#55(L) 7/19/66

First Supplement to Memorandum 66-38

Subject: Study No. 55(L) - Additur

Since preparing the basic memorandum on this subject, we received a letter (attached as Exhibit I) from Mr. Richard D. Agay, Los Angeles attorney.

Mr. Agay suggests several changes in the tentative recommendation. These are indicated below:

Section 657

Mr. Agay suggests that a substantive change should be made in subdivisions 5 and 6 of Section 657. He would limit the power of the trial judge to grant a new trial under those subdivisions as follows:

Subdivision 5 should be limited to cases where excessive or inadequate damages exist as a matter or law or in other words where there is no substantial evidence to support the damages awarded.

Subdivision 6 should apply solely in those cases where, after giving the benefit of all possible inferences to the verdict, it is concluded that the verdict could not as a matter of law have been reached by following the court's instructions to the jury.

We submit that neither of these changes is within the scope of the Commission's assignment from the Legislature. Moreover, these suggestions deal with a problem that has occupied much of the attention of the Legislature at recent sessions. At the 1965 session, the Legislature enacted

legislation that is represented to be a compromise of all conflicting views of this subject.

Mr. Agay also suggests that the amendment of Section 657 make it clear that excessive or inadequate damages are covered only by subdivision 5 and not by subdivision 6.

Section 662.5

Mr. Agay suggests that additur should be available only in cases where a new trial is granted limited to the issue of damages. Our tentative recommendation does not so limit the authority of the court. The court must determine that a new trial limited to the issue of damages would be appropriate before additur can be used, but in using additur the court may grant it as an alternative to granting a new trial on all issues. If his suggestion is adopted, we suggest that Section 662.5 as set out on page 3 of the basic memorandum be revised to read:

> 662.5. (a) In any civil action where the verdict of the jury on the issue of damages is supported by substantial evidence but the trial court makes an order granting a new trial limited to the issue of damages, the court may made its order subject to the condition that the motion for a new trial is denied if the party against whom the verdict has been rendered consents to an addition of so much thereto as the court in its discretion determines.
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> No change in balance of section.

Mr. Agay also suggests that the use of remittitur be limited to cases where the court grants a new trial limited to the issue of damages. We did not attempt to spell out when remittitur was available in the tentative recommendation. We have determined not to recommend any change in the law

relating to remittitur and we believe that that decision is sound.

Respectfully submitted,

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July 13, 1966

IN REPLY PLEASE REFER TO:

AIR MAIL

California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California

RE: Tentative Recommendation Relating to Additur

Gentlemen:

I should like to offer certain comments and suggestions with respect to the above recommendation.

This is a topic about which I feel very strongly. I shall do my utmost to limit this letter to a logical presentation and restrict signs of emotion as well as I can.

The proposed legislation proceeds on certain assumptions which I shall discuss more fully below. If these assumptions must be accepted, then the basic idea behind the recommendation I feel is sound.

Section 662.5(a) states the basis for the subsections following. It refers to "motion for new trial on the ground of inadequate damages". According to the case law as reflected in this recommendation, it appears that such basis still will fall within subsection 6, notwithstanding the fact that it is also separately stated in subsection 5 of Section 657. In addition, the mere separation of excessive or inadequate damages in subsection 5 may lead some court to believe that what is required thereunder is something different or apart from that required by the former cases which fell under the insufficienc of evidence subsection. I would, therefore, suggest that subsection 6 clearly state that it is applicable in cases other than those covered by subsection 5.

Next, I believe that a clarification with respect to remittitur should be added to the code either in Section 662.5 or somewhere else. While logically additur and remittitur should be used, if at all, only in cases where any new trial which is granted would be limited to the issue of damages. Perhaps subsection 662.5(a) accomplishes this result as to additur. However, in practice, some courts use their power of new trial coupled with remittitur as a club. Defendants' motions for new trial are denied on condition of a consent to a reduction of damages by the plaintiff and if not so consented to are granted on all issues. I would suggest that statutory law make clear that his practice is not proper.

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The careful analysis which you have made in connection with this recommendation has of course included a thorough consideration of motions for new trial and the bases therefor. The suggested legislation does not purport to alter the existing bases as interpreted by the courts, but rather the suggested legislation merely clarifies and codifies the existing law. Your statement on page 12 that "remittitur has proved extremely useful" and the existing statutory and case law proceeds on certain assumptions which apparently by your failure to modify section 657, you concur in. They are:

1. That a judge is better able to fix the value of an eye, arm or leg than a jury.

2. That a judge is better able to detect who is telling the truth than a jury.

I do not agree with such assumptions and I have never seen or heard any sound argument to support the foregoing assumptions. Rather, the constitutional right to jury trials seems to negate such assumptions. Yet on these assumptions, and from the best I have been able to determine on these assumptions alone, subsections 5 and 6 of Section 657 are continued.

Were the purpose of these subsections to permit new trials where an appeal would clearly be granted, or in other words were the basis for granting new trials under these subsections the same as granting an appeal, then I would have no quarrel with them. But that is not the law.

What is more hazy in the law than this area where the evidence is sufficient to support a verdict for purposes of appeal but does not "justify the verdict"? I have great difficulty myself understanding such a principle. I can conceive of no other basis for such a principle other than the assumption that the jury is incapable and the judge is supercapable.

Were the incidence of abuse by the judge under subsections 5 or 6 of Section 657 a mere occasional occurence, then perhaps no deep thought should be expended. I represent to you, however, that the incidence of abuse is not merely occasional but rather with certain trial judges in personal injury cases in this community, it is near constant. I believe that a review of motions for new trial in front of certain judges will show an unbelievably high percentage (if not 100%) of victories for the defendant. Can it be that these judges always get the bad juries? I think not.

I recognize that there is no cure-all for the foregoing problem but a partial answer I suggest is a limitation of a trial judge's power under Section 657. I would therefore suggest that subsection 5 be limited to where excessive or inadequate damages exist as a matter of law or in other words that there is no substantial evidence to support the damages awarded. I realize that this would require a modification if not elimination of the principle of additur as recognized by your proposed legislation but I suggest that a far more just result would be obtained by limiting trial judge's power to upset jury verdicts than the limited benefit from additur.

Secondly, I would scale down subsection 6 to apply solely in those cases where after giving the benefit of all possible inferences to the verdict, it is concluded that the verdict could not as a matter of law have been reached by following the court's jury instructions themselves. If one side or another should win as a matter of law in the judge's opinion, then a directed verdict should be given. There is no excuse for giving the party favored by the judge two chances: one to win with the jury and if unsuccessful there, then with the judge.

Thank you for the privilege of submitting these suggestions.

Yours very truly,

RICHARD D. AGAY

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