#55 1/5/67

Memorandum 67-8

Subject: Study 55 - Additur

Attached to this memorandum as Exhibit I (pink paper) is an advance private copy of an interim report of the Committee on Administration of Justice to the Board of Governors of the State Bar.

The Committee recommends opposition to the Commission's recommendation unless the Commission withdraws its proposed change in subdivision (6) of Code of Civil Procedure Section 657. The remainder of the Commission's recommendation is approved. Thus, the CAJ approves the substance of our proposal relating to additur but objects to any change in the language relating to the grounds for new trial to delete the reference to "insufficiency of the evidence."

The Commission has proposed removing from Code of Civil Procedure Section 657 "insufficiency of the evidence" as a ground for a new trial. The Commission proposes to substitute the ground that "the evidence does not justify the verdict or other decision." The Commission's recommendation is based on the proposition that "insufficiency of the evidence" is inaccurate. The comment points out that the California cases hold 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 such (both present and of such probative force) as to convince the court that a contrary verdict is clearly required by the evidence." The words "insufficiency of the evidence" simply do not describe this latter situation. In dealing with additur, we are dealing with the kind of case in which the plaintiff has produced more than sufficient evidence, not the kind of case where the

plaintiff has produced insufficient evidence. Hence, we determined to revise Section 657 in order to describe accurately what we are dealing with.

CAJ objects to the change on the ground that it will open up new interpretations based on presumed legislative intent. "Insufficiency of the evidence" is a well established term in California law, and, hence, attorneys presumably understand that the term can mean precisely the opposite of what it says.

CAJ is correct in its assertion that the change in wording in Section 657 is not essential to our recommendation on additur. We think they are incorrect in stating that it is unrelated to additur. Nevertheless, it appears to be a matter that we could well abandon if its inclusion would jeopardize the enactment of the bill.

It appears to us to be premature to decide whether to eliminate this proposed revision. We have not heard from the judges as yet, and they may approve it. Moreover, the objection comes in the CAJ's report to the Board of Governors and we do not know what action the Board of Governors may take. If the Board of Governors decides to oppose the bill on the basis of this provision we can very well leave it to the legislative committee hearing the bill to decide whether to eliminate the provision.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

INTERIM REPORT OF COMMITTEE ON ADMINISTRATION OF JUSTICE TO THE BOARD OF GOVERNORS:

The following reports are respectfully submitted on four proposed measures of the Law Revision Commission referred to the Committee on Administration of Justice for study and report:

I

POWER OF TRIAL COURT TO PRESCRIBE ADDITUR, AS WELL AS REMITTITUR, IN NEW TRIAL RULING - CCP 657 (AM.), 662.5 (NEW).

This proposed measure was referred to this committee in 1965-6 in the form of the Commission's "tentative" recommendation dated January 1, 1966. Later, the Commission forwarded a revised report titled "recommendation," dated September 1, 1966. The comments of this committee are addressed to the latter.

RECOMMENDATION OF THIS COMMITTEE. It is recommended that the Commission's measure be opposed, unless there is deleted from the proposed amendments to CCP 657 new wording as to "insufficiency of evidence" as a ground of new trial. Otherwise, it is recommended that the proposed amendments be supported, in the form proposed by the Commission.*

REASONS FOR OPPOSITION TO WORDING REPLACING "INSUFFICIENCY OF EVIDENCE."

The Commission's proposal, as here pertinent, would provide that a new trial be granted on the following ground (among others):

"CCP 657 .....

6. ~~Insufficiency of~~ The evidence ~~is~~ does not justify the verdict or other decision....."

*Purely as a matter of style, the committee suggests that the reference in proposed subd.(c) of CCP 662.5 as to remittitur should be in terms of the court's "granting" a motion for new trial, rather than in terms of the court's "ordering" a new trial. See CCP 657 et seq.

The words "the evidence does not justify the verdict or other decision" would also be substituted elsewhere in Section 657, in place of "insufficiency of the evidence."

The committee has reviewed the reasons advanced for this change (Commission's Tentative Recommendation of January 1, 1966. Comments, p. 15-16; Commission's Recommendation of September 1, 1966, p. 10-11). It does not find them persuasive.

It is stated by the Northern Section:

> "The new wording as to insufficiency of evidence is not related to the purpose of additur. In the view of the Northern Section, the proposed new wording accomplishes nothing, and is subject to the criticism that it will open up new interpretations, based upon presumed legislative intent. The cases cited in the Commission's Recommendation, page 11, are only two of the many cases on the subject. "Insufficiency of evidence" is a well established term in California law."

The Southern Section has concurred in this.

It is to be recalled that in 1965, Section 657 was extensively amended to reflect recommendations of a special committee appointed by the Board of Governors (Galen McKnight, Chairman). This committee did not change "in

insufficiency of evidence" in the code section. Its amendments, in part, amplified the "insufficiency of evidence" wording.

ADDITUR

The Commission proposal as to additur has been prepared in the light of Dorsey v. Barba, (1952), 38 Cal. 2d. 350. In that case, the Supreme Court held, in a 6 to 1 decision on the point, that the practice of "additur" violated the nonconsenting plaintiff's constitutional right to have a jury determine the amount of damages to which he is entitled. The present Chief Justice expressed the view that there was no unconstitutional denial of jury trial.

According to the Commission's report (Recommendation, September 1, 1966, page 6)

> "(T)rial. courts can and should be given authority by statute--if such authority does not now exist--to use additur in cases where granting 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 a jury trial is logically and constitutionally satisfied."
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> ********
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> "This (additur procedure) will encourage the judicious use of this alternative to the granting of a motion for a new trial and will thus avoid the delay and expense of retrials."

In substance, the Commission's text of proposed CCP 662.5, relating to additur, provides:

- Where the verdict of the jury on the issue of damages is supported by substantial evidence but an order granting a new trial limited to the issue of damages would nevertheless be proper, the trial

court in effect may deny the motion if the defendant consents to an addition to the verdict "of so much thereto as the court in its discretion determines."

(subd. a)

- In any other case, the trial court may make such order where "constitutionally permissible." (subd. b)

- Nothing in the section affects the trial court's power as to "remittitur." (subd. c)*

Both sections of this committee have felt that there is a need for "additur," while recognizing the possibile uncertainty created by Dorsey v. Barba. Short of a constitutional amendment, the Commission's approach seems the best available method of attacking the problem.

A slight minority would disapprove the proposal on the ground that it does not clear up present uncertainty and upon the further ground that subd. b, summarized above, is particularly objectionable, in the use of the words "constitutionally permissible."

Form of Subd. b. In its initial approach, the Northern Section felt that subd. b. should be amplified to give guidance by wording listing situations where it was believed "additur" is proper, even in the light of the Dorsey case, and then including the catch-all "and in any other case where such an order is constitutionally permissible." A draft text was prepared. However, the Southern Section felt that the draft text was

*In Butler v. Schefers, 245 A.C.A. 363, 365-6 (September, 1966) The trial court made an "additur" order, in connection with a motion for new trial. Both parties agreed this could not be done. Files, P.J., stated, in the appellate decision striking the "additur" wording: "There is no basis for guessing the reasoning by which the trial court decided to attach the improper 'additur' to its order." (P.366)

subject to technical imperfections and that the Commission's version was preferable. At the General Meeting on December 12, 1966, the South's views were adopted as the views of the committee.

# RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

*relating to*

# ADDITUR

## BACKGROUND

When the defendant moves for a new trial on the ground of excessive damages, the trial court may condition its denial of the motion upon the plaintiff's consent to the entry of a judgment for damages in a lesser amount than the damages awarded by the jury. This practice is known as remittitur. Although the trial court—not the jury—actually fixes the amount of the damages when remittitur is used, the California courts have held that this practice does not violate the nonconsenting defendant's right to have a jury determine the amount of the damages for which he is liable.

In *Dorsey v. Barba*, 38 Cal.2d 350, 240 P.2d 604 (1952), the California Supreme Court held that a trial court could not condition its denial of a plaintiff's motion for new trial on the ground of inadequate damages upon the defendant's consent to the entry of a judgment for damages in a greater amount than the amount awarded by the jury. The court held that this practice—known as additur—violated the nonconsenting plaintiff's constitutional right to have a jury determine the amount of the damages to which he is entitled.

Although some corrective device must be available to the trial court when it is convinced that the damages awarded by the jury are clearly inadequate or excessive, the granting of a new trial is a time-consuming and expensive remedy. "The consequence [of granting new trials] has been to prolong litigation, to swell bills of cost, to delay final adjudication, and, in a large number of instances, to have such excessive judgments repeated over and over, upon the new trial." *Alabama Great Southern R.R. v. Roberts*, 113 Tenn. 488, 493, 82 S.W. 314, 315 (1904). "It is thus held in reserve as the last resort, because it is more expensive and inconvenient than other remedies . . . ." *Lisbon v. Lyman*, 49 N.H. 553, 600 (1870). See also McCormick, Damages 77 (1935) ("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.").

Thus, methods have been sought that will end litigation by permitting more expeditious corrective measures where damages are inadequate or excessive. Where permitted, additur and remittitur serve this purpose. Commentators generally agree that both devices should be an integral part of our judicial machinery. *E.g.*, Carlin, *Remittiturs and Additurs*, 49 W. Va. L. Q. 1 (1942); Comment, 40 Cal. L. Rev. 276 (1952); Comment, 44 Yale L. J. 318 (1934); Note, 12 Hastings L. J. 212

(1960); Note, 6 U.C.L.A. L. REV. 441 (1959); 28 CAL. L. REV. 533 (1940); 14 So. CAL. L. REV. 490 (1941). Not only do these devices tend to benefit the particular litigants by ending the litigation and avoiding the expense of a retrial, but they also benefit litigants generally by reducing calendar congestion.

Although remittitur is a well-recognized California alternative to granting a new trial on the ground of excessive damages, additur is not used to any great extent in California because of the doubts concerning its constitutionality that were raised in *Dorsey v. Barba*, 38 Cal.2d 350, 240 P.2d 604 (1952). This has resulted in giving plaintiffs a benefit unavailable to defendants, for remittitur is available to correct an excessive verdict but additur is not available to correct an inadequate verdict.

The Law Revision Commission believes that additur should be available as a corrective for inadequate verdicts whenever its use does not infringe the plaintiff's right to a jury determination of his damages. A careful analysis of the *Dorsey* case indicates that it neither holds nor requires a holding that additur would be unconstitutional in a case where the jury verdict on the issue of damages is supported by substantial evidence [1] and, accordingly, a denial of a motion for a new trial on the ground of inadequate damages would not be improper. In such a case, the court may grant or deny a new trial in its discretion, and either action will be sustained as proper; because a new jury trial may be entirely denied, it is no deprivation of the right to a jury trial to condition the denial of a new trial in such a case upon additur.

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); thus no allowance whatsoever was made for pain and disfigurement. The plaintiffs' motion for a new trial, based on an inadequate jury award, was denied by the trial court 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 Supreme 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 dissented, noting particularly that "plaintiffs have already had their jury trial" (38 Cal.2d at

[1] If the *Dorsey* case represents the view of the present members of the California Supreme Court, 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 not concerned with that kind of case in this recommendation.

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 as to the validity of the original verdict that was rendered in the case. The majority apparently viewed the verdict as invalid because the jury had failed to find on a material issue—the general damages. Therefore, the plaintiffs had a right to a jury determination of that issue in a new trial and that right had been violated by the trial court's attempt to determine the issue. The minority justice apparently viewed the verdict as being sufficiently supported by the evidence so that the plaintiffs had no constitutional right to a new trial. There being no error in the denial of the new trial, the verdict satisfied the plaintiffs' constitutional right to a jury trial and they could not possibly be prejudiced by the court's judgment granting them more than the verdict.

The reasoning of the *Dorsey* opinion, so interpreted, does not preclude additur in a case where a jury determination of damages is supported by substantial evidence. In such a case, the plaintiff could not successfully contend that he had been deprived of a jury determination on the issue of damages if judgment were entered on the verdict. *Cf. Lambert v. Kamp*, 101 Cal. App. 388, 281 Pac. 690 (1929). Of course, this does not preclude the trial court from granting a new trial based on inadequate damages because it is the court's duty on such a motion to make an independent appraisal of the evidence and an independent determination of the amount of damages to which the plaintiff is entitled. But in such a case the plaintiff is not invoking his constitutional right to jury trial, for that right was satisfied by the rendition of a jury verdict supported by substantial evidence. He is appealing, rather, to the trial judge—sitting as a thirteenth juror—for a review of the jury's determination. If the plaintiff is given, not a new trial, but an increment to the valid jury verdict in the exercise of a power of additur, he has no constitutional ground of objection.

Accordingly, the Commission has concluded that trial courts can and should be given authority by statute—if such authority does not now exist—to use additur in cases where granting 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 a jury trial is logically and constitutionally satisfied.

## RECOMMENDATIONS

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

(1) A new section—Section 662.5—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 trial 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 as remittitur authority will continue to exist without benefit of explicit statutory recognition.

The new section will make it clear that additur is an integral part of our judicial machinery. This will encourage the judicious use of this alternative to the granting of a motion for a new trial and thus will avoid the delay and expense of retrials.

(2) The statement in Code of Civil Procedure 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. *E.g., 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 issues where the sufficiency of the evidence may be questioned. Second, elimination of excessive damages as an independent ground for granting a new trial would cast doubt upon its continued availability.

(3) Inadequacy of damages awarded by a jury should be explicitly recognized in Section 657 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. *E.g., Harper v. Superior Air Parts, Inc.*, 124 Cal. App.2d 91, 268 P.2d 115 (1954). Explicit statutory recognition of excessive damages 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.

## 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 662.5 to, the Code of Civil Procedure, relating to new trials.*

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

### Code of Civil Procedure Section 657 (amended)

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, on the ground of "insufficiency of the evidence to justify the verdict," 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 be 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. It is settled that the true basis for granting a new trial because of excessive damages is that the verdict is against the weight of the evidence, *i.e.*, "the insufficiency of the evidence to justify the verdict or other decision"; neither passion nor prejudice need be shown. *Koyer v. McComber*, 12 Cal.2d 175, 82 P.2d 941 (1938). See *Sine v. Owens*, 33 Cal.2d 749, 205 P.2d 3 (1949).

Third, subdivision 6 is revised to substitute "the evidence does not justify the verdict or other decision" for "insufficiency of the evidence to justify the verdict or other decision." This revision codifies the decisional law 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 such (both present and of such probative force) as to convince the court that a contrary verdict is clearly required by the evidence. *Estate of Bainbridge*, 169 Cal. 166, 146 Pac. 427 (1915); *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846 (1889). Conforming changes are made in three other places in the section.

Fourth, an explicit reference to "excessive or inadequate damages" is added to the second paragraph following subdivision 7, and 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. The phrase "the evidence does not justify the verdict or other decision" has been substituted for "insufficiency of the evidence to justify the verdict or other decision." The reference to "excessive or inadequate damages" has been added in recognition of the fact that the true basis for granting a new trial on either of these

grounds has been "the insufficiency of the evidence to justify the verdict or other decision." Conforming changes are also made in the last paragraph of the section.

**Code of Civil Procedure Section 662.5 (new)**

SEC. 2. Section 662.5 is added to the Code of Civil Procedure, 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 an order granting a new trial limited to the issue of damages would nevertheless be proper, the trial court may grant a motion for new trial on the ground of inadequate damages and make 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.

(b) Nothing in this section precludes a court from making an order of the kind described in subdivision (a) in any other case where such an order is constitutionally permissible.

(c) Nothing in this section affects the authority of the court to order a new trial on the ground of excessive damages and to make such order subject to the condition that the motion for a new trial on that ground is denied if the party recovering the damages consents to a reduction of so much therefrom as the court in its discretion determines.

*Comment.* Section 662.5 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 used 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.

*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. In addition, the defendant must consent to the additional damages; otherwise, the condition upon which the court's order denying the new trial is predicated will not have been satisfied and, 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 000–000 (1967).

The exercise of additur authority under subdivision (a) is limited to cases where "an order granting a new trial limited to the issue of damages would . . . be proper." This limitation prevents the use of additur where the inadequate damages are the result of a compromise on liability. A new trial limited to the issue of damages is not appropriate in such a case. *E.g., Hamasaki v. Flotho*, 39 Cal.2d 602, 248

P.2d 910 (1952); *Leipert v. Honald*, 39 Cal.2d 462, 247 P.2d 324 (1952).

Subdivision (a) applies only to civil actions where there has been a trial 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 is unaffected. See CODE CIV. PROC. § 53; CAL. RULES OF COURT, Rule 24(b).

*Subdivision (b)*

This subdivision makes it clear that Section 662.5 does not preclude the exercise of additur authority in any other case in which it may appropriately be exercised. It appears from the holdings and discussion in various cases 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 such a case—*e.g.*, where plaintiff sues on a $25,000 note and the jury has returned a verdict for $20,000—the court by an additur order merely fixes damages in the only amount justified by the evidence and the only amount that a jury properly could find; any variance in that amount would either be excessive or inadequate as a matter of law. See *Pierce v. Schaden*, 62 Cal. 283 (1882); *Adamson v. County of Los Angeles*, 52 Cal. App. 125, 198 Pac. 52 (1921).

*(2) In any case where the court's additur order 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) In any case where the court, with the consent of the defendant, fixes damages in the highest amount which the evidence will support.* Since any larger amount would be excessive as a matter of law, the plaintiff is not prejudiced by denial of a second jury trial. See *Dorsey v. Barba*, 38 Cal.2d 350, 358, 240 P.2d 604, 608 (1952) ("[T]he plaintiff has actually been injured [only] 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); Comment, 40 CAL. L. REV. 276, 285–286 (1952).

Subdivision (b) also leaves the California Supreme Court free to modify, limit, or even overrule its decision in the *Dorsey* case and allow additur practice in cases where the jury verdict on damages is *not* supported by substantial evidence.

*Subdivision (c)*

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

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