

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

ADDITUR

October 1966

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

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NOTE

This pamphlet begins on page 601. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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October 4, 1966

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 180 of the Statutes of 1965 to make a study to determine whether the law relating to additur and remittitur should be revised.

The Commission submits herewith its recommendation relating to additur and the study prepared by Mr. Albert C. Bender, who served as a part-time member of the Commission's staff. Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

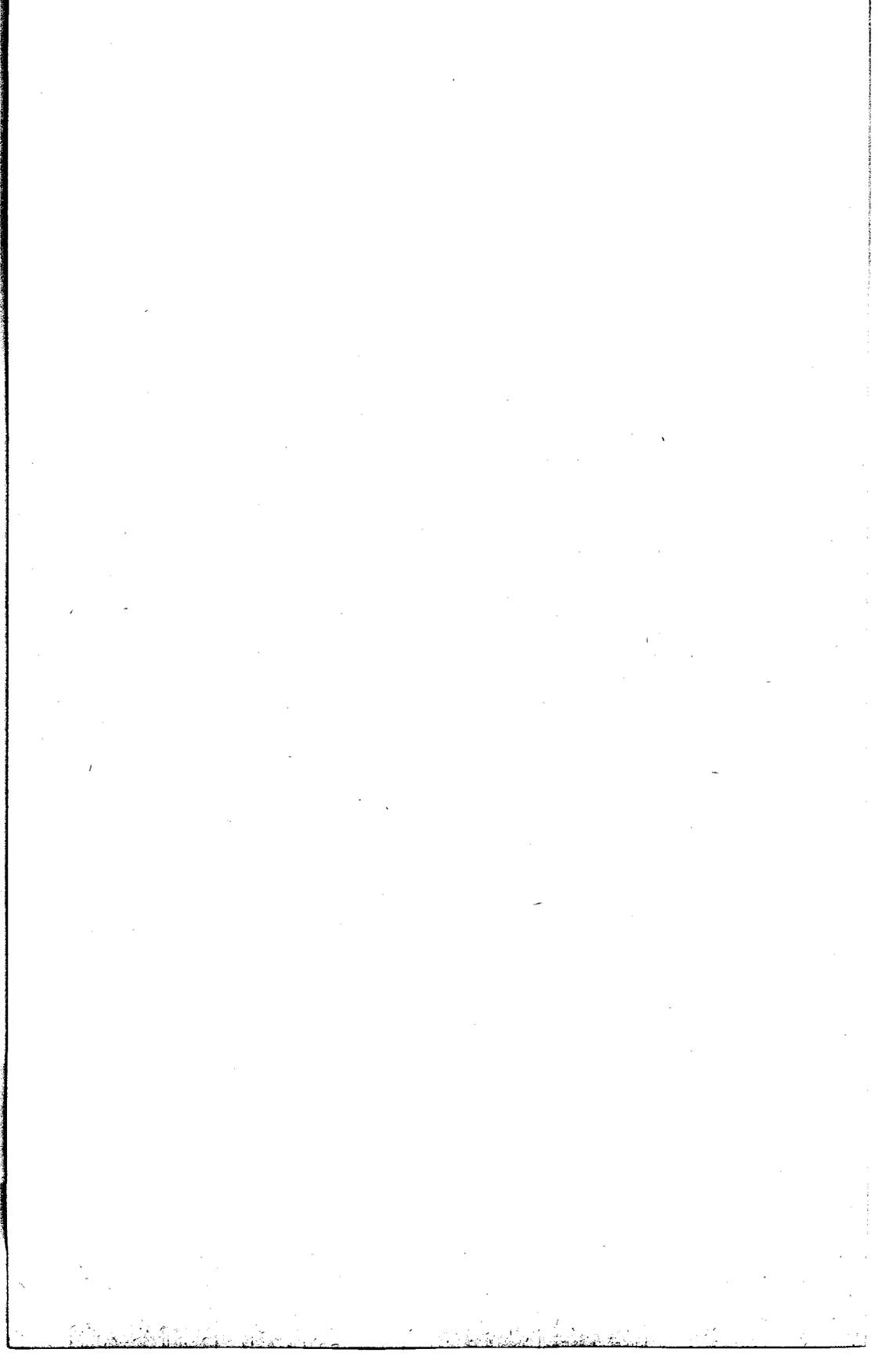
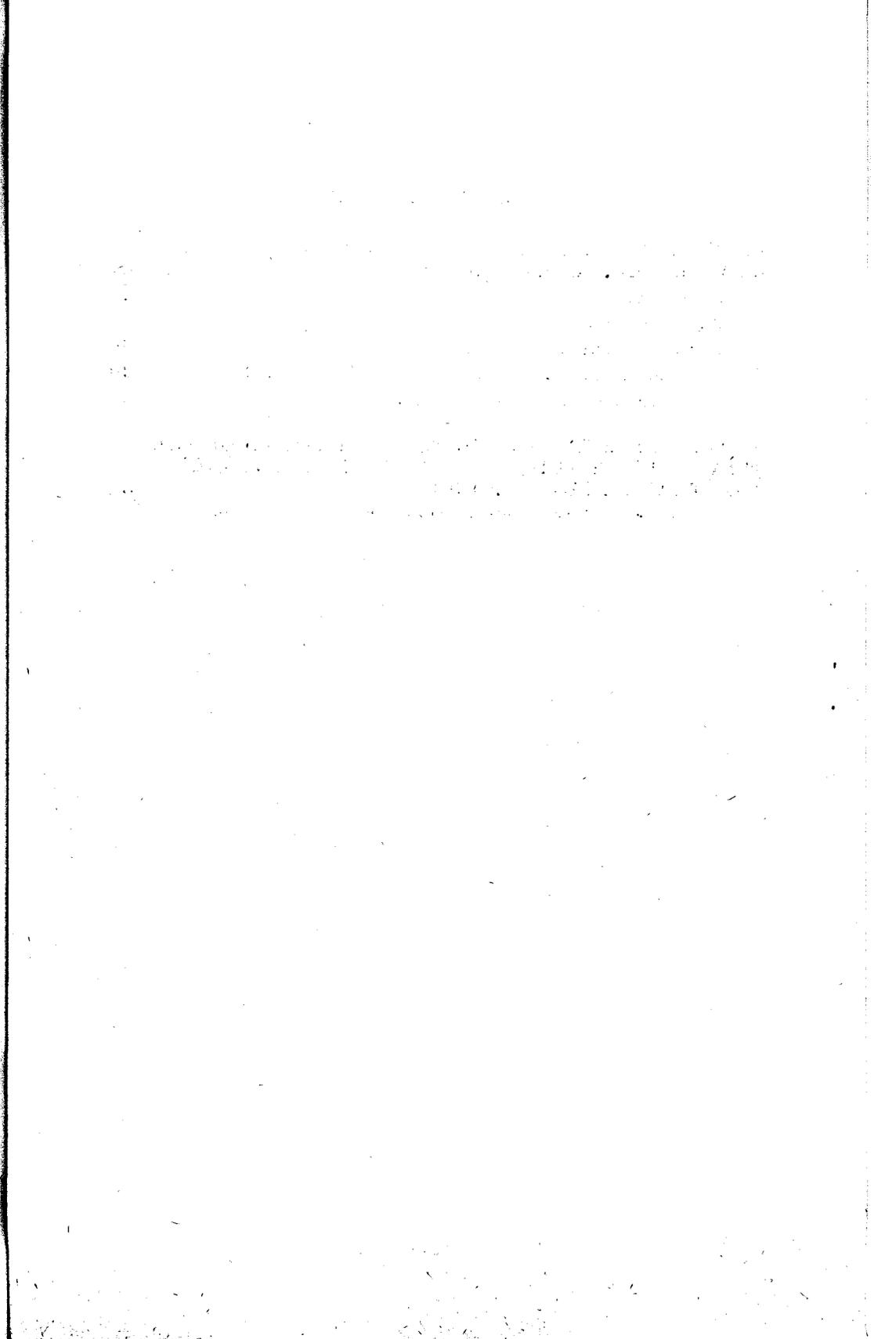


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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

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 non-consenting 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 evidence¹ 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 *Sinz 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 608-609 (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. Honold*, 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.

**A STUDY RELATING TO ADDITUR—THE POWER OF THE
TRIAL COURT TO DENY A NEW TRIAL ON THE
CONDITION THAT DAMAGES BE INCREASED ***

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* This study, beginning on page 617, is reprinted with permission from the *California Western Law Review*, Volume 3, page 1 (1966).

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Additur—The Power of the Trial Court to Deny a New Trial on the Condition That Damages Be Increased†

ALBERT C. BENDER*

I. INTRODUCTION

A. *Statement of Definitions and Objective of Article*

Additur is a term describing the power of a court to make a conditional order, upon a motion for a new trial,¹ granting a new trial to the moving party unless the party relying on the verdict of the jury consents to an increase in the award against him in an amount specified by the court.² It is closely analogous to the practice of remittitur, in which a new trial is granted to the moving party unless the party relying on the verdict of the jury consents to a specified decrease or remission in the amount of the award.

The objective of this article is to analyze the power of a trial court in California to make an additur order. This in turn necessitates to some extent a consideration of remittiturs, of historical distinctions between increasing and decreasing a verdict, of the status of additur and remittitur in other jurisdictions, and of the power of California trial and appellate courts in general to grant new trials.

B. *Use of Additur and Remittitur*

Additur and remittitur are designed to bring a jury verdict more in accord with the judge's notion of what constitutes adequate compensation to the injured party. In each case the objective is reached without the necessity of enduring a new trial. Clearly, then, the practices of additur and remittitur emanate from the power of a court to grant a new trial on the ground of inadequacy or excessiveness of the amount of damages awarded by the jury verdict.

Typically, the practice of additur is followed only when the plain-

† This article was prepared under the direction of the California Law Revision Commission to provide the Commission with background information on this subject. However, the opinions, conclusions, and recommendations contained in this article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

* B.A., Wheaton College, 1963; LL.B., Stanford University, 1966. This article was prepared while the author was serving as a part-time student legal research assistant for the California Law Revision Commission.

1. The motion is typically for a new trial limited to the issue of damages, in jurisdictions where a partial new trial is permitted. Also the court may often grant a conditional new trial on its own initiative.

2. "Additur" is also called "increscitur." See MCCORMICK, DAMAGES § 19 at 82 (1935).

tiff moves for a new trial claiming that the damages awarded him by the jury are inadequate. The court grants the motion unless the defendant consents to an increase in the amount of the verdict against him. In remittitur, the defendant moves for a new trial claiming the damages awarded against him are excessive, and the court grants the motion unless the plaintiff consents to a decrease in the amount of the verdict which was rendered in his favor.³

In situations in which damages are assessed against the plaintiff, such as condemnation cases, or in which judgment goes against the plaintiff as on a counterclaim, the usual position of the parties *vis-à-vis* additur or remittitur is reversed. Thus, when the verdict is claimed to be inadequate, the party relying on the verdict of the jury will be the plaintiff rather than the defendant, and the plaintiff's consent will be necessary to increase the verdict; conversely, in remittitur situations the defendant rather than the plaintiff will want to retain the jury's verdict which the plaintiff contends is excessive, and the defendant's consent will be necessary to decrease the verdict. For the sake of simplicity, this article will discuss additur and remittitur in reference to its application to the first mentioned, typical situation.

II. CONSTITUTIONAL AND HISTORICAL CONSIDERATIONS

A. *The Constitutional Issue*

It is universally recognized throughout common law jurisdictions that both parties to an action at law are entitled to a jury determination of controverted issues of fact.⁴ Ordinarily, the amount of damages to be assessed against a party, as well as the issue of liability, is regarded as an issue of fact.⁵ Also, the content of the right to trial by jury is often said to be determined by the right as it existed at common law at the time of the adoption of the Constitution which

3. The usual form of an additur or remittitur order is that a new trial is hereby "granted unless" the defendant files a written consent to an addition, or the plaintiff to a remission, within a specified number of days. In *Cotton v. Hallinan*, 201 Cal. App. 2d 415, 20 Cal. Rptr. 40 (1st Dist. 1962), a remittitur order stating that the defendant's motion for a new trial is "denied if" each party consents to a remission, "otherwise granted," was upheld although the plaintiff did not file a consent and no further order granting a new trial was issued. The court rejected the plaintiff's argument that the conditional portion of the order was void, in that the order denied a new trial with a proviso that a new trial will be granted if the condition is met. See 3 WITKIN, CALIFORNIA PROCEDURE 2092 (1954).

4. E.g., *People v. Hickman*, 204 Cal. 470, 476, 268 Pac. 909, 912 (1928). See *Dorsey v. Barba*, 38 Cal. 2d 350, 356, 240 P.2d 604, 607 (1952); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); McCORMICK, DAMAGES § 6 (1935). Louisiana, a civil law jurisdiction, has no constitutional guarantee of a trial by jury in civil cases. Verdicts are commonly increased or decreased without the consent of either party. See, e.g., *York v. Starns*, 14 La. App. 548, 129 So. 226 (1930).

5. *Dorsey v. Barba*, 38 Cal. 2d 350, 240 P.2d 604 (1952); *Carlin, Remittiturs and Additurs*, 49 W. VA. L. REV. 1, 20-24 (1942).

preserves that right.⁶ Thus, the use of an additur or a remittitur as a condition for refusal to grant a new trial, raises the difficult constitutional issue of whether either party is thereby deprived of his right to a jury determination on the issue of damages.

B. Constitutional Provisions

The seventh amendment to the United States Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.⁷

The last clause of the seventh amendment, the "re-examination clause," presents the most serious constitutional threat to the use of additur and remittitur.⁸ In general, the trial by jury guarantees found in state constitutions do not include a re-examination clause,⁹ but merely provide in essence that the right of trial by jury shall be preserved or shall remain inviolate.¹⁰ Thus, procedures which are held to violate the seventh amendment in federal courts may nevertheless be permissible in state courts, because the states are not bound by the provisions of the seventh amendment, either directly¹¹ or by reason of incorporation into the due process clause of the fourteenth amendment.¹²

Despite the differences in content between the seventh amendment and the California constitutional guarantee of trial by jury, the California Supreme Court in 1952, relying upon a 5-4 decision rendered

6. Thus, the seventh amendment preserves the right to trial by jury as it existed in 1791. *Dimick v. Schiedt*, 293 U.S. 474 (1935). *But see* *Byrne v. Matczak*, 254 F.2d 525 (3d Cir. 1958). The California constitutional provision guarantees the right of trial by jury as it existed in 1849. *Dorsey v. Barba*, 38 Cal. 2d 350, 240 P.2d 604 (1952); *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 231 P.2d 832 (1951).

7. U.S. CONST. amend. VII. The sixth amendment also guarantees "the right to a speedy and public trial, by an impartial jury" in criminal cases, and the first clause of the fifth amendment provides for indictment by a grand jury in prosecutions for capital or infamous crimes. U.S. CONST. amend. VI, V.

8. See Comment, 44 YALE L.J. 318, 324 (1934).

9. Re-examination clauses similar to that of the seventh amendment are found only in the constitutions of Oregon and West Virginia. ORE. CONST. art. I, § 17; W. VA. CONST. art. 3, § 13.

10. The California provision is typical: "The right of trial by jury shall be secured to all, and remain inviolate . . ." CAL. CONST. art. 1, § 7.

11. *Pearson v. Yewdall*, 95 U.S. 294 (1877). Thus, many state courts allow judgments non obstante veredicto, although the practice has been held improper in the federal courts under the seventh amendment. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913). *But see* Rule 50(b) of the Federal Rules of Civil Procedure.

12. *Walker v. Sauvinet*, 92 U.S. 90 (1875) (seventh amendment trial by jury provision not contained in privileges and immunities or due process clause of fourteenth amendment); *Malloy v. Hogan*, 378 U.S. 1, 4 n.2 (1964) (dictum).

by the United States Supreme Court in 1935,¹³ held that an additur order entered with the consent of only the defendant violated the plaintiff's right to have a jury assess the amount of damages.¹⁴ At the same time, however, both of these high courts explicitly recognized the continuing validity of remittitur orders entered with the consent of only the plaintiff, although it would appear that the defendant's constitutional objection in remittitur cases would be as equally persuasive as the plaintiff's contentions in additur cases. The reason for this dichotomy of treatment between additur and remittitur is best discovered by a brief historical survey of the rise of the power of courts to control or modify the jury's assessment of the amount of damages.

C. Historical Analysis

The early common law, as it developed in England following the Norman Conquest, contained no provision for setting aside a jury verdict. A jury determination of the amount of damages could be avoided only by a writ of attain, an ancient form of action of a quasi-criminal nature designed to punish jurors for reaching an improper verdict.¹⁵ With the decline of the harsh remedy of attain around the sixteenth century, courts of equity and later courts of law began to grant new trials on the ground of misconduct of the jury.

It was not until the seventeenth century that the practice of granting a new trial because of error in the amount of the verdict was recognized.¹⁶ In the middle of the seventeenth century a new trial was first granted because of excessive damages, the judge characterizing them as resulting from misconduct of the jury.¹⁷ Eventually, excessive damages became an independent ground for granting a new trial. For many years, however, new trials were limited to cases in which damages were liquidated or easily ascertainable, typically

13. *Dimick v. Schiedt*, 293 U.S. 474 (1935), discussed in text accompanying n.52 *infra*.

14. *Dorsey v. Barba*, 38 Cal. 2d 350, 240 P.2d 604 (1952), discussed in text accompanying n.85 *infra*.

15. The ancient jury decided issues of fact upon its personal knowledge, and the oath was considered to require it to find a true verdict, at its peril. The writ of attain, at its height during the thirteenth through fifteenth centuries, employed a special tribunal of citizens to determine the guilt or innocence of the witness-jurors accused of perjury. The punishment to which jurors were subjected for finding a "false" verdict was most vindictive and cruel. See MCCORMICK, DAMAGES § 6 (1935).

As the function of the jury gradually changed from a body of witnesses to judicial fact-finders using only evidence properly introduced in court, the basis of attain was undermined and gradually died out.

For a more thorough treatment of the interesting history of the development of new trials, see Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 345 (1931).

16. Comment, 40 CALIF. L. REV. 276 (1952).

17. *Wood v. Gunston*, Sty. 466, 82 Eng. Rep. 867 (1655). See Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 345, 362 (1931).

contract actions, and it was not until the end of the eighteenth century that new trials because of excessive damages were granted in tort actions.¹⁸

The development of a new trial remedy for inadequate damages was considerably slower.¹⁹ Apparently, a new trial on the ground of inadequacy of damages was not granted in an action for personal injury in England until 1879.²⁰ Early statutes in the United States expressly precluded inadequacy of damages as a ground for a new trial.²¹ The precise reasons for this historical difference in treatment are based at least in part on the fact that the ancient proceeding of attain was limited to obtaining a *reduction* of the amount assessed by the jury, and early questions regarding the allowance of new trials were often decided by reference to precedents in attain.²²

As could be expected, the development of a court's power to grant a conditional new trial paralleled this. During the fifteenth century the remedy of attain was considered barred if the plaintiff agreed to release or remit the excess damages.²³ However, the use of additur or remittitur in connection with a new trial never developed to any significant extent in England, and in 1905 the House of Lords held that courts had no power to conditionally alter the amount of the verdict without the consent of both litigants.²⁴ In the United States a remittitur order was entered as early as 1822,²⁵ whereas additur did not appear until 1866, and then only in a case involving damages the amount of which was definitely calculable from the evidence.²⁶ Apparently additur was not used in a case involving an unliquidated or unascertainable amount of damages until almost the turn of the century.²⁷

18. Washington, *supra* note 17; Comment, 40 CALIF. L. REV. 276 (1952).

19. Dorsey v. Barba, 38 Cal. 2d 350, 368, 240 P.2d 604, 615 (1952) (dissenting opinion).

20. See Washington, *supra* note 17, at 365 n.7; Wilson, *Motion for New Trial Based on Inadequacy of Damages Awarded*, 39 NEB. L. REV. 694, 696 (1960).

21. See Wilson, *supra* note 20, at 697.

22. MCCORMICK, DAMAGES § 6, at 27 (1935); Washington, *supra* note 17, at 348, 359.

23. Washington, *supra* note 17, at 349.

24. Watt v. Watt [1905] A.C. 115. A remittitur order was entered with the consent of the plaintiff, and the defendant appealed. The language of the opinion made it clear that additur, as well as remittitur, was not permissible without consent of both parties.

25. See Blunt v. Little, 3 Fed. Cas. 760 (No. 1578) (S.D. Mass. 1822).

26. See Carr v. Miner, 42 Ill. 179 (1866).

27. In Volker v. First Nat'l Bank, 26 Neb. 602, 42 N.W. 732 (1889), an additur order increasing the jury's verdict from \$16.60 to \$50, on an action to recover a penalty for taking usurious interest, was upheld. In Bradwell v. Pittsburgh & West End Passenger Ry., 139 Pa. 404, 20 Atl. 1046 (1891), an additur order was entered by the trial court upon the defendant's consent and the plaintiff appealed, but the supreme court reversed because of an erroneous instruction to the jury and never reached the additur issue.

Thus, while remittitur crept into American jurisprudence almost surreptitiously during the nineteenth century, constitutional problems arising from the use of additur were not presented before the courts until relatively recent times. The result is that today remittitur is almost universally accepted in the United States,²⁸ whereas additur has been passed upon in only a few jurisdictions, and its validity as against the non-consenting plaintiff is generally open to question.

D. Constitutional Justification for Remittitur and Additur

Because of its deep historical roots, the constitutional justification for allowing a plaintiff to consent to a verdict in an amount lower than that rendered by the jury, as a condition to denying the defendant a new trial, is difficult to trace. The 1822 decision rendered by Justice Story entering a remittitur order contained no justification for the practice.²⁹ Similarly, remittitur appeared very early in California jurisprudence but the first case considering its propriety merely dismissed the defendants' appeal with the observation that "it can scarcely be just ground of complaint on the part of the appellants that the judgment of the court stands for but one half the amount, for which the verdict of the jury was rendered."³⁰ In 1874, the California Supreme Court again rejected the defendant's contention that the trial court had no authority to disregard the verdict and render a judgment of its own with the consent of only the plaintiff. "The Court certainly inflicted no injury upon the defendant in requiring the plaintiff to remit a part of the damages."³¹

By 1893, the California Supreme Court was no longer even professing to review the propriety of remittitur. In a case decided that year the defendant contended in essence that his right to a jury trial had been infringed, but although the court recognized that the contention "is undoubtedly upon principle a very strong one . . .," it held that "whatever might be considered the weight of reason and foreign authority on the question . . . if it were *res integra* here,

28. Kentucky is the only state which has generally refused to allow the practice of remittitur. See *Louisville & Nashville R.R. v. Earl*, 94 Ky. 368, 22 S.W. 607 (1893) (dictum). But a remittitur is permitted if the amount of the excess is clearly attributable to an item of damage held not recoverable. *Chesapeake & Ohio Ry. v. Meyers*, 150 Ky. 841, 151 S.W. 19 (1912).

Georgia and West Virginia permit the practice of remittitur only where the amount of the excess can be accurately ascertained. See *Tifton, Thomasville & Gulf Ry. v. Chastain*, 122 Ga. 250, 50 S.E. 105 (1905); *Unfried v. Baltimore & Ohio R.R.*, 34 W. Va. 260, 12 S.E. 512 (1890).

29. See *Blunt v. Little*, 3 Fed. Cas. 760 (No. 1578) (S.D. Mass. 1822); *Dimick v. Schiedt*, 293 U.S. 474, 483 (1935).

30. *George v. Law*, 1 Cal. 363, 365 (1851). A trial court entered a remittitur order in California as early as 1850, but the plaintiff did not consent to the remission so a new trial was granted. See *Payne v. Pacific Mail Steamship Co.*, 1 Cal. 33 (1850).

31. *Dreyfous v. Adams*, 48 Cal. 131, 132 (1874).

the right of a court to do what is complained of in the case at bar is too firmly established in this state by a long line of decisions to be now questioned."³² Later California cases continued to avoid reviewing the propriety of remittitur orders by employing the fiction that the trial court was only "supervising" the jury so that the situation was to be viewed on appeal as if the jury had in fact returned a verdict in the decreased amount in the first instance.³³

The most realistic attempt to justify the power of a trial court to enter a remittitur order stems from the same underlying rationale which probably moved the judges many years ago to first employ the device. The reasoning proceeds as follows: When a jury verdict is excessive but the error affects only the amount of damages and not the question of liability,³⁴ only the plaintiff would be unfavorably affected by a reduction in the verdict. Indeed, a reduction would *benefit* the defendant because he would be required to pay less damages than the jury determined he should pay;³⁵ therefore, the defendant would not be aggrieved by this action and it would not be necessary to obtain his formal consent to such a modification.

As applied to an inadequate verdict, early decisions recognized that this rationale was equally apropos to exclude any necessity for formal consent by the plaintiff to an increase in the verdict in his favor, because here the plaintiff rather than the defendant was the party favorably affected by the modification. One court, in holding that this rationale was improperly applied where the trial court increased the verdict with the consent of only the *plaintiff*, articulated this principle as follows:

It was, in effect, a denial of appellant's [defendant's] right of trial by jury, as to the amount of the award. . . . If the court's change of the award of the verdict had been favorable to the appellant, he, of course, could not have complained This court has never held that a money award made by the verdict of a jury deciding contested unliquidated damages could be lawfully increased or decreased by a trial court without the consent of the party unfavorably affected by such increase or decrease. An election of a party to submit to a different award than that made by the verdict of the jury, in lieu of

32. *Davis v. Southern Pacific Co.*, 98 Cal. 13, 17, 32 Pac. 646 (1893). The cases cited by the court are even more vague and inconclusive in passing upon the validity of remittitur than are the decisions mentioned in text.

33. *Cooper v. National Motor Bearing Co.*, 136 Cal. App. 2d 229, 237, 288 P.2d 581, 586 (1st Dist. 1955); *Hughes v. Hearst Publications, Inc.*, 79 Cal. App. 2d 703, 705, 180 P.2d 419, 420 (1st Dist. 1947); *Smith v. Brown*, 102 Cal. App. 477, 487, 283 Pac. 132, 136 (2d Dist. 1929); *Lynch v. Southern Pacific Co.*, 24 Cal. App. 108, 113, 140 Pac. 298, 300 (2d Dist. 1914).

34. This essential requirement as applied to additur will be discussed in text accompanying nn. 44-51 *infra*.

35. See *Carlin*, *supra* note 5, at 16.

being awarded a new trial, must be an election more favorable to his opponent than the award of the verdict.³⁶

Similarly, a California court, in applying the same rationale to an additur order increasing the verdict with the consent of the defendant, stated:

[T]he trial court has a right to grant or deny a motion for a new trial . . . conditioned upon the party unfavorably affected thereby consenting in writing to an acceptance of a specified increase or reduction of the amount of damages awarded by the jury.³⁷

The rationale behind allowing modification of a jury verdict without the consent of the party benefitted or "favorably affected" thereby was justifiable only so long as that party did not in fact object. But as might be expected, the benefitted party often did object, contending that the verdict was still too high or too low as the case might be. We have seen, however, that as to remittitur orders, the defendant's objections were almost universally rejected. Apparently the early decisions failed to distinguish the defendant's objection to being held liable at all, from his objection that the remittitur order deprived him of the right to a jury determination on the amount of damages. When plaintiffs began appealing from additur orders years later, however, the courts began to re-evaluate the whole problem; but before dealing with those cases in detail, a short survey of areas in which the constitutional issue in additur is not actually presented is essential to gain a proper perspective of the problem.

III. LIMITATIONS ON THE APPLICABILITY OF ADDITUR

A. *Judgment Notwithstanding Verdict*

As a preliminary matter, it is important to distinguish situations in which an additur order is entered from those in which a judgment notwithstanding the verdict is proper.³⁸ In the latter case, the assessment of the amount of recovery is not actually an issue for jury determination; the jury could have been required to return a verdict according to the directions of the trial judge. Clearly, no deprivation of the right to a jury determination of the amount of damages is involved,³⁹ as long as a directed verdict in favor of the plaintiff on that issue would have been proper.⁴⁰

36. *Sigol v. Kaplan*, 147 Wash. 269, 274-75, 266 Pac. 154, 156 (1928). Here, the trial court attempted to carry over the remittitur practice to inadequate verdicts without realizing that in additur the position of the parties *vis-à-vis* reliance on the verdict is reversed.

37. *Blackmore v. Brennan*, 43 Cal. App. 2d 280, 290, 110 P.2d 723, 728 (1941) (dictum; plaintiff did not appeal).

38. See CAL. CODE CIV. PROC. § 629. In jurisdictions without such a statute, the common law motion for judgment non obstante verdicto may be utilized.

39. *Wayland v. Latham*, 89 Cal. App. 55, 264 Pac. 766 (1st Dist. 1928).

40. Usually, a directed verdict if proper is rendered in favor of the defendant. How-

Although this distinction is readily apparent, it needs to be mentioned because courts in many jurisdictions have neglected it. They have determined whether or not the trial courts should have the power to increase the amount of the jury's verdict in favor of the plaintiff without his consent, without ever distinguishing whether the trial court erred in entering judgment notwithstanding the verdict or whether the case was one in which a jury determination on the issue of damages was required so that the consent of at least the defendant would be necessary in order to increase the verdict.⁴¹ The constitutional issue in additur properly arises only in cases in which the quantum of proof before the court necessitates a jury determination of the issue of damages.

The California Supreme Court recognized this distinction as far back as 1882. In *Pierce v. Schaden*,⁴² an action to recover the principal and interest due on a promissory note, the court held that the trial court should have granted the plaintiff's motion to enter judgment for the full amount claimed, although the jury had returned a verdict for a lesser amount, because there was no plea of payment and "the jury had nothing to do with matters not in issue."⁴³

B. Type of Error Curable by Additur: Compromise Verdicts

It must also be noted that remittitur or additur may properly be used to cure an erroneous jury verdict *only* when the error is reflected solely in the amount of damages awarded. This basic principle arises from the fact that the power to enter a conditional new trial order is subject to the same limitations as is the power to grant an unconditional new trial limited to the issue of damages.⁴⁴ Thus, when excessive damages have been awarded by the jury, the trial court may give the plaintiff the option of remitting the excess in order to avoid a new trial only if there is no error which affects the issue of liabil-

ever, in rare instances a directed verdict or judgment notwithstanding the verdict in favor of the plaintiff may be proper. See *Transport Clearing-Bay Area v. Simmonds*, 226 Cal. App. 2d 405, 38 Cal. Rptr. 116 (1st Dist. 1964) (judgment notwithstanding verdict rendered for plaintiff on issue of liability). Similarly, a directed verdict or judgment notwithstanding the verdict, when liability is unclear but the amount of damages if any is fixed, should be proper as to the issue of damages.

41. See, e.g., *Buck v. Little*, 24 Miss. 463 (1852); *State ex rel. State Highway Comm'n v. Green*, 305 S.W.2d 688 (Mo. Sup. Ct. 1957); *Stern v. Rona*, 270 App. Div. 600, 61 N.Y.S.2d 563 (1946); *Allen v. City Realty Co.*, 236 S.W. 231 (Tex. Civ. App. 1921). Cf. *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), cert. denied, 379 U.S. 951 (1964) (court recognized additur not involved but applied *Dimick*).

42. 62 Cal. 283 (1882).

43. *Id.* at 285.

44. See *Mullin v. Kaiser Foundation Hospitals*, 206 Cal. App. 2d 23, 23 Cal. Rptr. 410 (2d Dist. 1962); *Amavisca v. City of Merced*, 149 Cal. App. 2d 481, 308 P.2d 380 (3d Dist. 1957); *Harper v. Superior Air Parts, Inc.*, 124 Cal. App. 2d 91, 268 P.2d 115 (2d Dist. 1954); *Moran v. Feitis*, 69 N.J. Super. 531, 174-A.2d 618 (1961). Although a trial court is not compelled to use additur or remittitur in connection with granting a partial new trial only, such appears to be the practice.

ity.⁴⁵ Similarly, an additur may be used to cure an inadequate verdict only where the errors at trial affect only the amount of the verdict.⁴⁶

The additur situation is the more difficult one in this respect, because the very reason for the inadequacy of the verdict may have been a compromise among the jurors on the issue of liability.⁴⁷ When the amount of damages is uncontested, or only one amount could be assessed as a matter of law, a jury verdict for damages in a lower amount is a sure indication that the verdict was a compromise on the issue of liability.⁴⁸ Conversely, when the amount of damages is in contention and not easily ascertainable, and the amount awarded by the jury exceeds to any extent the proven special damages, it cannot be maintained that the verdict was a compromise on the issue of liability.⁴⁹ But if the amount awarded by the jury fails to cover even the plaintiff's special damages, the verdict might have been a compromise depending on the peculiar circumstances of the case.⁵⁰ Unfortunately, several decisions purporting to invalidate additur have failed to delineate the fact that the verdict in question was probably a compromise on the issue of liability, a situation in which additur should not be permissible.⁵¹

IV. THE STATUS OF ADDITUR IN FEDERAL COURTS

In *Dimick v. Schiedt*,⁵² the question of the validity of additur with reference to the constitutional right of the plaintiff to a jury trial on

45. See *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880 (1889) (by implication); *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 Pac. 771 (1911); *Hurt v. Basalt Rock Co.*, 84 Cal. App. 2d 81, 190 P.2d 240 (3d Dist. 1948). *But see Whicker v. Crescent Auto Co.*, 20 Cal. App. 2d 240, 66 P.2d 749 (1st Dist. 1937) (upheld remittitur order granting conditional new trial on all statutory grounds).

46. *Secreto v. Carlander*, 35 Cal. App. 2d 361, 95 P.2d 476 (2d Dist. 1939) (dictum).

47. For a general discussion of compromise verdicts, see Comment, 45 IOWA L. REV. 163 (1959).

48. See *National Fire Ins. Co. v. Great Lakes Warehouse Corp.*, 261 F.2d 35 (7th Cir. 1958) (indemnification action; amount of damages uncontested); *Ice-Kist Packing Co. v. J. F. Sloan Co.*, 157 Cal. App. 2d 695, 321 P.2d 840 (1st Dist. 1958).

49. *Adams v. Hildebrand*, 51 Cal. App. 2d 117, 124 P.2d 80 (2d Dist. 1942); see also *McNear v. Pacific Greyhound Lines*, 63 Cal. App. 2d 11, 146 P.2d 34 (1st Dist. 1944).

50. *Compare Rose v. Melody Lane*, 39 Cal. 2d 481, 247 P.2d 335 (1952) (error to limit new trial to issue of damages) with *Haynes v. Hunt*, 208 Cal. App. 2d 331, 25 Cal. Rptr. 174 (2d Dist. 1962) (not error to grant limited new trial; evidence of liability "overwhelming"). See also *Leipert v. Honold*, 39 Cal. 2d 462, 247 P.2d 324 (1952) (compromise verdict, but both parties waived right to new trial); *Clifford v. Ruocco*, 39 Cal. 2d 321, 246 P.2d 651 (1952) (compromise verdict, new trial granted).

51. See, e.g., *Sarvis v. Folsom*, 114 So. 2d 490 (Fla. Dist. Ct. App. 1959) (personal injury action, verdict for \$800; trial court had indicated plaintiff entitled to at least \$882.94 if anything); *Yep Hong v. Williams*, 6 Ill. App. 2d 456, 128 N.E. 2d 655 (1955) (personal injury action, verdict for \$1000 although special damages were \$1350); *Woodmansee v. Garrett*, 247 Miss. 148, 153 So. 2d 812 (1963) (personal injury action; special damages not stated but clear from opinion they were far in excess of the \$365 verdict).

52. 293 U.S. 474 (1935).

the issue of damages was presented before the United States Supreme Court for the first time. The case involved damages for personal injuries resulting from an automobile accident wherein the trial judge had entered an order granting the plaintiff a new trial on the grounds the damages were inadequate unless the defendant consented to an increase in the jury's award against him of \$500 to the amount of \$1500. The defendant consented and the plaintiff's motion for a new trial was denied and he appealed. The closely divided Court held that this action deprived the plaintiff of his right to a jury trial under the seventh amendment.⁵³

The Court's basic premise was that the common law rules regarding granting new trials as they existed at the time of the adoption of the Constitution in 1791 are controlling for the purpose of construing the jury trial guarantee of the seventh amendment. Thus, the Court proceeded to analyze the common law in 1791 as to the power of a court to increase the verdict of a jury. This historical approach produced the foregone conclusion that, with the possible exception of actions in debt, "the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury"⁵⁴

Before concluding that additur was unconstitutional, however, the Court had to cope with the fact that remittitur had been practiced in the federal courts for over one hundred years, and its constitutionality had been upheld by the Supreme Court on several occasions.⁵⁵ The Court noted that although previously it had never expressed any doubt as to the validity of remittitur, "it is, however, remarkable that in none of these cases was there any real attempt to ascertain the common law rule on the subject."⁵⁶ The Court then applied the historical test to the validity of remittitur as well, and discovered that its origins were even more ancient and obscure than those of additur. The conclusion reached was that "if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than one hundred years and uniformly

53. Although not clarified by the Court, its rationale was that the "re-examination" clause rather than the "shall be preserved" language of the seventh amendment precluded additur. The Court cited a Supreme Court case decided in 1889 (cited in n.55 *infra*) rejecting the contention, on the authority of earlier state and federal cases, that a remittitur is in effect a re-examination by the court in a mode not known at common law of facts tried by the jury. See 293 U.S. at 484.

54. 293 U.S. at 482 (italics in original).

55. *E.g.*, *Gila Valley, Globe & Northern Ry. v. Hall*, 232 U.S. 94 (1914); *German Alliance Ins. Co. v. Hale*, 219 U.S. 307 (1911) (by implication); *Arkansas Valley Land & Cattle Co. v. Mann* 130 U.S. 69 (1889); *Northern Pacific R.R. v. Herbert*, 116 U.S. 642 (1886).

56. 293 U.S. at 483.

applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day."⁵⁷

Having given its grudging approval, out of deference to the principle of stare decisis, to a practice of which the majority of the Court obviously disapproved,⁵⁸ the Court then attempted to rationalize its decision by finding some logical distinction between the power to conditionally increase a verdict and the power to conditionally decrease it.

Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely *lopping off an excrescence*. But where the verdict is too small, an increase by the court is a *bald addition* of something which in no sense can be said to be included in the verdict.⁵⁹

A persuasive dissent in *Dimick* was filed by Mr. Justice Stone, with Mr. Chief Justice Hughes, and Justices Brandeis and Cardozo concurring.⁶⁰ The main thrust of Stone's argument consisted of a frontal attack upon the historical approach employed by the majority opinion, which he characterized as a "search of the legal scrap heap of a century and a half ago" leading to an "incongruous position."⁶¹ At the outset Stone excluded from his consideration the fact that additur had apparently never been used before the adoption of the seventh amendment:

The question is a narrow one: whether there is anything in the Seventh Amendment or in the rules of the common law, as it had developed before the adoption of the Amendment, which would require a federal appellate court to set aside the denial of the motion merely because the particular reasons which moved the trial judge to deny it are not shown to have similarly moved any English judge before 1791.⁶²

57. 293 U.S. at 484-85.

58. The whole tenor of the Court's opinion in the *Dimick* case evinces a distaste for both additur and remittitur. See Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1, 27-28 (1942).

59. 293 U.S. at 486 (emphasis added). The validity of this distinction is discussed in text accompanying nn. 185-87 *infra*.

60. It is somewhat ironic that the validity of additur was decided in 1935, during a controversial period in the judicial history of the United States Supreme Court. By the October 1939 term, the only justices comprising the majority in *Dimick* who were still on the Court were Justices McReynolds and Roberts. Justices Sutherland and Van DeVanter had retired, and Mr. Justice Butler died in November of 1939.

61. 293 U.S. at 495 (dissenting opinion).

62. 293 U.S. at 490 (dissenting opinion).

Thus, the mere fact that a given procedural device relative to the jury's fact-finding function was unknown to the common law at a certain point in history, Stone argued, was not determinative. The purpose of the seventh amendment was to preserve the essentials of jury trial and not to "perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791."⁶³ Stone severely criticized the majority approach for incorporating by reference the particular details of ancient English trial practice, and failing to see the common law as a system and guide to judicial decision, rather than a stagnant collection of precedents.⁶⁴

V. THE STATUS OF ADDITUR IN CALIFORNIA

A. Early Cases

Although the validity of additur was not squarely faced in California until the landmark case of *Dorsey v. Barba*,⁶⁵ decided in 1952, several earlier cases contain language bearing on the validity of additur in special contexts. Many of the cases containing statements recognizing the practice of additur were expressly distinguished in *Dorsey* on "procedural and factual" grounds,⁶⁶ so that their validity is not affected by that decision.

1. Amount of Damages Certain

In California it has been held that a trial court has the power to increase the amount of the plaintiff's recovery as determined by the jury by entering an additur order, if the amount of damages is liquidated or easily ascertainable from the evidence.⁶⁷

In the opinion of the writer, however, treating cases in which the amount of damages is uncontested, liquidated, or easily ascertainable from the evidence as proper cases for additur only leads to confusion. Neither party has a right to a jury determination of an issue of fact

63. *Ibid.*

64. 293 U.S. at 494-95 (dissenting opinion).

65. 38 Cal. 2d 350, 240 P.2d 604 (1952).

66. 38 Cal. 2d at 356 n.2, 240 P.2d at 608 n.2.

67. *Adamson v. County of Los Angeles*, 52 Cal. App. 125, 198 Pac. 52 (1st Dist. 1921) (condemnation case; jury found 29 miles of fencing needed to enclose defendant's property whereas evidence showed 31½ miles required); *County of Los Angeles v. Rindge Co.*, 53 Cal. App. 166, 200 Pac. 27 (2d Dist. 1921), *aff'd on other grounds*, 262 U.S. 700 (1923). The *Adamson* case was distinguished in *Dorsey v. Barba* (n.66 *supra*); the language of *Dorsey* as well makes it clear that *Adamson* is unaffected by that decision.

Accord, *Kraas v. American Bakeries Co.*, 231 Ala. 278, 164 So. 565 (1935); *Rudnick v. Jacobs*, 39 Del. 169, 197 Atl. 381 (1938); *E. Tris Napier Co. v. Gloss*, 150 Ga. 561, 104 S.E. 230 (1920); *James v. Morey*, 44 Ill. 352 (1867); *Carr v. Miner*, 42 Ill. 179 (1866); *Marsh v. Kendall*, 65 Kan. 48, 68 Pac. 1070 (1902); *Caen v. Feld*, 371 S.W.2d 209 (Mo. Sup. Ct. 1963).

See *Eaton v. Jones*, 107 Cal. 487 (1895) (quiet title action; additur used to change verdict giving property to defendant which was stipulated to belong to plaintiff).

which is uncontested or as to which a reasonable jury could arrive at only one conclusion.⁶⁸ The right to a jury trial extends only to controverted issues of fact.⁶⁹ When the disputed issues relate only to liability, neither party is necessarily entitled to a jury determination of the amount of damages. Thus, when such an issue has been submitted to the jury but its verdict is not supported by any evidence, the trial court should possess the power to alter the verdict without the consent of either party. In other words, the court's power to alter an erroneous jury verdict on liquidated or uncontested damages is an adjunct to its power to enter a judgment notwithstanding the verdict, rather than being an incident of its power to grant a new trial. Although not articulated therein, this conclusion is supported by many decisions upholding the power of a trial court to increase the jury's verdict when damages are certain or easily ascertainable, because the decisions contain the implicit assumption that consent by the defendant is irrelevant.⁷⁰

Regardless of which of these approaches a court takes, however, it must be aware of the probability that the verdict was the result of a compromise on the issue of liability, as discussed earlier,⁷¹ if the verdict was for an amount less than the established amount of damages.⁷² It should be noted, though, that where additur rather than the "judgment notwithstanding the verdict" approach is utilized, the compromise verdict problem loses much of its importance.⁷³ Because consent by the defendant, against whom the judgment is rendered, is required, he can protect himself from a compromise on the liability

68. In 12 *HASTINGS L.J.* 212 (1960), the writer delineates two categories of cases in which damages are certain: (1) where the jury could properly find only one amount, and (2) where the damages are ascertained by operation of law. He concludes that in both situations the function of the jury is properly restricted to a determination of liability. However, this restriction is constitutional, the article continues, only because "the determination of liability carries with it a determination of damages." *Ibid.* at 215.

69. See text accompanying n.4 *supra*.

70. See *Shaffer v. Great American Indem. Co.*, 147 F.2d 981 (5th Cir. 1945); *Fornara v. Wolpe*, 26 Ariz. 383, 226 Pac. 203 (1924); *Harris v. McLaughlin*, 39 Colo. 459, 90 Pac. 93 (1907); *Crown Life Ins. Co. v. Feagin*, 139 So. 2d 461 (Fla. App. 1962); *Fall v. Tucker*, 113 Kan. 713, 216 Pac. 283 (1923); *City of Indianola v. Love*, 227 Miss. 156, 85 So. 2d 812 (1956); *Allison v. Mountjoy*, 383 S.W.2d 314 (Mo. App. 1964); *Schwarz v. Bank of Pittsburgh Nat'l Ass'n*, 283 Pa. 200, 129 Atl. 52 (1925); *Apperson-Lee Motor Co. v. Ring*, 150 Va. 283, 143 S.E. 694 (1928); *W. H. Shenners Co. v. Delzer*, 169 Wis. 507, 173 N.W. 209 (1919); *Woodmansee v. Garrett*, 247 Miss. 148, 153 So. 2d 812 (1963) (dictum); *Williams v. Thrall*, 167 Wis. 410, 167 N.W. 825 (1918) (dictum). *Cf. Thorpe v. Bamberger R.R.*, 107 Utah 265, 153 P.2d 541 (1944) (reduction by appellate court of amount of damages; excess apparently capable of exact computation).

71. See text accompanying nn. 47-51 *supra*.

72. See *Ice-Kist Packing Co. v. J. F. Sloan Co.*, 157 Cal. App. 2d 695, 321 P.2d 840 (1st Dist. 1958); *Amavisca v. City of Merced*, 149 Cal. App. 2d 481, 308 P.2d 380 (3d Dist. 1957); *Peterson v. Rawalt*, 95 Colo. 368, 36 P.2d 465 (1934); *Dunn v. Blue Grass Realty Co.*, 163 Ky. 384, 173 S.W. 1122 (1915); *Bormann v. Beckman*, 73 N.D. 720, 19 N.W.2d 455 (1945); *Walters v. Gilham*, 52 S.D. 82, 216 N.W. 854 (1927).

73. *Cf. Carlin*, *supra* note 58, at 25.

issue by simply refusing to consent to the additur and thereby obtaining a new trial. This is true only, of course, if the new trial is total and not limited to the issue of damages.

2. *Additur as Affecting Verdict on Issue of Liability*

In *Werner v. Bryden*,⁷⁴ the jury returned a verdict in favor of the defendant, and the plaintiff moved for a new trial on the ground of insufficiency of the evidence to justify the verdict. The trial court entered an additur order granting a new trial unless the defendant consented to entry of judgment against him in a specified amount. The defendant consented and the plaintiff appealed. The appellate court stated that the evidence was insufficient to justify the verdict and the order violated the plaintiff's right to have a jury assess the amount of damages.⁷⁵ What the court meant, however, and what the case now stands for, is the proposition that additur can only affect the jury determination of the amount of damages, not its determination on the issue of liability.

It is arguable that the error on the issue of liability was cured by the defendant's consent to judgment against him. However, as noted in the discussion of compromise verdicts, additur can be constitutionally permissible only when the error in the verdict is reflected solely in the amount of damages awarded. Obviously, then, additur cannot be employed as a device to reverse a verdict on the issue of liability. The underlying rationale of *Werner* is that a verdict erroneous on the issue of liability is too erroneous to be corrected by the court; a new trial must be granted.

3. *Defendant Refuses to Consent to Additur*

In *Secreto v. Carlander*,⁷⁶ the plaintiff obtained a verdict in a personal injury action, and the trial court ordered an additur conditioned on the defendant's consent to an increase in the verdict from \$150 to \$1200. The defendant refused to consent and contended on appeal that the trial court was without power to enter a new trial order conditioned on the consent of the defendant to an increase in the verdict. The court sustained in broad language the power of a trial court to enter an additur⁷⁷ without mentioning the fact that

74. 84 Cal. App. 472, 258 Pac. 138 (3d Dist. 1927).

75. A similar holding in another jurisdiction is found in *Raymond L. J. Riling, Inc. v. Schuck*, 346 Pa. 169, 29 A.2d 693 (1943).

76. 35 Cal. App. 2d 361, 95 P.2d 476 (2d Dist. 1939).

77. "The law is established in this state that as a condition for denying a motion for a new trial the trial court has the power to require the opposing party to consent to an increase in the amount of the jury's verdict to bring the amount of the verdict in conformity with the evidence." *Secreto v. Carlander*, 35 Cal. App. 2d 361, 364, 95 P.2d 476, 477 (2d Dist. 1939). Clearly, this dictum was overruled by *Dorsey v. Barba*, 38 Cal. 2d 350, 240 P.2d 604 (1952).

a new trial was in fact granted and that the defendant rather than the plaintiff was appealing.⁷⁸ However, the court's actual holding—that the defendant cannot object to an attempted additur—was sustained in *Dorsey v. Barba*,⁷⁹ and was followed in a subsequent case.⁸⁰

4. *Additur Entered but Defendant Appeals*

One pre-*Dorsey* case squarely involved the validity of an additur entered upon the consent of the defendant, where the amount of damages was contested and not easily ascertainable from the evidence. But the plaintiff was apparently satisfied with the increased verdict, and only the defendant appealed. In *Blackmore v. Brennan*, the court held that "acceptance of the condition constitutes a waiver by the aggrieved party of his constitutional right to resubmit his cause to a jury."⁸¹ The court went on to state in dictum that trial judges have the power in appropriate circumstances "to modify judgments on motions for new trials by either reducing or increasing the judgments to conform to the evidence, conditioned upon the written consent of the parties unfavorably affected thereby."⁸² As applicable to the plaintiff's constitutional rights, this language is modified by the *Dorsey* decision, but the precise holding that failure of the plaintiff to appeal constituted a waiver is preserved by that decision.⁸³

B. *The Case of Dorsey v. Barba*

Prior to 1952, the question of the validity of additur had reached the California Supreme Court on only one occasion. There, the court cited the district court of appeal cases discussed in the prior section, but declined to pass on the issue, holding that the trial court's action was erroneous on another ground.⁸⁴

In *Dorsey v. Barba*,⁸⁵ the validity of additur as applied to the constitutional right of the plaintiff to a jury determination of the

78. A commentator on the *Secreto* case also failed to appreciate the fact that the additur was frustrated by failure of the defendant to consent. See 28 CALIF. L. REV. 533 (1940).

79. See 38 Cal. 2d 350, 356 n.2, 240 P.2d 604, 608 n.2 (1952).

80. See *Patterson v. Rowe*, 113 Cal. App. 2d 119, 124, 247 P.2d 949, 951 (4th Dist. 1952). The *Secreto* case was not cited.

81. *Blackmore v. Brennan*, 43 Cal. App. 2d 280, 289, 110 P.2d 723, 729 (3d Dist. 1941).

82. *Id.* at 289, 110 P.2d at 728.

83. See 38 Cal. 2d 350, 356 n.2, 240 P.2d 604, 608 n.2 (1952).

84. *Taylor v. Pole*, 16 Cal. 2d 668, 107 P.2d 614 (1940). This case was a personal injury action wherein the jury had found for the plaintiffs but assessed the husband's damages at "\$No." The trial court entered an additur to \$117.64, which represented the amount of damage to his car, upon the defendants' consent. Both plaintiffs appealed. The court held that an instruction to the jury was prejudicially erroneous.

85. 38 Cal. 2d 350, 240 P.2d 604 (1952).

amount of damages was squarely presented before the court. The case involved an action to recover damages for personal injuries resulting from an automobile accident. The jury returned verdicts in favor of the plaintiffs and against the defendant-driver,⁸⁶ and the trial court granted the plaintiffs' motion for a new trial on the ground of insufficiency of the evidence to support the verdict,⁸⁷ unless the defendant filed a written consent to a specified increase in the amount of the verdict. The defendant consented and the plaintiffs appealed from the judgment.⁸⁸ On appeal, the additur was held invalid.

In reaching this conclusion, the California Supreme Court relied on the reasoning of the *Dimick* case, despite the severe and almost universal criticism which had been directed toward that decision.⁸⁹ While relying somewhat upon the historical approach used by the majority of the Court in *Dimick*,⁹⁰ the *Dorsey* opinion noted that the California constitutional guarantee of trial by jury "does not require adherence to the letter of common law practice, and new procedures better suited to the efficient administration of justice may be substituted if there is no impairment of the substantial features of a jury trial."⁹¹ But the court hastened to add: "An essential element of such a trial, however, is that issues of fact shall be decided by a jury, and the assessment of damages is ordinarily a question of fact."⁹²

After mentioning decisions from other jurisdictions on the subject, and noting that the defendant's consent was generally deemed necessary in order for a court to increase an inadequate award when damages are contested and unliquidated, the court stated that it should "follow logically" that the plaintiff's consent is also necessary.

Despite the fact that he is apparently benefitted by the increase,

86. Another important aspect of *Dorsey* involved the imputation of liability statute, new CAL. VEHICLE CODE § 17150. The court reversed judgment rendered in favor of the defendant-owner (the driver's wife) holding that the presumption that the automobile was owned as community property was inapplicable because it was registered solely in the wife's name.

87. See 38 Cal. 2d at 365, 240 P.2d at 613 (dissenting opinion).

88. In California, an appeal may not be taken from an order denying a motion for a new trial. *Tyson v. Romey*, 88 Cal. App. 2d 752, 199 P.2d 721 (1st Dist. 1948). Thus, the moving party must appeal from the judgment. See *Wilkinson v. Southern Pacific Co.*, 224 Cal. App. 2d 478, 36 Cal. Rptr. 689 (3d Dist. 1964).

89. See, e.g., 14 So. CAL. L. REV. 490 (1941); 1952 U.C.L.A. INTRA. L. REV. 34; Comment, 10 WASH. & LEE L. REV. 46 (1953); but see Note, 21 VA. L. REV. 666 (1935).

90. Citing *Dimick*, the court noted that as of 1849, when the California constitution was adopted, "there was no recognized common law practice allowing the court to increase a jury's award in a case involving unliquidated damages." 38 Cal. 2d at 356, 240 P.2d at 607.

91. 38 Cal. 2d at 357, 240 P.2d at 607.

92. *Ibid.*

the plaintiff has actually been injured if, under the evidence, he could have obtained a still larger award from a second jury.⁹³

In dealing with remittitur, the court admitted that "there is considerable doubt" as to its historical validity as well. However, the court did not attempt to draw a logical distinction between remittitur and additur as was done in *Dimick*.

There may be no real distinction between the powers to increase and decrease an award of damages, but it does not follow that because the practice of remitting damages over the defendant's objection has been approved through what appears to have been a misconception of common law procedure, we must now allow the court to assess increased damages over the plaintiff's objection, a practice which has even less basis in the common law. Like the United States Supreme Court in the *Dimick* case, we are reluctant to extend the precedent of the remittitur cases, by analogy or otherwise, to the present situation, since it would result in impairment of the right to jury trial.⁹⁴

Justice Traynor, now Chief Justice, concurred in the result but dissented on the issue of additur. He did not reject the historical approach *in toto*, but found that it supported his position as well as that of the majority.

These early English and California cases show clearly that when the constitutional right to jury trial was established it was regarded as a protection to parties relying upon a verdict. Not until today has this court undertaken to extend that protection to parties who attack a verdict.⁹⁵

Traynor also attacked the idea that remittitur and additur could be given different constitutional interpretations. He contended that the decisions approving remittitur are controlling for the purpose of additur. Also, "to hold remittitur constitutional and additur unconstitutional is not only illogical—it is unfair. . . . I doubt whether such a procedure accords a defendant the equal protection of the laws."⁹⁶

C. Additur Cases Decided Subsequently to *Dorsey v. Barba*

1. Consent of Both Parties

If the consent of the plaintiff, as well as that of the defendant, is required by the terms of the order as a condition to the court

93. 38 Cal. 2d at 358, 240 P.2d at 608.

94. *Id.* at 359, 240 P.2d at 609. Subsequent cases continued to recognize the validity of remittitur. See *Northrup v. Baker*, 202 Cal. App. 2d 347, 20 Cal. Rptr. 797 (1st Dist. 1962); *Cotton v. Hallinan*, 201 Cal. App. 2d 415, 20 Cal. Rptr. 40 (1st Dist. 1962) (dictum).

95. 38 Cal. 2d at 363, 240 P.2d at 611-12 (concurring and dissenting opinion).

96. *Id.* at 368, 240 P.2d at 614-15 (concurring and dissenting opinion).

entering judgment in a higher amount than provided by the verdict of the jury, the plaintiff has not been deprived of his right to a jury determination of the amount of damages. If the plaintiff consents, he has waived the right to a jury determination;⁹⁷ if he does not consent, he has preserved that right by obtaining a retrial of his case.⁹⁸ A few California cases have already recognized, either directly or by implication, that neither the holding nor the rationale of *Dorsey* precludes this form of additur.⁹⁹ However, such a requirement would practically preclude the operation of additur as effectively avoiding a new trial, in that it is unrealistic to assume that consent of both parties may be obtained.¹⁰⁰

2. *Additur Upon Defendant's Consent Only*

On only two occasions has an additur entered without the plaintiff's consent been appealed in California since the *Dorsey* decision. In the first, the additur order had been entered by the trial court before *Dorsey* was decided, and the defendant had consented to the increase. The plaintiff appealed and the case was reversed, the appellate court simply stating that the *Dorsey* decision "has laid down the rule that the trial court has no power to make such an order."¹⁰¹

The other case, *Morgan v. Southern Pacific Co.*,¹⁰² sustained the trial court's imposition of additur on procedural grounds. The action was brought under the Federal Employers' Liability Act for personal injuries. The jury returned a verdict for the plaintiff for \$1200, and he moved for a new trial. The trial court denied the motion on the condition that the defendant consent to judgment in the amount of \$2000; the defendant filed its consent and the plaintiff appealed contending that the court's action was unconstitutional under the *Dorsey* decision. In an attempt to reach what it felt was the right result and avoid the necessity of a new trial, the appellate court dis-

97. *Hall v. Murphy*, 187 Cal. App. 2d 296, 9 Cal. Rptr. 547 (1st Dist. 1960) (dictum).

98. *Hall v. Murphy*, 187 Cal. App. 2d 296, 9 Cal. Rptr. 547 (1st Dist. 1960).

99. See *Clifford v. Ruocco*, 39 Cal. 2d 327, 246 P.2d 651 (1952). (In that case, the jury returned a verdict for the plaintiff of \$1500. Plaintiff moved for a new trial on the ground that the damages were inadequate. An additur order increasing the verdict to \$2000 was entered. Defendant consented; trial court permitted plaintiff to refuse the increase and entered judgment on the verdict in the amount of \$1500. Plaintiff appealed. The Supreme Court reversed and new trial was granted); *Mullin v. Kaiser Foundation Hospitals*, 206 Cal. App. 2d 23, 23 Cal. Rptr. 410 (2d Dist. 1962); *Hall v. Murphy*, 187 Cal. App. 2d 296, 9 Cal. Rptr. 547 (1st Dist. 1960).

100. In all of the cases cited in note 99, consent of both parties was required by the additur order. In none of them was it actually obtained. In *Cotton v. Hallinan*, 201 Cal. App. 2d 415, 20 Cal. Rptr. 40 (1st Dist. 1962), the trial court applied this practice to a remittitur order, but was unable to obtain the consent of both parties.

101. *Gearhart v. Sacramento City Lines*, 115 Cal. App. 2d 375, 377, 252 P.2d 44, 45 (3d Dist. 1953).

102. 173 Cal. App. 2d 282, 343 P.2d 330 (1st Dist. 1959).

tinguished the *Dorsey* case. In discussing the facts of *Dorsey*, the court stated:

The record showed that the jury awards barely covered the amount of the plaintiffs' special damages, leaving nothing for general damages. The finding that the jury award lacked support in the evidence was, therefore, correct and a new trial should have been granted.¹⁰³

In applying this interpretation of *Dorsey* to the facts of the *Morgan* case, the court held that because the plaintiff-appellant had furnished only a clerk's transcript, there was no means by which the court could test the accuracy of the plaintiff's contention and determine whether he was "injured or aggrieved" by the increase in the verdict.¹⁰⁴ Thus, there being no finding that the verdict was inadequate and lacked support in the evidence, the judgment affirmed.

VI. THE STATUS OF ADDITUR IN OTHER JURISDICTIONS

California is far from being alone in treating remittitur as valid but additur as invalid. On the other hand, a substantial number of states have sustained the validity of both practices. This portion of the article will categorize the law on additur of each jurisdiction in the United States which has considered the matter, by classifying the various positions a state could take on the validity of additur *vis-à-vis* the validity of remittitur.¹⁰⁵ It should be noted, however, that the status of additur is by no means settled, especially in the jurisdictions disapproving of it; the decisions in general are far from satisfactory and could easily be distinguished upon factual situations presenting a stronger case for additur.

A. Remittitur and Additur Both Prohibited

Only one state, Kentucky, forbids the use of remittitur almost entirely.¹⁰⁶ Understandably, the Court of Appeals of Kentucky has refused to allow additur to be used, even in cases involving liquidated or uncontested damages.¹⁰⁷

103. *Id.* at 284, 343 P.2d at 332. A separate aspect of this holding is considered in the concluding section of this article.

104. *Id.* at 285, 343 P.2d at 333.

105. The reader may notice that several states are listed in more than one category. This is not an oversight; my intention is to set forth the decisions apparently reaching a certain position rather than attempting to reconcile decisions within any given jurisdiction. Only where the older decisions are clearly superseded have they been excluded.

106. See note 28 *supra*.

107. See *Dunn v. Blue Grass Realty Co.*, 163 Ky. 384, 173 S.W. 1122 (1915) (dictum).

B. *Remittitur and Additur Valid Only When Damages Are Liquidated*

Georgia and West Virginia permit the practice of remittitur only when the amount by which the verdict is excessive is liquidated or capable of accurate computation.¹⁰⁸ It has also been held in Georgia that additur may be used under similar circumstances.¹⁰⁹ Although additur has not yet been passed upon in West Virginia, it is probable that it would be accorded the same treatment.¹¹⁰

C. *Remittitur Unlimited but Additur Valid Only When Damages Are Liquidated*

The states of Alabama,¹¹¹ Delaware,¹¹² Illinois,¹¹³ Kansas,¹¹⁴ and Missouri¹¹⁵ have allowed the device of additur to be employed only when the amount of damages is liquidated or ascertainable from the evidence. A decision of the Iowa Supreme Court contains language supporting the same conclusion.¹¹⁶

Decisions from the states of Arizona,¹¹⁷ Colorado,¹¹⁸ Florida,¹¹⁹ Kansas,¹²⁰ Mississippi,¹²¹ Missouri,¹²² North Dakota,¹²³ Pennsyl-

108. See note 28 *supra*.

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

110. For a comprehensive treatment of the law of West Virginia, see Carlin, *Remittitur and Additur*, 49 W. VA. L. REV. 1, 29 (1942).

111. *Kraas v. American Bakeries Co.*, 231 Ala. 278, 164 So. 565 (1935) (additur valid where amount by which verdict is inadequate is clearly and definitely established by the evidence).

112. *Rudnick v. Jacobs*, 39 Del. 169, 197 Atl. 381 (1938) (personal injury action treated as one to recover amount of proven special damages, where jury verdict impliedly rejected claim for general damages and inadequacy of verdict explainable by fact one item of special damage was omitted).

113. *James v. Morey*, 44 Ill. 352 (1867); *Carr v. Miner*, 42 Ill. 179 (1866).

114. *Marsh v. Kendall*, 65 Kan. 48, 68 Pac. 1070 (1902).

115. *Caen v. Feld*, 371 S.W.2d 209 (Mo. Sup. Ct. 1963) (on motion by defendant, appellate court increased verdict by liquidated amount).

116. *Reuber v. Negles*, 147 Iowa 734, 126 N.W. 966 (1910) (dictum). This decision is mentioned here because the 1908 Iowa decision upholding additur, note 155 *infra*, is not a clear holding on the subject.

117. *Fornara v. Wolpe*, 26 Ariz. 383, 226 Pac. 203 (1924) (brokerage commission; if defendant liable, only one amount of damages supported by the evidence).

118. *Peterson v. Rawalt*, 95 Colo. 368, 36 P.2d 465 (1934) (dictum; verdict was a compromise on issue of liability).

119. *Crown Life Ins. Co. v. Feagin*, 139 So. 2d 461 (Fla. App. 1962) (by implication).

120. *Fall v. Tucker*, 113 Kan. 713, 216 Pac. 283 (1923) (interest accruing from time cause of action arose added to amount of verdict).

121. *City of Indianola v. Love*, 227 Miss. 156, 85 So. 2d 812 (1956) (appellate court increased verdict to undisputed amount of damage to plaintiff's truck); *Woodmansee v. Garrett*, 247 Miss. 148, 153 So. 2d 812 (1963) (dictum; verdict can be increased by trial or appellate court where the amount in question is undisputed, liquidated, fixed by law, or determinable by mathematical calculation).

122. *Allison v. Mountjoy*, 383 S.W.2d 314 (Mo. App. 1964).

123. *Bormann v. Beckman*, 73 N.D. 720, 19 N.W.2d 455 (1945) (dictum; verdict was compromise on issue of liability).

vania,¹²⁴ Virginia,¹²⁵ and Wisconsin¹²⁶ have apparently reached the same result without finding it relevant whether the consent of either party was obtained before the trial court increased the verdict of the jury. This is consistent with the writer's conclusion discussed earlier in this article that additur as such should not be necessary to correct a verdict when the damages are liquidated, uncontested, or easily calculable, because only a verdict in the specified amount would be supported by substantial evidence and not subject to reversal on appeal.¹²⁷

D. *Remittitur Valid but Additur Invalid*

1. *Statutes Disallowing New Trials Due to Inadequacy*

Because of the historical hangover discussed earlier, at one time statutes in many states prohibited the granting of a new trial on the ground of inadequacy of the verdict.¹²⁸ For the most part these statutes have been repealed. However, new trials on the ground of inadequacy are still limited by statute in at least two jurisdictions. In Nebraska, one of the statutory grounds for granting a new trial is "error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." A separate statutory ground exists for "excessive damages appearing to have been given under the influence of passion or prejudice."¹²⁹ In Arkansas, a new trial may not be granted "on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the pecuniary injury sustained."¹³⁰ Thus, in these two states, a statutory basis exists for a more restricted treatment of additur than of remittitur.¹³¹

2. *Decisions Squarely Prohibiting Additur*

Authoritative decisions by the highest courts of Michigan,¹³²

124. *Schwarz v. Bank of Pittsburgh Nat'l Ass'n*, 283 Pa. 200, 129 Atl. 52 (1925).
125. *Apperson-Lee Motor Co. v. Ring*, 150 Va. 283, 143 S.E. 694 (1928) (action for damage to automobile; amount not contested).

126. *W. H. Shenners Co. v. Delzer*, 169 Wis. 507, 173 N.W. 209 (1919); *Williams v. Thrall*, 167 Wis. 410, 167 N.W. 825 (1918) (dictum).

127. See text accompanying notes 68-70 *supra*.

128. See text accompanying note 21 *supra*.

129. NEB. REV. STAT. § 25-1142 (1964).

130. ARK. STAT. ANN. § 27-1902 (1947). Also, § 27-1903 expressly authorizes the practice of remittitur.

131. Apparently, however, additur has been upheld in Nebraska. See note 157 *infra*. In Indiana, a new trial on the grounds of inadequacy of damages is authorized where the party is entitled to recover and was awarded "substantially less" than the facts in evidence show his actual pecuniary loss to be. IND. ANN. STAT. § 2-2406 (1946). This provision appears to supersede a provision in § 2-2401 similar to the Nebraska statutory provision.

132. *Lorf v. City of Detroit*, 145 Mich. 265, 108 N.W. 661 (1906).

Mississippi,¹³³ and South Dakota,¹³⁴ and by an intermediate appellate court in Florida¹³⁵ have held that additur deprives the plaintiff of his constitutional right to a jury determination of the amount of damages. In *Lorf v. City of Detroit*,¹³⁶ an action for personal injuries caused by a fall on a sidewalk, the jury returned a verdict for the plaintiff in the amount of six cents. An additur to the amount of \$100 was entered and the plaintiff appealed. The Supreme Court of Michigan held the order invalid, but used language strongly suggesting that the paucity of damages awarded was equivalent to no determination whatsoever on the issue of damages: "the jury has not awarded any damages and the court itself must fix the damages upon conflicting testimony without any option on the part of the plaintiff to refuse the court's award."¹³⁷

The South Dakota decision was rendered in a condemnation action, and the court gave the additur problem a very cursory treatment. Also, the additur holding was only an alternative holding, the court also basing its decision on a constitutional provision that private property cannot be taken without just compensation as determined by a jury. The Florida and Mississippi cases would have been more accurately decided on the basis that additur was improper because the verdict was a compromise by the jury on the issue of liability.¹³⁸

3. Decisions Disapproving of Additur

Decisions rendered by the highest courts of Missouri,¹³⁹ Montana,¹⁴⁰ and Pennsylvania,¹⁴¹ and by intermediate appellate courts in Illinois¹⁴² and Ohio,¹⁴³ have clearly disapproved of additur, but for various reasons the decisions cannot be regarded as direct holdings against the validity of the practice. For one thing, several of these decisions are merely dicta on the subject of additur. Either no additur was involved in the case at all,¹⁴⁴ or the lower court en-

133. *Woodmansee v. Garrett*, 247 Miss. 148, 153 So. 2d 812 (1963).

134. *State v. Hammerquist*, 67 S.D. 417, 293 N.W. 539 (1940) (alternative holding).

135. *Sarvis v. Folsom*, 114 So. 2d 490 (Fla. Dist. Ct. App. 1959).

136. 145 Mich. 265, 108 N.W. 661 (1906).

137. *Id.* at 267, 108 N.W. at 662.

138. See note 51 *supra*.

139. *King v. Kansas City Life Ins. Co.*, 350 Mo. 75, 164 S.W.2d 458 (1942) (dictum; unconditional new trial on grounds of inadequacy granted by lower court); *Burdick v. Missouri Pacific Ry.*, 123 Mo. 221, 27 S.W. 453 (1894) (dictum; remittitur case).

140. *State Highway Comm'n v. Schmidt*, 143 Mont. 505, 391 P.2d 692 (1964) (dictum); *Seibel v. Byers*, 136 Mont. 39, 344 P.2d 129 (1959) (dictum).

141. *Raymond L. J. Riling, Inc. v. Schuck*, 346 Pa. 169, 29 A.2d 693 (1943) (dictum), citing *Lemon v. Campbell*, 136 Pa. Super. 370, 7 A.2d 643 (1939).

142. *Yep Hong v. Williams*, 6 Ill. App. 2d 456, 238 N.E.2d 655 (1955) (dictum).

143. *In re Ohio Turnpike Comm'n*, 101 Ohio App. 474, 140 N.E.2d 328 (1955).

144. See the Missouri cases cited in note 139 *supra*, and *Seibel v. Byers*, 136 Mont. 39, 344 P.2d 129 (1959).

tered an additur order but the defendant did not consent to the increase and he appealed.¹⁴⁵

Furthermore, the Pennsylvania case was similar to the *Werner* case discussed earlier,¹⁴⁶ in that the jury's verdict was in favor of the defendant rather than the plaintiff. However, the Pennsylvania Supreme Court cited and relied upon an earlier lower court decision in which additur was squarely presented and held invalid. In that case the court had distinguished additur and remittitur on the ground that in remittitur the successful plaintiff is given the option to avoid a new trial whereas in additur "it is the *losing, negligent defendant* who has the option of deciding whether a new trial shall be granted or an increased amount be *substituted for the verdict of the jury.*"¹⁴⁷ Although this astonishing moralistic "distinction" was not relied on by the Pennsylvania Supreme Court, the lower court's holding was approved.

The lower Ohio court decision against additur is placed in this classification even though it is a square holding, because one member of the Ohio Supreme Court had indicated in dictum only four years before that additur as well as remittitur is constitutional.¹⁴⁸ Also, an earlier Ohio decision invalidating an increase in the jury verdict accomplished without the consent of either party strongly implied that an increase in the verdict with the consent of the party prejudiced thereby would be appropriate where the verdict was inadequate, just as a remittitur would be appropriate where the verdict was excessive.¹⁴⁹

E. Remittitur and Additur Both Valid

1. Statutory Authorization for Additur

The states of Massachusetts, Rhode Island, and Washington have statutes directly bearing on the practice of additur. A statute in Rhode Island has been interpreted as providing that a verdict shall not be set aside by a trial of appellate court as excessive or inade-

145. See the Illinois case cited note 142 *supra*, and *State Highway Comm'n v. Schmidt*, 143 Mont. 505, 391 P.2d 692 (1964) (condemnation case so additur was conditional on plaintiff's consent; it refused and appealed). The Illinois case also contains the aspect of a compromise verdict. See note 51 *supra*.

146. *Werner v. Bryden*, 84 Cal. App. 472, 258 Pac. 138 (3d Dist. 1927), discussed at text accompanying note 74 *supra*.

147. *Lemon v. Campbell*, 136 Pa. Super. 370, 377, 7 A.2d 643, 646 (1939) (italics in original).

148. See *Markota v. East Ohio Gas Co.*, 154 Ohio St. 546, 97 N.E.2d 13 (1951), in which Justice Taft, writing the majority opinion, stated his personal views on additur, the rest of the court being of the opinion that the question was not properly raised by the case at bar.

149. See *American Ry. Express Co. v. Bender*, 20 Ohio App. 436, 152 N.E. 197 (1926); Comment, 44 YALE L.J. 318, 325 n.49 (1934).

quate until the prevailing party has had the opportunity to consent to a remission or an additur.¹⁵⁰ Thus, a Rhode Island court *must* utilize the device of additur before a new trial on the ground of inadequacy of damages may be granted.

In Washington, a trial court is expressly authorized to enter an additur or remittitur order, but if the party whose consent was not required appeals from the order, the action of the trial court is reviewed de novo and there is a presumption that the jury's verdict on the issue of damages was correct.¹⁵¹ Additur was judicially upheld in Washington, however, even before the statute was enacted.¹⁵²

Massachusetts has a statute providing that "a verdict shall not be set aside solely on the ground that the damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable."¹⁵³ This provision does not authorize additur because the consent of both parties is required, but an early Massachusetts case upheld an order resembling additur increasing the verdict without the consent of the plaintiff.¹⁵⁴

2. Decisions Squarely Upholding Additur

Authoritative decisions from the highest courts of Iowa,¹⁵⁵ Minnesota,¹⁵⁶ Nebraska,¹⁵⁷ New Jersey,¹⁵⁸ New York,¹⁵⁹ North Carolina,¹⁶⁰ Utah,¹⁶¹ and Wisconsin,¹⁶² in addition to those of Rhode Island,

150. See R.I. GEN. LAWS ANN. § 9-23-1 (1956); *O'Brien v. Waterman*, 91 R.I. 374, 163 A.2d 31 (1960). The Rhode Island statute, however, has not yet been upheld against the attack of the plaintiff in additur. In *O'Brien* and other cases, the defendant appealed from the additur order. See also *Reuter v. Yellow Cab Co.*, 93 R.I. 57, 170 A.2d 906 (1961); *Albro v. Vallone*, 90 R.I. 392, 158 A.2d 571 (1960).

151. WASH. REV. CODE ANN. § 4.76.030 (1962).

152. See *Clousing v. Kershaw*, 129 Wash. 67, 224 Pac. 573 (1924) (dictum; defendant did not consent and appealed).

153. MASS. GEN. LAWS ANN. ch. 231, § 127 (1956). This sentence was added to the statute in 1945.

154. *Clark v. Henshaw Motor Co.*, 246 Mass. 386, 140 N.E. 593 (1923) (action for breach of contract, verdict for plaintiff for \$1 increased to \$51 upon stipulation by defendant; denial of plaintiff's motion for new trial affirmed).

155. *Smith v. Ellyson*, 137 Iowa 391, 115 N.W. 40 (1908) ("semble").

156. *Genzel v. Halvorson*, 248 Minn. 527, 80 N.W.2d 854 (1957); see 56 MICH. L. REV. 124 (1957).

157. *Volker v. First Nat'l Bank*, 26 Neb. 602, 42 N.W. 732 (1889). This case is generally cited for allowing additur only when the damages are liquidated. But the facts of the case demonstrate that the damages were neither liquidated, uncontested, nor clearly ascertainable from the evidence.

158. *Fisch v. Manger*, 24 N.J. 66, 130 A.2d 815 (1957); *Gaffney v. Illingsworth*, 90 N.J.L. 490, 101 Atl. 243 (1917) (dictum; new trial granted because defendant did not consent, he appealed). See *Moran v. Feitis*, 69 N.J. Super. 531, 174 A.2d 618 (1961).

159. *O'Connor v. Papertian*, 309 N.Y. 465, 131 N.E.2d 883 (1956).

160. *Caudle v. Swanson*, 248 N.C. 249, 103 S.E.2d 357 (1958).

161. *Bodon v. Suhrmann*, 8 Utah 2d 42, 327 P.2d 826 (1958) (additur order entered by Supreme Court of Utah.).

162. *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927); see *Risch v.*

Washington and Massachusetts, have held that additur does not deprive the plaintiff of his constitutional right to a jury determination of the amount of damages. This group of decisions includes in general not only the more recent but the better reasoned opinions on the question of additur.

In each case, except the Utah one in which the appellate court exercised the power of additur, the trial court entered an additur order the effect of which was to increase the verdict and deny the plaintiff's motion for a new trial, because the defendant consented. The plaintiff's contention on appeal of deprivation of the right to a jury trial was rejected. In general, the opinions stressed the fact that it was in the interest of sound administration of justice to determine the rights of litigants in one trial and avoid new trials,¹⁶³ and that additur does not prejudice the rights of a plaintiff any more than remittitur prejudices the rights of a defendant.¹⁶⁴

Probably the most adequate judicial treatment of additur to date is found in the North Carolina opinion sustaining the validity of the practice.¹⁶⁵ An action was brought by a builder to recover under an oral contract or to recover the reasonable value of his services in constructing a residence for the defendants. It was clear that the defendants owed the plaintiff something, but evidence as to the amount was in sharp conflict. The plaintiff appealed from an additur in the amount of \$500 entered by the trial court upon the consent of the defendants. In affirming the action of the trial judge, the court's basic rationale was that both the verdict of the jury and the verdict as increased by the trial court were supported by substantial evidence; thus, neither could be reversed on appeal as being either inadequate or excessive, because no abuse of discretion was evident. Thus, the court was careful to differentiate between the power of a trial judge to modify a verdict and the power of an appellate court to reverse for refusal to grant a new trial. In the court's own words:

There is sufficient competent evidence to support the verdict. Plaintiff's motions to set aside the verdict for the reasons assigned were

Lawhead, 211 Wis. 270, 248 N.W. 127 (1933); *but see* Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N.W.2d 393 (1960). The complexities and vicissitudes of the Wisconsin rule will be discussed in text accompanying notes 201-12 *infra*.

163. See, e.g., Genzel v. Halvorson, 248 Minn. 527, 534, 80 N.W.2d 854, 859 (1957); Volker v. First Nat'l Bank, 26 Neb. 602, 606, 42 N.W. 732, 733 (1889); Fisch v. Manger, 24 N.J. 66, 80, 130 A.2d 815, 823 (1957); Caudle v. Swanson, 248 N.C. 249, 259, 103 S.E.2d 357, 364 (1958).

164. See, e.g., Genzel v. Halvorson, 248 Minn. 527, 534, 80 N.W.2d 854, 859 (1957); Fisch v. Manger, 24 N.J. 66, 80, 130 A.2d 815, 823 (1957); Gaffney v. Illingsworth, 90 N.J.L. 490, 492, 101 Atl. 243 (1917); O'Connor v. Papertian, 309 N.Y. 465, 472, 131 N.E.2d 883, 887 (1956); Caudle v. Swanson, 248 N.C. 249, 257, 103 S.E.2d 357, 363 (1958); Bodon v. Suhrmann, 8 Utah 2d 42, 45, 327 P.2d 826, 828 (1958).

165. See case cited in note 160 *supra*.

addressed to the sound discretion of the trial judge, and in the absence of a showing of abuse of discretion by the trial judge his refusal of such motions will not be disturbed on appeal. There is a vital distinction between mere inadequacy in a verdict, and such inadequacy as would indicate a verdict was the result of bias and prejudice. . . .

In the instant case the trial judge in his discretion refused to set the verdict aside. By the additur procedure adopted, the plaintiff, by consent of the defendants, receives no less, but in fact more, than the jury awarded him by its verdict, and he receives no less than a reasonable jury might award him on the sharply conflicting evidence in the case. . . .

Plaintiff has had one jury trial free from error. He has no right to two jury trials.¹⁶⁶

3. *Decision Tacitly Approving of Additur*

In a New Hampshire case,¹⁶⁷ the trial court entered an additur order increasing the verdict in a wrongful death action if the defendant consented. The defendant did not consent and appealed. The court held that the damages awarded by the jury were not inadequate but did not discuss the propriety of the attempted additur. Thus, it is not inconceivable that this decision, while not passing on additur even by way of dictum, could subsequently be considered to constitute tacit approval of the practice.

VII. JUDICIAL DISCRETION AND APPELLATE REVIEW IN REGARD TO NEW TRIAL ORDERS

In order to establish a proper framework in which to evaluate additur, it is necessary to briefly consider the trial court's authority to rule on motions for a new trial and the appellate court's power to review such determination. The rules of other jurisdictions vary widely here, so my analysis on this point will be limited to the law of California.

In California, the grounds for granting a new trial are set forth in section 657 of the Code of Civil Procedure. The fifth ground is "excessive damages, appearing to have been give under the influence of passion or prejudice." The sixth ground lists "insufficiency of the evidence to justify the verdict." An inadequate award of damages is not explicitly recognized as an independent ground for granting a new trial.¹⁶⁸ However, the courts have held that "insufficiency of the evidence to justify the verdict" is an adequate basis for granting a

166. *Caudle v. Swanson*, 248 N.C. 249, 255-56, 261, 103 S.E.2d 357, 362, 363, 366 (1958).

167. *Morrell v. Gobeil*, 84 N.H. 150, 147 Atl. 413 (1929).

168. See CAL. CODE CIV. PROC. § 657.

new trial on account of inadequacy of damages.¹⁶⁹ Similarly, the "appearing to have been given under the influence of passion or prejudice" limitation for granting a new trial on account of excessive damages has in effect been judicially deleted from the statute, because excessive damages is also a basis for a new trial on the ground of insufficiency of the evidence to justify the verdict.¹⁷⁰ Thus, a new trial may be granted in California on the basis that the damages are either excessive or inadequate and no passion or prejudice need be shown.¹⁷¹

The common law rule that a trial judge could not grant a new trial if a reasonable man could upon the evidence reach the same verdict that the jury returned, has long since been abrogated in California.¹⁷² Indeed, a trial judge now has very broad discretion in deciding whether or not to grant a litigant a new trial. It has been variously stated that the trial judge has not only the power but the duty to grant a new trial whenever in his considered opinion and independent judgment the jury has reached the wrong result.¹⁷³ In effect, the judge sits as a "thirteenth juror" and has the exclusive province to weigh the evidence, judge the credibility of witnesses, determine the proba-

169. See *McFarland v. Kelly*, 220 Cal. App. 2d 585, 33 Cal. Rptr. 754 (4th Dist. 1963); *Ice-Kist Packing Co. v. J. F. Sloan Co.*, 157 Cal. App. 2d 695, 321 P.2d 840 (1st Dist. 1958); *Harper v. Superior Air Parts, Inc.*, 124 Cal. App. 2d 91, 268 P.2d 115 (2d Dist. 1954); *Belyew v. United Parcel Service*, 49 Cal. App. 2d 516, 122 P.2d 73 (1st Dist. 1942); *Reilley v. McIntire*, 29 Cal. App. 2d 559, 85 P.2d 169 (3d Dist. 1938); *Crowe v. Sacks*, 44 Cal. 2d 590, 283 P.2d 689 (1955) (dictum); *Benjamin v. Stewart*, 61 Cal. 605 (1882) (dictum); *Bray v. Rosen*, 167 Cal. App. 2d 680, 335 P.2d 137 (4th Dist. 1959) (dictum).

Early cases refused to allow a new trial on account of inadequacy to be based on the ground of "excessive damages appearing to have been given under the influence of passion or prejudice." See *Benjamin v. Stewart*, 61 Cal. 605 (1882); *Bakurjian v. Pugh*, 4 Cal. App. 2d 450, 41 P.2d 175 (2d Dist. 1935).

170. See *Sinz v. Owens*, 33 Cal. 2d 749, 205 P.2d 3 (1949) (by implication); *Ballard v. Pacific Greyhound Lines*, 28 Cal. 2d 357, 170 P.2d 465 (1946); *Koyer v. McComber*, 12 Cal. 175, 82 P.2d 941 (1938); *Garcia v. San Gabriel Ready Mix*, 173 Cal. App. 2d 355, 343 P.2d 327 (2d Dist. 1959); *Van Ostrum v. State of California*, 148 Cal. App. 2d 1, 306 P.2d 44 (2d Dist. 1957); *Dreyer v. Cyriacks*, 112 Cal. App. 279, 297 Pac. 35 (1st Dist. 1931). *But see* *Eagans v. Key System Transit Lines*, 158 Cal. App. 2d 13, 321 P.2d 891 (1st Dist. 1958) ("*semble*"), in which the court stated: "Relief from allegedly excessive damages is available only when it appears that the damages awarded have been given under the influence of passion or prejudice." *Id.* at 13, 321 P.2d at 894. If the court is referring to relief at the trial level, as the context would indicate, the statement is clearly erroneous in view of the many decisions to the contrary.

171. Logically, the courts have held that passion or prejudice need not be shown in order to obtain a new trial on account of inadequacy of damages. See *Reilley v. McIntire*, 29 Cal. App. 2d 559, 85 P.2d 169 (3d Dist. 1938); *Hoffman v. Lane*, 11 Cal. App. 2d 655, 54 P.2d 477 (1st Dist. 1936).

172. See *Perry v. Fowler*, 102 Cal. App. 2d 808, 229 P.2d 46 (2d Dist. 1951).

173. See *Mullin v. Kaiser Foundation Hospitals*, 206 Cal. App. 2d 23, 23 Cal. Rptr. 410 (2d Dist. 1962); *Patterson v. Rowe*, 113 Cal. App. 2d 119, 247 P.2d 949 (4th Dist. 1952); *Norden v. Hartman*, 111 Cal. App. 2d 751, 245 P.2d 3 (4th Dist. 1952); *Perry v. Fowler*, 102 Cal. App. 2d 808, 229 P.2d 46 (2d Dist. 1951); *McNear v. Pacific Greyhound Lines*, 63 Cal. App. 2d 11, 146 P.2d 34 (1st Dist. 1944); *Belyew v. United Parcel Service*, 49 Cal. App. 2d 516, 122 P.2d 73 (1st Dist. 1942); *Dreyer v. Cyriacks*, 112 Cal. App. 279, 297 Pac. 35 (1st Dist. 1931).

tive force of testimony, and to resolve conflicts in favor of the party moving for a new trial.¹⁷⁴ Also, the judge is not bound by the substantial evidence rule,¹⁷⁵ but may grant a new trial if there is *any* evidence which would support a judgment in favor of the moving party.¹⁷⁶ Thus, as applied to a motion for a new trial based on inadequacy of damages, the trial judge should grant the plaintiff a new trial if he concludes, based on his independent evaluation of the evidence, that the damages awarded by the jury are inadequate.¹⁷⁷

Some limitation may have been imposed on the application of these principles by the 1965 legislative change in section 657 of the Code of Civil Procedure. The amendment to section 657 provides, in part:

A new trial shall not be granted upon 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.

As applied to granting new trials on account of inadequate or excessive damages, however, it is clear that a "contrary verdict" really means a "different verdict," so that judicial discretion is retained even though the error does not affect the issue of liability. Thus, the statutory revision will not have any appreciable effect on the discretion of a trial judge to grant a new trial because of inadequacy or excessiveness of the verdict, in that under present practice a judge probably considers himself "convinced" that the verdict was wrong before he grants a new trial.

174. See *Slawinski v. Mocettini*, 217 Cal. App. 2d 192, 31 Cal. Rptr. 613 (1st Dist. 1963); *Yarrow v. State of California*, 53 Cal. 2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960); *Ballard v. Pacific Greyhound Lines*, 28 Cal. 2d 357, 170 P.2d 465 (1946); *Weinman v. Gray*, 206 Cal. App. 2d 817, 24 Cal. Rptr. 189 (4th Dist. 1962); *Estate of Elliot*, 114 Cal. App. 2d 747, 250 P.2d 684 (2d Dist. 1952); *Norden v. Hartman*, 111 Cal. App. 2d 751, 245 P.2d 3 (4th Dist. 1952); *Brown v. Boehm*, 78 Cal. App. 2d 595, 178 P.2d 49 (3d Dist. 1947); *Estate of Phillipi*, 76 Cal. App. 2d 100, 172 P.2d 377 (4th Dist. 1946); *Sassano v. Roullard*, 27 Cal. App. 2d 372, 81 P.2d 213 (4th Dist. 1938).

175. Thus, a trial court may grant a new trial even though the jury verdict is supported by substantial evidence. *Post v. Camino Del Properties, Inc.*, 173 Cal. App. 2d 446, 343 P.2d 294 (4th Dist. 1959); *Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 291 Pac. 184 (1930). Unfortunately, some appellate opinions confuse the issue with comments to the effect that the trial court may grant a new trial whenever the verdict was "not supported by sufficient evidence." See *State Industries, Inc. v. Capitol Metals Co.*, 227 Cal. App. 2d 650, 38 Cal. Rptr. 870 (2d Dist. 1964); *Traub Co. v. Coffee Break Service, Inc.*, 210 Cal. App. 2d 711, 27 Cal. Rptr. 79 (2d Dist. 1962).

176. *Hawk v. City of Newport Beach*, 46 Cal. 2d 213, 293 P.2d 48 (1956); *Ballard v. Pacific Greyhound Lines*, 28 Cal. 2d 357, 170 P.2d 465 (1946); *Weinman v. Gray*, 206 Cal. App. 2d 817, 24 Cal. Rptr. 189 (4th Dist. 1962). However, some opinions still mention the power of a trial judge to grant a new trial in terms of his belief that the "weight" of the evidence is contrary to the finding of the jury. See *Hutchison v. Elliott*, 183 Cal. App. 2d 263, 7 Cal. Rptr. 77 (2d Dist. 1960); *Tice v. Kaiser Co.*, 102 Cal. App. 2d 44, 226 P.2d 624 (4th Dist. 1951).

177. *Mullin v. Kaiser Foundation Hospitals*, 206 Cal. App. 2d 23, 23 Cal. Rptr. 410 (2d Dist. 1962); *Patterson v. Rowe*, 113 Cal. App. 2d 119, 247 P.2d 949 (4th Dist. 1952); *McNear v. Pacific Greyhound Lines*, 63 Cal. App. 2d 11, 146 P.2d 34 (1st Dist. 1944).

Correspondingly, the power of an appellate court to review the trial court's determination on a motion for a new trial is very limited. It is often stated that the action of a trial judge in granting a new trial will not be disturbed on appeal unless there is a clear showing of a "manifest and unmistakable abuse of discretion."¹⁷⁸ Also, "it cannot be held that a trial court has abused its discretion where there is any evidence which would support a judgment in favor of the moving party."¹⁷⁹ Thus, it is only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment, a judgment more favorable to the moving party, that an appellate court will reverse an order granting a new trial on the ground of insufficiency of the evidence to justify the verdict.¹⁸⁰ Similarly, the substantial evidence rule operates to effectively prohibit an appellate court in California, contrary to the practice in many jurisdictions, from entering an additur or remittitur order when the trial judge has refused to conditionally grant a new trial.¹⁸¹

VIII. POLICY CONSIDERATIONS

A. *New Trials and the Effective Administration of Justice*

As developed earlier in this article the practice of granting a litigant a new trial was historically a very important remedy, once the power became recognized in the common law. In modern times, however, it is likely that a litigant will obtain a fair trial the first time around. Crowded court calendars as well as the implementation of devices more consistent with the sound administration of justice have necessitated the limitation of the remedy of a new trial. As one com-

178. *E.g.*, *Malkasian v. Irwin*, 61 Cal. 2d 738, 747, 40 Cal. Rptr. 78, 84, 394 P.2d 822, 828 (1964); *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal. 2d 165, 169, 153 P.2d 338, 340 (1944); *Tice v. Kaiser Co.*, 102 Cal. App. 2d 44, 46, 226 P.2d 624, 625 (4th Dist. 1951); *MacKenzie v. Angle*, 82 Cal. App. 2d 254, 258, 186 P.2d 30, 32 (3d Dist. 1947).

179. *Hawk v. City of Newport Beach*, 46 Cal. 2d 213, 219, 293 P.2d 48, 51 (1956).

180. *Yarrow v. State of California*, 53 Cal. 2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960); *Ballard v. Pacific Greyhound Lines*, 28 Cal. 2d 357, 170 P.2d 465 (1946); *Armstrong v. Svoboda*, 240 Adv. Cal. App. 489, 49 Cal. Rptr. 701 (4th Dist. 1966); *Slawinski v. Mocettini*, 217 Cal. App. 2d 192, 31 Cal. Rptr. 613 (1st Dist. 1963); *Weinman v. Gray*, 206 Cal. App. 2d 817, 24 Cal. Rptr. 189 (4th Dist. 1962); *Pember-ton v. Barber*, 199 Cal. App. 2d 534, 18 Cal. Rptr. 784 (5th Dist. 1962); *Spencer v. Young*, 194 Cal. App. 2d 252, 14 Cal. Rptr. 742 (4th Dist. 1961); *Estate of Phillipi*, 76 Cal. App. 2d 100, 172 P.2d 377 (4th Dist. 1946).

181. See *Bazzoli v. Nance's Sanitarium, Inc.*, 109 Cal. App. 2d 232, 240 P.2d 672 (3d Dist. 1952). A remittitur order was entered in an early appellate decision in California, in *Kinsey v. Wallace*, 36 Cal. 462 (1868), and later in *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 Pac. 771 (1911), but the practice apparently died out completely with the advent of modern rules on the scope of appellate review. However, most decisions in other jurisdictions imply that the appellate courts have power equivalent to the trial courts to enter additur or remittitur orders. See, *e.g.*, *Caen v. Feld*, 371 S.W.2d 209 (Mo. Sup. Ct. 1963); *Bachmann v. Passalacqua*, 46 N.J. Super. 471, 135 A.2d 18 (1957); *Chester Park Co. v. Schulte*, 120 Ohio St. 273, 166 N.E. 186 (1929); *Baxter v. Greyhound Corp.*, 65 Wash. 2d 421, 397 P.2d 857 (1964); *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 102 N.W.2d 393 (1960).

mentator has stated, "the efficiency of judicial administration is hampered by the granting of new trials, with their concomitant delays in final adjudication and increased costs to litigants. Courts and legislatures have sought to avoid these evils by eliminating retrials for both excessive and inadequate verdicts."¹⁸²

B. Treatment of Remittitur and Additur

The almost universal practice of requiring the plaintiff to remit a portion of his damages as a condition to avoiding a new trial is the most effective device known for remedying an excessive jury verdict. Its propriety in appropriate situations is virtually uncontested,¹⁸³ and as a practical matter remittitur has become a fixture of the common law.¹⁸⁴ Thus, the policy question to which this article is directed is whether similar efficacy should be accorded to the closely analogous practice of additur.

The logical distinction between additur and remittitur which the *Dimick* case attempted to draw, in essence, was that in remittitur the entire amount awarded the plaintiff by the court was also awarded by the jury, whereas in additur the court awards the plaintiff an amount which was not contained in the jury verdict.¹⁸⁵ One approach to an analysis of this "test tube" theory, as I shall label it, is simply to reverse its emphasis. As applied by *Dimick*, the theory focuses only on what quantitative portion of the verdict arrived at by the judge was also included in the jury's verdict. Of course, only when the verdict is decreased is the entire amount of the final verdict, as modified by the judge, contained within the verdict as rendered by the jury. But the "test tube" theory can just as easily be applied to cut in the other direction. One could focus instead on what quantitative portion of the verdict as rendered by the jury was retained by the judge's modification. This approach leads one to the conclusion that only when the verdict is increased is the entire verdict of the jury quantitatively contained in the final verdict. In other words, it all depends upon the "test tube" to which one is referring. In *Dimick*, the "test tube" is

182. Comment, 44 YALE L.J. 318 (1934).

183. A few commentators have reservations about the propriety of remittitur. In Note, 21 VA. L. REV. 666 (1935), the author expressed approval of the *Dimick* result, but desired to see remittitur also declared unconstitutional. In Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1 (1942), the writer stated his lack of "personal preference" either for or against the practices of remittitur and additur, but concluded that the practices should be based on some articulated constitutional justification, and not the fiction that the judge does not really substitute his judgment for that of the jury.

184. It is not likely, judging from the decisions already rendered on additur, that remittitur will also be re-evaluated when the validity of additur is raised for the first time in jurisdictions which have not yet considered the matter. No American decision as yet has overturned remittitur. The English decision discussed in text accompanying note 24 *supra* has apparently had little effect on remittitur in the United States.

185. This portion of the opinion is quoted in text accompanying note 59 *supra*.

the final verdict as determined by the judge. Only in remittitur is the jury's verdict contained therein. Conversely, the "test tube" could be viewed as the verdict as originally returned by the jury. Then, only in additur is the verdict as modified by the judge to be found therein.

A second general approach in analyzing the distinction of *Dimick* is to focus only on what happens to the verdict as returned by the jury when it is judicially modified. Applying this to remittitur, part of the verdict is *deleted* by the court, whereas in additur the entire verdict is *retained* in the final determination of damages. Thus, it is even arguable that additur is more compatible than remittitur with the constitutional right of a jury determination of the amount of damages. As stated by Justice Taft of the Ohio Supreme Court, "both the remittitur and the additur practices uphold part of what the jury did. Under the remittitur practice, part of what the jury did is taken away from the plaintiff with his consent. Under the additur practice, the whole of what the jury did is upheld and something in addition is given to the plaintiff with the consent of the defendant. Thus, it would appear easier to uphold the additur practice because, under it, all that the jury did is sustained."¹⁸⁶

Thus, the logical distinction between remittitur and additur drawn by the United States Supreme Court in *Dimick* is non-existent. This was implicitly recognized by the California Supreme Court in *Dorsey*, and no attempt was made to find a logical distinction between the two practices. The commentators in each of the leading legal periodicals which has dealt with the subject, including the small minority of writers who disapprove of additur, have reached the unanimous conclusion that there should be no distinction, logical or otherwise, between the power of a court to enter a remittitur and its power to enter an additur.¹⁸⁷

Furthermore, considerations of fairness as well as logic dictate an equality of treatment of additur and remittitur. In both situations, something is taken away from the more successful litigant, who is relying on the jury's verdict, and is given to the party who desires a

186. *Markota v. East Ohio Gas Co.*, 154 Ohio St. 546, 558, 97 N.E.2d 13, 19 (1951). The same point was made in *Caudle v. Swanson*, 248 N.C. 249, 256, 103 S.E.2d 357, 363 (1958).

187. See Carlin, *supra* note 183; Comment, 40 CALIF. L. REV. 276 (1952); Note, 6 UTAH L. REV. 244 (1958); Note, 21 VA. L. REV. 666 (1935) (disapproves of remittitur as well as additur, but states that *Dimick* distinction is unsound); Comment, 10 WASH. & LEE L. REV. 46 (1953); Comment, 44 YALE L.J. 318 (1934); 28 CALIF. L. REV. 533 (1940); 34 CHI.-KENT L. REV. 186 (1956); 14 SO. CAL. L. REV. 490 (1941); 3 STAN. L. REV. 738 (1951); 6 U.C.L.A.L. REV. 441 (1959); 1952 U.C.L.A. INTRA. L. REV. 34. See also *Dimick v. Schiedt*, 293 U.S. 474 (1935), in which Justice Stone complained that to invalidate additur while sustaining remittitur was an "indefensible anachronism." *Id.* at 497 (dissenting opinion).

change in the amount of the verdict.¹⁸⁸ The plaintiff's right to a jury determination on the issue of damages is not prejudiced in additur any more than is the defendant's right in remittitur.¹⁸⁹ The present situation in California and a few other states results in giving plaintiffs greater constitutional rights than defendants. If the jury verdict is inadequate, the plaintiff obtains a new trial as a matter of right, whereas if the same suit resulted in an excessive verdict, the defendant would not be entitled to the same right.¹⁹⁰

IX. PROPOSED SOLUTIONS

Having exposed throughout this article the confused and unjustifiable state of the law on additur, I will conclude by offering a set of alternative proposed solutions to the problem. A statute would be required to effectuate any of these proposals, because it is clear that absent statutory authority no trial judge will utilize additur as long as *Dorsey* remains law,¹⁹¹ and *Dorsey* cannot be modified as long as a trial court never utilizes the device.

A. Statute Directly Authorizing Additur

The simplest and most direct solution would be for the legislature to enact a statute which specifically authorizes additur on enumerated policy grounds and which reconfirms the validity of remittitur. The immediate objection would be raised, of course, that *Dorsey* held additur *unconstitutional* so the problem cannot be cured by such a statute. However, this objection fails to square with the realities of the situation. First, whether a given procedure is or is not constitutional is a close question. The very existence of a statute is influential because the intent of the legislature on the problem is made manifest and the court will accord much weight to its determination.¹⁹² Second, it is always open to the legislature to give the courts the opportunity to pass on a question a second time, especially when the first decision is almost universally considered to have been erroneous. This consideration is particularly relevant here because the only member of the California Supreme Court, as it was comprised when

188. *E.g.*, Comment, 40 CALIF. L. REV. 276, 285 (1952).

189. See, *e.g.*, Note, 21 VA. L. REV. 666 (1935); 14 SO. CAL. L. REV. 490 (1941).

190. See, *e.g.*, Comment, 40 CALIF. L. REV. 276 (1952); 34 CHI-KENT L. REV. 186 (1956). By this statement, of course, I am oversimplifying my meaning by use of the terms plaintiff and defendant. Reference should be made at this point to the introductory comments to the article.

191. *But see* *Morgan v. Southern Pacific Co.*, 173 Cal. App. 2d 282, 343 P.2d 330 (1st Dist. 1959), discussed in text accompanying notes 102-04 *supra*.

192. This principle is illustrated by the technique of constitutional adjudication often employed by the United States Supreme Court of interpreting a statute so as to render it constitutional.

Dorsey was decided, remaining on the court is Chief Justice Traynor who dissented in that decision.¹⁹³ It is unlikely that *Dorsey* represents the views of the present members of the court. Furthermore, although this might have been true in 1952, it is most likely, in fact almost predictable with certainty, that the United States Supreme Court today would refuse to follow *Dimick*,¹⁹⁴ upon which the California Supreme Court relied in *Dorsey*.

B. Quantitative Limitation Upon Additur

1. Additur to Highest Amount Allowable

A second solution would be to authorize additur when the amount to which the verdict is increased if the defendant consents is the *maximum* amount which is supported by substantial evidence. This is a variation of the Wisconsin rule, which will be discussed in the next section, and its purpose is to preclude any constitutional objection on the part of the plaintiff. Any higher verdict would be excessive as a matter of law and reversed on appeal. One commentator has reconciled this "maximum amount allowable" approach with the *Dorsey* holding by pointing out that *Dorsey* could by its very language be read as prohibiting additur only when the plaintiff "under the evidence . . . could have obtained a still larger award from a second jury."¹⁹⁵

The language and the facts of the case seem to indicate that a trial court could validly deny plaintiff's motion for a new trial on condition that defendant consent to the highest award a jury could be allowed to find. The plaintiff would have no complaint under the circumstances because he could not possibly receive more on second trial than the defendant has consented to pay; any higher award by a second jury would presumably be set aside as excessive.¹⁹⁶

At least one commentator has indicated that this position has in

193. With the appointment of Justice Burke on November 18, 1964, to occupy the place vacated by the retirement of Justice Schauer, all six justices who comprised the majority on the additur issue in *Dorsey* are no longer on the court. Justice Peters, however, participated in the case while it was before the District Court of Appeal, writing an opinion supporting the position eventually taken by the Supreme Court majority. *Dorsey v. Barba*, 226 P.2d 677 (1st Dist., 1951).

194. *Fisch v. Manger*, 24 N.J. 66, 74, 130 A.2d 815, 820 (1957); see *Genzel v. Halvorson*, 248 Minn. 527, 531, 80 N.W.2d 854, 857 (1957). A fifth circuit decision held *Dimick* inapplicable to a condemnation action and stated that that decision, "decided as it was by a closely divided court, is authority only for its own facts . . ." See *United States v. Kennesaw Mountain Battlefield Ass'n*, 99 F.2d 830, 833-34 (5th Cir. 1938), *cert. denied*, 306 U.S. 646 (1939).

195. The *Dorsey* opinion noted that "the evidence would sustain recovery for pain and disfigurement well in excess of the amounts assessed by the court." *Dorsey v. Barba*, 38 Cal. 2d 350, 358, 240 P.2d 604, 608 (1952).

196. Comment, 40 CALIF. L. REV. 276, 285-86 (1952). The article goes on to point out that the district court of appeal opinion in *Dorsey* expressly mentioned this possibility. *Id.* at 286.

fact been adopted in New York.¹⁹⁷ However, a close examination of the New York decision¹⁹⁸ authorizing additur reveals that this observation is inaccurate. In that case, the Appellate Division of the Supreme Court entered an additur order stating that the amount to which the verdict was increased was the highest amount a jury could reasonably find. The defendants consented to the additur and the plaintiff appealed. In affirming the action of the lower appellate court, the Court of Appeals relied somewhat on the fact that the additur gave the plaintiff a verdict in the "maximum amount she would be allowed to recover by a jury verdict as a matter of law."¹⁹⁹ But the rationale of the opinion is clearly that an additur to any reasonable amount is constitutional, just as is the situation in remittitur. Subsequent cases in which additurs have been entered by the Appellate Division of the Supreme Court support this conclusion.²⁰⁰

The basic problem with this proposal is that its advantages are no greater than, while its disadvantages are greater than, the Wisconsin rule. Thus, discussion of its propriety will be contained in the evaluation of the Wisconsin rule.

2. *The Wisconsin Rule*

A third possibility would be to adopt the so-called Wisconsin rule under which the trial court is empowered to give the option to *either* party to avoid a new trial when the amount of damages assessed by the jury is erroneous. The Wisconsin rule provides that when the damages are inadequate, the court may grant a new trial unless the defendant consents to judgment in the highest amount a jury could reasonably award,²⁰¹ or may grant a new trial unless the *plaintiff* consents to accept judgment in the *least* amount allowable by the evidence.²⁰² Conversely, if the damages awarded by the jury are excessive, the court may grant a new trial unless the plaintiff consents to remit the judgment to the least amount allowable,²⁰³ or may grant a new trial unless the *defendant* consents to judgment in the *highest* amount supportable by the evidence.²⁰⁴

197. See 6 U.C.L.A.L. REV. 441, 444 n.10 (1959).

198. O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E.2d 883 (1956).

199. *Id.* at 473, 131 N.E.2d at 887.

200. See Gering v. Nicholville Telephone Co., 18 App. Div. 2d 945, 237 N.Y.S.2d 643 (1963) and Russell v. Cirillo, 17 App. Div. 2d 1005, 234 N.Y.S.2d 67 (1962), in which additur orders were entered without any mention of what sum constituted the highest amount supportable by the evidence.

201. Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927) (dictum); Reuter v. Hickman, Lauson & Diener Co., 160 Wis. 284, 151 N.W. 795 (1915) (dictum).

202. Risch v. Lawhead, 211 Wis. 270, 248 N.W. 127 (1933) (plaintiff waived consent by failure to appeal; dictum that, despite ordinary rules in additur, defendant need not consent because verdict only increased to lowest amount allowable by law so he can't complain). *Accord*, Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927) (in which the order was entered without consent of either party).

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

204. McCauley v. International Trading Co., 268 Wis. 62, 66 N.W.2d 633 (1954).

Thus, the Wisconsin rule constitutes an ultimate application of the "party unfavorably affected" rationale. In essence, the trial judge determines in each case what, in his opinion, is the maximum and minimum amounts to which the plaintiff is entitled. If the jury's verdict falls outside those limits, regardless of whether it is excessive or inadequate, the judge may either give the plaintiff the option of accepting the least amount allowable (which could result either in raising or lowering the verdict) or submitting to a new trial, or he may give the defendant the option of paying the greatest amount allowable (which again could either raise or lower the verdict) or having a new trial. Or the judge could grant such an option to each party consecutively, if the first party to whom the option was offered refused to consent to the specified change in the verdict.²⁰⁵

Adoption of this practice in California, however, would constitute a contraction of the present practice of allowing the plaintiff to remit damages to any reasonable amount.²⁰⁶ Thus, although eliminating any distinction between additur and remittitur, it would be unwise from a policy standpoint in that the effectiveness of remittitur would be greatly diminished. On the other hand, California could adopt the Wisconsin rule only as to its application to inadequate damage cases, so that the defendant would be given the chance to consent to judgment in the highest amount allowable, or the plaintiff to the lowest amount. This solution, however, would retain much of the present disparity of treatment between additur and remittitur.

Both of these proposals raise other distinct problems, from both a theoretical and a practical viewpoint. For one thing, it has been generally assumed that because the verdict against him is increased, the defendant is always the party unfavorably affected by an additur, so his consent is the *sine qua non* of an effective additur. Thus, increasing the verdict with the consent of only the plaintiff, even though the amount to which it is increased is the least amount supportable by the evidence on the issue of damages, might be thought to raise a special constitutional problem. Similarly, under the pure Wisconsin practice, a decrease in the verdict with the consent of only the defendant might raise a problem because a remittitur traditionally requires the consent of the plaintiff.

This problem, however, is more theoretical than real. Although the modification in the verdict is unfavorable to the non-consenting party, he is not merely injured if in fact the modification goes only far

205. See Comment, 44 YALE L.J. 318, 325 (1934).

206. See *Heppner v. Libby, McNeill & Libby*, 114 Cal. App. 747, 300 Pac. 830 (1st Dist. 1931), in which the court rejected the defendant's contention that remittitur should be authorized in California only when the verdict, as modified, was for the lowest possible sum a reasonable jury could award the plaintiff.

enough to make the verdict barely supportable by the evidence (assuming, of course, the verdict on the issue of liability is also supported by the evidence). To illustrate the point, the judge determines that in a given suit a verdict less than \$10,000 is inadequate, and one greater than \$25,000 is excessive. If the jury returns the verdict of \$8000, an additur to \$10,000 with the consent of only the plaintiff surely does not prejudice the defendant, even though the verdict against him was increased without his consent.²⁰⁷ And if the jury verdict was for \$30,000, a remittitur to \$25,000 with the consent of only the defendant does not really prejudice the interests of the plaintiff, even though the verdict in his favor was reduced.²⁰⁸

A second objection to these proposals is more meaningful. In actual practice, they render additur useless. It is inconceivable that the plaintiff would ever consent to judgment in the least amount to which he is entitled, or that the defendant would agree to judgment in the greatest amount for which he could be liable.²⁰⁹

Thirdly, and most significantly, the Wisconsin rule was recently abandoned even in Wisconsin, the only state which adhered to it. In *Powers v. Allstate Ins. Co.*,²¹⁰ the Wisconsin Supreme Court, mindful of the practical objection just mentioned, held that the plaintiff should be given the option of remitting an excess over a reasonable amount of damages as determined by the trial court.²¹¹ Although it is as yet unclear just what is the present status in Wisconsin of the old option system described earlier, the *Powers* case seems to establish that either remittitur with the consent of the plaintiff or additur with the consent of the defendant may be employed when the verdict is excessive or inadequate, respectively, to the end of changing the verdict to any reasonable amount as the court may determine.²¹² Thus,

207. It must be remembered that these principles are applicable only if the error solely affected the amount of damages, and not the issue of liability. See text accompanying notes 44-51 *supra*. Of course, an incorrect determination of damages by the judge can be corrected on appeal.

208. This illustration also points up the anomaly of the traditional aspect of the Wisconsin rule. A remittitur here would be authorized with the consent of the plaintiff only to change the verdict from \$30,000 to \$10,000, and an additur with the consent of the defendant would have to change the verdict from \$8000 to \$25,000; in each case a very extreme change in the jury verdict, quantitatively speaking, is involved.

209. See Comment, 40 CALIF. L. REV. 276, 287 (1952). In *Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284, 151 N.W. 795 (1915), the court stated: "Permitting a defendant to allow judgment against him for a maximum amount is usually not a 'consummation devoutly to be wished' by him." *Id.* at 286, 151 N.W. at 796.

210. 10 Wis. 2d 78, 102 N.W.2d 393 (1960).

211. The court held that the excessive verdict had to be the result of prejudicial error committed during the trial, but this limitation was subsequently removed in *Spleas v. Milwaukee & Suburban Transport Corp.*, 21 Wis. 2d 635, 124 N.W.2d 593 (1963).

212. Although the *Powers* case involved a decrease in the amount of the verdict, subsequent cases made it clear that the principle applies equally well to increasing a verdict. However, it is highly unclear whether the Wisconsin aberrations—increasing the verdict to the least amount allowable with the consent of only the plaintiff, and decreasing the verdict to the maximum amount allowable with the consent of only the

Wisconsin has fallen in line with the jurisdictions according full equality of treatment to additur and remittitur without any quantitative limitations upon their use.

C. *Alternative Motion*

Another alternative is suggested by a discussion in the dissenting opinion in the Utah case approving of additur.²¹³ Additur could be authorized where the plaintiff moves for a new trial *or in the alternative* for judgment in an amount over and above the jury's verdict. This motion could be deemed an implied consent on the part of the plaintiff to the entry of judgment in any increased amount in his favor, and he could not complain if he felt the verdict, as modified, was still inadequate, unless of course it was still inadequate as a matter of law. It is unclear whether such a device would be valid, but it is at least not improbable that this form of additur would have some utility. It would also give additur a status close to that of remittitur; once the plaintiff made such a motion, the entry of any additur order of the traditional type would become fully authorized.

D. *Additur Where Verdict Supported by Substantial Evidence*

Probably the most promising solution to the additur problem raised by *Dorsey* is to authorize additur whenever the jury verdict, although inadequate, is supported by substantial evidence on the issue of damages as well as on the issue of liability. As pointed out earlier in this article, a trial judge has broad discretion to grant a new trial on account of inadequacy of damages, even though the jury's verdict was supported by substantial evidence so that absent the new trial it would have been affirmed on appeal.²¹⁴

This substantial evidence test is supported by the facts, if not the rationale, of the *Dorsey* case. As revealed by the opinion of the district court of appeal in *Dorsey*, the jury returned a verdict in favor of plaintiff Josephine for \$620.39 and in favor of plaintiff Beatrice for \$1293.60. Josephine's special damages were between \$612.39 and \$712.39, depending on which estimate the jury believed as to the expense of future surgery necessitated by the accident. Beatrice's

defendant—will survive the *Powers* case. Their utility would seem to be superseded by the overthrow of the quantitative limitation principle in general. See *Parchia v. Parchia*, 24 Wis. 2d 659, 130 N.W.2d 205 (1964); *Vasselos v. Greek Orthodox Community of St. Spyridon*, 24 Wis. 2d 376, 129 N.W.2d 243 (1964); *Richie v. Badger State Mutual Cas. Co.*, 22 Wis. 2d 133, 125 N.W.2d 381 (1963); *Dodge v. Dobson*, 21 Wis. 2d 200, 124 N.W.2d (1963); *Cordes v. Hoffman*, 19 Wis. 2d 236, 120 N.W.2d 137 (1963).

213. *Bodon v. Suhrmann*, 8 Utah 2d 42, 50, 327 P.2d 826, 832 (1958) (dissenting opinion, Justice Henriod). See text accompanying note 161 *supra*.

214. See text accompanying notes 172-77 *supra*.

special damages were between \$1021.60 and \$1221.60 plus loss of wages, so that even the lowest estimate of her special damages exceeded the jury's verdict in her favor. There was evidence that both plaintiffs suffered permanent facial scars. The additur increased the verdicts to \$1500 for Josephine and \$3000 for Beatrice.²¹⁵ While not setting out these figures, the Supreme Court noted that "the verdicts . . . apparently made no allowance for damages for pain and disfigurement suffered by the plaintiffs since the amounts awarded were insufficient to cover medical expenses and loss of earnings."²¹⁶

Thus, while the rationale of the *Dorsey* opinion would seem to be that, except for remittitur, the jury must be the final body to assess the amount of damages where damages is a contested issue of fact, unless both parties consent to a modification by the judge, the decision is not inconsistent with the substantial evidence formulation. In fact, the court at one point stated its holding in language that can be read as supporting the substantial evidence test:

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 . . .²¹⁷

Interestingly enough, the substantial evidence test is also supported by the facts of the *Dimick* case. There, the plaintiff obtained a verdict of \$500 for personal injuries, which was obviously inadequate. The United States Supreme Court stated:

When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle the plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication?²¹⁸

The opinion of the First Circuit Court contained even stronger language, indicating that there was no jury verdict on the issue of damages that was supported by substantial evidence:

If the plaintiff in this case was entitled to recover he was obviously entitled on the evidence to recover more than \$500 . . . but as there

215. *Dorsey v. Barba*, 226 P.2d 677, 682-83 (1st Dist. 1951), *affirmed in part* 38 Cal. 2d 350, 240 P.2d 604 (1952).

216. *Dorsey v. Barba*, 38 Cal. 350, 355, 240 P.2d 604, 607 (1952).

217. *Id.* at 358, 240 P.2d at 609. It is likely that the court was referring to inadequacy as determined by the trial court, but the statement is susceptible of the interpretation that an additur is not valid if the jury's verdict was so inadequate, as was the situation in *Dorsey*, that it was not supported by substantial evidence and would be reversed on appeal.

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

was some evidence tending to show that the plaintiff was guilty of contributory negligence, the inadequate verdict may well have been due to a compromise among the jury.²¹⁹

The *Dimick* case was subsequently distinguished by the Fifth Circuit Court, in a condemnation action in which an additur was entered, on the ground that, unlike the situation in *Dimick*, there was no error at trial warranting a new trial and there was ample evidence to support the verdict. The court stated that *Dimick* was applicable only where a new trial should have been granted.²²⁰

At least two California cases decided before *Dorsey*, including one by the California Supreme Court, contain at least implicit support for the substantial evidence formulation.²²¹ Also, one case decided subsequent to *Dorsey* expressly distinguished the *Dorsey* result on that basis:

The record showed that the jury awards barely covered the amount of the plaintiffs' special damages, leaving nothing for general damages. The finding that the jury award lacked support in the evidence was, therefore, correct and a new trial should have been granted.²²²

Another case involved a jury verdict in the exact amount of the plaintiff's special damages. No analysis was made by the appellate court as to whether the verdict was supported by substantial evidence, but the reversal of the additur order is at least not inconsistent with the substantial evidence test.²²³

The results reached by the decisions from other jurisdictions, including those rejecting the practice of additur²²⁴ as well as those sus-

219. *Schiedt v. Dimick*, 70 F.2d 558, 562 (1st Cir. 1934), *affirmed*, 293 U.S. 474 (1935).

220. *United States v. Kennesaw Mountain Battlefield Ass'n*, 99 F.2d 830, 833-34 (5th Cir. 1938), *cert. denied*, 306 U.S. 646 (1939).

221. See *Taylor v. Pole*, 16 Cal. 2d 668, 107 P.2d 614 (1940); *Blackmore v. Brennan*, 43 Cal. App. 2d 280, 110 P.2d 723 (3d Dist. 1941). In the latter case, the court sustained additur in dictum and stated: "The court is authorized to prescribe an alternative condition upon which the granting or denial of a motion for a new trial may depend, provided the judgment which is rendered is supported by the evidence." *Id.* at 290, 110 P.2d at 728-29.

222. *Morgan v. Southern Pacific Co.*, 173 Cal. App. 2d 282, 284, 343 P.2d 330, 332 (1st Dist. 1959).

223. See *Gearhart v. Sacramento City Lines*, 115 Cal. App. 2d 375, 252 P.2d 44 (3d Dist. 1953). The opinion does not make it clear from a recital of the facts whether the plaintiff was entitled to any general damages. Since the action was for personal injuries, occasioned by the plaintiff's foot getting caught in a streetcar door, probably the verdict was not supported by substantial evidence, as well as being inadequate.

224. See *Sarvis v. Folsom*, 114 So. 2d 490 (Fla. Dist. Ct. App. 1959) (implication that verdict was not supported by substantial evidence); *Lorf v. City of Detroit*, 145 Mich. 265, 108 N.W. 661 (1906) (court admitted verdict against weight of evidence); *Woodmansee v. Garrett*, 247 Miss. 148, 153 So. 2d 812 (1963) (court stated verdict grossly inadequate and against weight of evidence); *In re Ohio Turnpike Comm'n*, 101 Ohio App. 474, 140 N.E.2d 328 (1955) (court noted verdict manifestly against weight of evidence). Cf. *Porcupine Reservoir Co. v. Lloyd W. Keller Corp.*, 15 Utah 2d 318, 392 P.2d 620 (1964) (no additur where verdict unusually small, suggesting passion or prejudice or a misunderstanding of the law or facts).

taining it,²²⁵ are consistent with the substantial evidence analysis. Apparently, decisions have been rendered in only two jurisdictions with results plainly inconsistent with this analysis.²²⁶ However, one of those decisions is completely explainable because the trial and appellate courts in that jurisdiction apparently have equal discretion to enter additurs; thus, either court may grant a new trial for inadequacy and no substantial evidence test for appellate review exists.²²⁷

One commentator has articulated two separate categories of additur situations²²⁸ which, in substance, support the underlying principle in the substantial evidence theory. The first category is where the jury verdict is between the upper and lower limits possible under the plaintiff's evidence. In this situation, he states, granting a new trial is "merely a determination that the verdict was against the weight of the evidence. In this area plaintiff actually gets more than he bargained for when the court grants additur, for, in the absence of the condition, the trial court's denial of the motion for new trial is final."²²⁹ This, of course, is just another way of saying that additur does not prejudice the interests of the plaintiff if the jury verdict was supported by substantial evidence; he has had a proper jury determination on the issue of damages and any variance rests in the sole discretion of the trial court. The second category the commentator delineates is where the verdict is so inadequate that an unconditional denial of plaintiff's motion for a new trial would constitute an abuse of discretion. This is "the difficult additur situation," and could be succinctly described as that in which the verdict is not supported by substantial evidence.

Employing additur only where the jury verdict is supported by substantial evidence is subject to essentially two criticisms. First, there would be no similar limitation upon the practice of remittitur so that the disparity of treatment is not eliminated. While this is a valid objection, it must be realized that under the present situation the disparity between additur and remittitur is significantly greater. The substantial evidence test is at least an improvement. Also, the statute

225. *Caen v. Feld*, 371 S.W.2d 209 (Mo. Sup. Ct. 1963) (court indicated it would not permit additur where jury verdict not supported by the evidence); *Caudle v. Swanson*, 248 N.C. 249, 103 S.E.2d 357 (1958) (quoted in text accompanying note 166 *supra*).

226. See *State Highway Comm'n v. Schmidt*, 143 Mont. 505, 391 P.2d 692 (1964) (dictum that additur invalid, and court said verdict supported by substantial evidence); *Bodon v. Suhrmann*, 8 Utah 2d 42, 327 P.2d 826 (1958) (special damages of \$69; verdict for \$100 held outside the limits of any reasonable appraisal of damages but appellate court entered additur to \$500).

227. See the Utah decision in note 226 *supra*.

228. 1952 U.C.L.A. INTRA. L. REV. 34. See also Note, 6 UTAH L. REV. 244, 251 n.54; 3 STAN. L. REV. 738 (1951).

229. 1952 U.C.L.A. INTRA. L. REV. 34, 35.

could place a similar limitation upon remittitur, and it is unlikely that such limitation would have any great impact on the actual utility of remittitur. A second criticism is that such a test would preclude the use of additur when it is needed the most, *i.e.*, when the verdict is less than the minimal amount supported by the evidence. A simple answer, however, is that any other solution is either impracticable or is not in any way consistent with the constitutional implications of *Dorsey*. If the verdict is so inadequate that the parties have not had the benefit of a determination by a properly functioning jury on the issue of damages, constitutional requisites block compulsory devices designed to avoid a new trial.²³⁰ In other words, the *Dorsey* case if strictly adhered to precludes additur at least where the verdict on the issue of damages is not supported by substantial evidence.

It should be noted in conclusion that, whichever of these proposed solutions, if any, is adopted, the statute should be worded so as to allow additur to be validated on a basis of complete equality with remittitur, in case the California Supreme Court on review of a statutorily authorized additur order decides to reconsider its holding in *Dorsey*.

230. See Note, 21 VA. L. REV. 666, 670 (1935).