Date of Meeting: April 18-19, 1958
Date of Memo: April 9, 1958

Memorandum No. 5

Subject: Study No. 55(L) - Additur

When the Commission's 1957 agenda resolution was before the Senate Judiciary Committee the resolution was amended on the motion of Senator Regan, Chairman of the Committee, to add the following topic for study:

Whether a trial court should have the power to require, as a condition of denying a motion for new trial, that the party opposing the motion stipulate to the entry of judgment for damages in excess of the damages awarded by the jury. In making his motion Senator Regan referred to the fact that he had on various occasions been required as attorney for a plaintiff to agree to remit a portion of the damages as found by the jury as a condition to the denial of the defendant's motion for new trial and said that he saw no reason why this should not cut both ways.

I have recently asked Professor Pickering of the Hastings College of Law to make a study for us on this subject. Yesterday I had a conference with Professor Pickering following his preliminary investigation of the matter. He informed me that the present state of the California law on additur is as follows: When the damages claimed, whether by plaintiff or in a cross-demand, are liquidated or susceptible of definite ascertainment the trial judge may require the party against whom an inadequate verdict has been returned to stipulate to

entry of judgment in a larger amount as a condition of denying the claimant's motion for new trial, made on the basis of the inadequacy of the award. However, Dorsey v. Barba, 38 Cal. 2d 350 (1952) held that this practice would be unconstitutional in a case in which damages are unliquidated and speculative because if permitted it would deprive the moving party of a jury trial on the issue of damages. The court said:

> "Arguments to the effect that court should be permitted to increase awards without the plaintiff's [i.e., the moving party's] consent because such procedure is more expeditious and would constitute an improvement over established practice might be persuasive if addressed to the people in support of a constitutional amendment, but they are not appropriate here."

In reaching this result, the California Supreme Court cited and followed the decision of the United States Supreme Court in Dimicks v. Schiedt, 293 U. S. 495 (1934) (decided 5-4, Justices Stone, Hughes, Brandeis and Cardozo dissenting.)

Professor Pickering pointed out that both the United States Supreme Court in the Dimicks case and the California Supreme Court in the Dorsey case acknowledged that the established remittitur power of federal and California trial courts is logically as much a deprivation of the right to jury trial as additur would be. Both courts stated that the remittitur power had been so long established that it would not now be held unconstitutional but that this fact did not warrant the further invasion of the right to jury trial which recognition of a power of additur would entail. It might be noted that there is some rational basis for the distinction between additur and remittitur in this respect inasmuch as both constitutions purport generally to adopt the right of jury trial as it existed in

English law in 1789 or thereabout as the constitutional standard and while remittitur was recognized in the English law of that time, additur was not. (Incidentally, Professor Pickering reports that remittitur has since been abolished in England.)

Whether or not the Dorsey decision is sound, it appears that if the Commission should determine that it would be desirable to give the trial courts the power of additur in all cases, it would be necessary to recommend a constitutional amendment to make this possible. This unanticipated development seems to me to require that the matter be considered further at this point by the Commission before Professor Pickering does any more work on it, and I have asked him to defer further work until the Commission has had an opportunity to do so at its April meeting.

I do not suppose that the Commission would undertake on its own motion to study problems the solution for which would entail amendment of the Constitution, save in such special cases as that of the claims statute where solution of a problem of considerable public importance requires it. Even there, the problem of who will undertake to rally popular support for the necessary constitutional amendment (assuming that the Legislature can be pursuaded to propose it) will pose a real problem. That problem would appear to be of considerably greater magnitude in the case of a matter like additur. On the other hand, I take it that we would not wish to disappoint Senator Regan. Certainly the Commission could make a study and file a report, possibly leaving it up to Senator Regan to deal with the problem of constitutional amendment at that point if so advised.

Professor Pickering pointed out in the course of our discussion that one matter with which any proposed legislation on the subject of additur should probably deal is that of whether and to what extent an appellate court may review the dollar amount fixed by a trial court in exercising the power. There is, of course, no appeal from an order denying a motion for new trial. On appeal from the judgment, the claimant might well be limited, in the absence of specific legislation, to challenging the judgment on the ground of its being inadequate as modified by the court. Under ordinary principles such review would be of quite restricted scope. It might be desirable, to confer on the appellate court a greater power of review with respect to the dollar amount fixed by the trial court in additur cases. Professor Pickering pointed out that if such provision for appelate review of the trial court's determination were provided it presumably should be made applicable also in remittitur cases inasmuch as the law is quite unclear at the present time with respect to whether and to what extent an appellate court may review a trial court's dollar amount determination in such cases. This point leads to the further suggestion (on my part) that if we are to have a statutory provision relating to additur we should perhaps at the same time codify the existing law relating to remittitur, amending it if necessary to conform it to whatever principles are adopted and expressed in the additur legislation.

In response to my questions, Professor Pickering indicated that, while his research on the questions is yet incomplete, his impression at this point is that most writers on the subject regard additur

favorably as a progressive device to eliminate unnecessary new trials but that most states do not recognize the power of additur in unliquidated damage cases.

It seems to me there are three possible alternatives for Commission action at this point:

1. Discontinue this study on the ground that a problem of constitutional rather than statutory revision is involved and report this action and the reason for it to the 1959 Session of the Legislature.

2. Discuss the matter with Senator Regan at this point, asking him whether in light of the constitutional problem involved he considers it desirable to carry the study further.

3. Continue the study, make a report, and recommend such constitutional amendments and statutes, if any, as the Commission determines are desirable.

If the Commission determines to go ahead with the study or to go ahead if Senator Regan desires, it should perhaps give some consideration at the April meeting to the scope of the study--e.g., whether appellate review of the trial court determination of dollar amount should be studied, whether the desirability of codifying the law on remittitur should be studied, etc.