by 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 (Blackmore v. Brennan, 43 Cal. App.2d 280, 110 P.2d 723 (1941)), his consent can in no way bind the plaintiff to forgo his

constitutional right to have the issue properly decided by a jury. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). However, as the foregoing discussion demonstrates, where a verdict is supported by substantial evidence, both parties' right to a jury determination of the issue of damages has been satisfied. Estate of Bainbridge, 169 Cal. 166, 169, 146 Pac. 427, 428 (1915) ("the constitutional guarantee . . . is fully observed when the verdict of the jury in the case is rendered and recorded").

Before concluding this discussion of the constitutional problem, one additional observation is pertinent. Due process probably does not require procedures which permit the trial judge to order a new trial where the damages awarded by a jury verdict are inadequate as a matter of law; clearly due process does not require a new trial where the verdict is supported by any substantial evidence even though the judge is convinced that the damages awarded are clearly inadequate. See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604, 613 (1952)(dissenting opinion by Justice Traynor)("At the time of the American Revolution, would plaintiffs have the right to a reassessment of damages by a second jury? They would have had no such right simply because, as has been seen, the first jury's determination of the amount of damages was conclusive. The re-examination of the damages issue following an inadequate verdict in cases of torts against the person is a modern development unknown to the common law."); Philips v. Lyon, 109 Cal. App. 264, 268, 292 Pac. 711, (1930)("Formerly, the rule at common law did not authorize the granting of new trials in actions for personal injuries or torts on the ground of inadequacy of damages.") Thus, it follows that the Legislature would be free to eliminate the right to a new trial on the grounds of inadequate damages in cases where the jury verdict is supported by substantial evidence. If

this is so, the Legislature could condition the right to a new trial in such cases by providing additur as an alternative to granting the motion for the new trial.

Accordingly, trial courts could be given authority by statute--if such authority does not now exist--to use additur in cases where a new trial on the issue of damages is otherwise appropriate and the jury verdict is supported by substantial evidence. Under these circumstances, the plaintiff's right to jury trial is logically and constitutionally satisfied.

RECOMMENDATION

The Commission recommends the enactment of legislation to accomplish the following objectives:

(1) Inadequacy of damages awarded by a jury should be explicitly recognized by statute as a ground for granting a new trial. It is presently recognized in fact by the courts, but the specific ground for such recognition is stated to be insufficiency of the evidence to justify the verdict. Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954). Explicit statutory recognition of excessivive damages (recommended below) without apparent recognition of its converse--inadequate damages--might create doubt as to the availability of the latter as a ground for granting a new trial. Hence, Section 657 of the Code of Civil Procedure should be amended to state that inadequacy of damages is a ground for granting a new trial.

(2) The statement in Section 657 that excessive damages is an independent ground for granting a new trial should be revised to eliminate the purported requirement that the excessive damages resulted from passion or prejudice. The true basis for granting a new trial because of an excessive award of damages is the insufficiency of the evidence to support the verdict. Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941 (1938). Despite this fact, the statement of excessive damages as an independent ground for granting a new trial should be continued. First, it serves to indicate precisely wherein the verdict is defective and distinguishes the damage issue from other evidentiary matters whose sufficiency may be questioned. Second, elimination of excessive damages as an independent ground for granting a new trial would cast doubt upon its continued availibility.

(3) A new section--Section 661.5--should be added to the Code of Civil Procedure to give express statutory recognition to additur practice in one area where its availability has not been clearly recognized by the case law, i.e., where after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the verdict, although supported by substantial evidence, is clearly inadequate. Explicit statutory recognition of additur authority in this type of case will eliminate the uncertainty that now exists. There is no need, however, to detail by statute the variety of other circumstances in which various forms of additur are permissible under existing case law; these exist and will continue to exist on a common law basis just the same as remittitur authority will continue to exist without benefit of explicit statutory recognition.

Additur should be an integral part of our judicial machinery. See e.g., Carlin, Remittiturs and Additurs, 49 W. VA. L.Q. 1 (1942); Comment, 44 YALE L.J. 318 (1934). See also the Commission's study infra at ***. Clarifying the law will encourage the judicious use of this alternative to the granting of a motion for a new trial limited to the issue of damages and will thus avoid the delay and expense of a retrial.

Since the proposed section grants additur authority only in cases where the jury verdict is supported by substantial evidence, the Commission believes that the right to a jury trial is logically and constitutionally satisfied. See the discussion at pages 5-11 supra.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 657 of, and to add Section 661.5 to, the Code of Civil Procedure, relating to new trials.

The people of the State of California do enact as follows:

SECTION 1. Section 657 of the Code of Civil Procedure is amended 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:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial ~~;~~ .

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors ~~;~~ .

3. Accident or surprise, which ordinary prudence could not have guarded against ~~;~~ .

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial ~~;~~ .

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

6. ~~Insufficiency-of~~ The evidence ~~to~~ does not justify the verdict or other decision, or ~~that-it~~ the verdict or other decision is against law ~~;~~ .

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground ~~of-insufficiency-of~~ that the evidence ~~to~~ does not justify the verdict or other decision , nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a ~~contrary~~ different verdict or decision.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in

the motion, whether or not specified in the order or specification of reasons ~~;-provided~~ , except that (a) the order shall not be affirmed upon the ground ~~of-the-insufficiency-of~~ that the evidence ~~to~~ does not justify the verdict or other decision , or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion ; and ~~provided-further-that~~ (b) on appeal from an order granting a new trial upon the ground ~~of-the--insufficiency of~~ that the evidence ~~to~~ does not justify the verdict or other decision, or upon the ground of excessive or inadequate damages ~~appearing-to-have-been-given-under-the-influence-of-passion-or-prejudice~~ , it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.

Comment. The amendments to Section 657 simply codify judicial decisions declaring its substantive effect:

First, the amended section explicitly recognizes that an inadequate award of damages is a ground for granting a new trial just as an excessive award of damages presently is recognized. The availability of this basis for granting a new trial is well settled in California. Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954); Reilley v. McIntire, 29 Cal. App.2d 559, 85 P.2d 169 (1938)(neither passion nor prejudice need by shown).

Second, the qualifying language in subdivision (5) and in the last paragraph that purports to limit the ground of excessive damages to an award influenced by "passion or prejudice" is eliminated as unnecessary. The true basis for granting a new trial because of excessive damages is the insufficiency of the evidence to support the award; neither passion nor prejudice need by shown. Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941 (1938). See Sinz v. Owens,

33 Cal.2d 749, 205 P.2d 3 (1949).

Third, subdivision (6) is amended to reflect the fact that a new trial can be granted not only where the court is convinced that the evidence is clearly insufficient (either nonexistent or lacking in probative force) to support the verdict but also where the evidence is so sufficient (both present and of probative force) that the court is convinced that a contrary verdict is clearly required by the evidence. Estate of Bainbridge, 169 Cal. 166, 146 Cal. 427 (1915); Sharp v. Hoffman, 79 Cal. 404 (1889). Conforming changes are made in two other places in the section.

Fourth, an explicit reference to excessive and inadequate damages should be added to the second paragraph following subdivision 7. The phrase "different verdict or decision" is substituted for "contrary verdict or decision" in the same paragraph to avoid any misunderstanding that might result from the addition of a reference to excessive or inadequate damages. This paragraph, which was added as a part of the 1965 revision of Section 657, directs the court not to grant a new trial upon the ground of insufficiency of the evidence unless the court is convinced that a contrary verdict should have been rendered. The reference to excessive or inadequate damages recognizes that the true basis for granting a new trial on either of these grounds is the insufficiency of the evidence to support the award. Conforming changes are also made in the last paragraph of the section.

SEC. 2. Section 661.5 is added to the Code of Civil Procedure, to read:

661.5. (a) 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:

(1) The verdict of the jury on the issue of damages is supported by any substantial evidence; and

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

(b) Nothing in this section prevents the trial court, as a condition for denying a motion for new trial on the ground of inadequate damages, from ordering an addition of so much thereto as the court in its discretion determines in any case where such an order is constitutionally permissible.

(c) Nothing in this section affects the law relating to remittitur.

Comment. This section makes it clear that additur may be used in certain cases as an alternative to granting a motion for a new trial on the ground of inadequacy of damages. The section is permissive in nature; it does not require that additur be resorted to merely because the conditions stated in the section are satisfied. The section does not preclude the use of additur in any other case where it is appropriate. Nor does the section affect existing remittitur practice. The section is discussed in more detail below.

Subdivision (a). Subdivision (a) authorizes additur only where after weighing the evidence the court is convinced from the entire record, including

reasonable inferences therefrom, that the verdict, although supported by substantial evidence, is clearly inadequate. See CODE CIV. PROC. § 657 (as proposed to be amended). In addition, the defendant must consent to the additional damages or the condition upon which the court's order denying the new trial is predicated will not have been satisfied and hence insofar as the order grants a new trial it will become effective as the order of the court. These conditions are designed to meet the constitutional objections to additur in unliquidated damages cases that were raised in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). See the discussion in 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES ***-*** (1967)[supra at 5-11].

Subdivision (a) permits the trial court to fix damages in an amount determined to be appropriate in the exercise of the court's discretion. Such discretion is, of course, not absolute; it may not be arbitrarily exercised. In the first place, a practical limitation is placed upon the court's discretion because the section requires the defendant's consent. A defendant obviously would be unwilling to consent to entry of an inordinately excessive judgment. Moreover, discretion of this nature vested in a trial court means "legal discretion" and not a whim or caprice. "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be excercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 422, 424 (1866).

The excercise of additur authority under subdivision (a) is limited 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 in cases where a new trial is appropriate on any issue other than damages but only in cases where the amount of damages to be awarded is the sole issue that ought to be retried. Second, additur is authorized only where a new trial would otherwise be appropriate. 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 section is not applicable. The section does not, however, affect the existing additur practice in unliquidated damages cases where the amount to be awarded can be fixed with certainty. See Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921).

Subdivision (a) applies only to civil actions tried by jury. Sufficient statutory authority for the exercise of discretionary additur authority in cases tried by the court without a jury is provided by Code of Civil Procedure Section 662.

Subdivision (a) grants additur authority to trial courts only; existing appellate additur practice in unaffected. See CODE CIV. PROC. § 53; CAL. CT. RULES Rule 24(b). Restriction of this grant of additur authority to trial courts is in recognition of the difference between trial and appellate functions. Extension to the appellate level of the additur authority granted to the trial court by this section would require an appellate court to exercise discretion in the same manner as a trial court but without benefit of seeing the witnesses and hearing the testimony.

Subdivision (b). This subdivision makes it clear that the proposed section does not preclude the exercise of additur authority in any case in which it may

appropriately be exercised. It appears from the earlier cases as well as from the opinion in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952) that additur is permissible not only under the circumstances specified in subdivision (a) but also in the following cases:

(1) In any case where damages are certain and ascertainable by a fixed standard. In effect, the court by an additur order merely fixes damages in the only amount justified by the evidence and the only amount that the jury could find. Any variance in that amount would either be excessive or inadequate as a matter of law. See Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921).

(2) In any case where the court's conditional order granting a new trial requires the consent of both plaintiff and defendant. Failure of either party to consent will result in granting a new trial; hence, the plaintiff retains control over whether or not he will receive a second jury trial. Since consent of both parties operates to waive each party's right to a jury trial, there can be no complaint to this form of additur. Hall v. Murphy, 187 Cal. App.2d 296, 9 Cal. Rptr. 547 (1960).

(3) With only the defendant's consent in any case where it is the defendant who is complaining from the final judgment. His consent waives his right to complain about the judgment as entered. Blackmore v. Brennan, 43 Cal. App.2d 280, 710 P.2d 723 (1941). See also Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

(4) In any case where the court fixes damages in the highest amount justified by the evidence even though only the consent of the defendant is obtained. Since any amount in excess of this sum would be excessive as a matter of law, no plaintiff could possibly receive a higher amount from any jury. Dorsey v.

Barba, 38 Cal.2d 350, 358, 240 P.2d 604, 608 (1952)("the plaintiff has actually been injured if, under the evidence, he could have obtained a still larger award from a second jury"); Dorsey v. Barba, 226 P.2d 677, 690 (Cal. Dist. Ct. App. 1951).

Subdivision (c). Subdivision (c) makes it clear that this section has no effect on existing remittitur practice.