#55(L) 12/3/65

Memorandum 65-80

Subject: Study No. 55(L) - Additur

Attached are two copies of:

Revised Tentative Recommendation on Additur

Draft of Letter of Transmittal to Interested Persons

Please mark your suggested changes on one copy and return the marked copy to the staff at the December meeting. We hope to distribute this tentative recommendation after the December meeting.

The proposed legislation was approved in substance at the last meeting.

Section 657 (to be amended) pages 13-17

This section was approved in this form. The Comment has been revised.

Section 662.5

This section has been renumbered and revised as suggested at the last meeting. Note that we have taken a portion of the introductory clause of subdivision (a) of the previous draft and made it paragraph (1) of subdivision (a) in the revised draft. The Comment has been revised. Take special note of the second paragraph from the bottom of page 21.

We suggest one change in Section 662.5 as set out in the revised tentative recommendation. We have phrased paragraph (1) of subdivision (a) in accordance with a suggestion made at the last meeting. We suggest that this paragraph be revised to read:

(1) A new trial limited to the issue of damages is otherwise appropriate.

The suggested language is that contained in the draft considered at the November meeting. We make this suggestion because the revised section appears to authorize the use of additur in cases of compromise verdicts.

Verdicts are sometimes rendered in personal injury or death actions which, in view of the evidence of injuries, suffering, medical and other expense, are clearly inadequate. Common experience suggests that these are the result of compromise, some jurors believing that the evidence fails to establish liability, but yielding to the extent of agreement on a small recovery. It would be unfair to the defendant to ignore this unmistakable evidence of compromise and to accept the verdict for the plaintiff at face value as a determination of liability. Accordingly, it is well settled that the error calls for a general new trial, and a limited order is an abuse of discretion. We believe that the same considerations should make it an abuse of discretion to make an additur order under such circumstances.

The suggested language will make it clear that additur cannot be used where there is a compromise verdict. It would, however, as pointed out at the last meeting, limit the use of additur to cases where a new trial limited to the issue of damages is otherwise appropriate. This might prevent use of additur in some cases where it might be useful. On balance, we believe the suggested language is the best standard for it incorporates the compromise verdict doctrine.

If the suggested language is adopted, we suggest that the comment to Section 662.5 be revised to read in part:

> The exercise of additur authority under subdivision (a) is limited to cases where "a new trial limited to the issue of damages is otherwise appropriate." This limitation serves two purposes. First, it 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., Leipert v. Honald, 39 Cal.2d 462, 247 P.2d 324 (1952); Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910 (1952). Second, it makes Section 662.5 inapplicable where an error in the amount of damages can be cured without the necessity of a new

trial, whether or not the curative action actually results in increasing the amount awarded. Section 662.5 does not, however, affect the existing additur practice in unliquidated damages cases where the amount to be awarded can be fixed with certainty. See Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921).

Tentative Recommendation

The tentative recommendation has been reorganized, revised, and supplemented. Suggestions made at the last meeting have been incorporated. The revisions are extensive and the tentative recommendation should be read with care.

Respectfully submitted,

John H. DeMoully
Executive Secretary

STATE OF CALIFORNIA

EDMUND G. BROWN, Governor

CALIFORNIA LAW REVISION COMMISSION
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LETTER OF TRANSMITTAL

In 1957, the California Law Revision Commission was directed by the Legislature to make a study to determine "whether a trial court should have the power to require, as a condition of denying a motion for a new trial, that the party opposing the motion stipulate to the entry of judgment for damages in excess of the damages awarded by the jury." This practice is commonly known as additur; it is the converse of remittitur, a practice whereby the court conditions the denial of a defendant's motion for a new trial upon the plaintiff's consent to the entry of judgment for damages in a lesser amount than the damages awarded by the jury. In 1965, the Legislature expanded its previous directive to include a study of remittitur as well as additur.

The enclosed tentative recommendation on additur, prepared by the Law Revision Commission, is being distributed to interested persons for comment. The comments will be taken into account when the Commission considers what recommendation it will make to the 1967 legislative session.

In order to maintain its schedule on this project, the Commission must have your comments not later than July 1, 1966. Please send your comments to California Law Revision Commission, 30 Crothers Hall, Stanford, California 94305.

Yours truly,

John H. DeMoully
Executive Secretary

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

ADDITUR

Power of trial court to require, as a condition of denying a motion for a new trial, that the party opposing the motion stipulate to the entry of judgment for damages in excess of the damages awarded by by the jury.

December 31, 1965

California Law Revision Commission
School of Law
Stanford University
Stanford, California

#55(L)

TENTATIVE 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 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. Draper v. Hellman Com. T. & S. Bank, 203 Cal. 26, 263 Pac. 240 (1928). This practice is known as remittitur. When remittitur is used, the court--not the jury--actually fixes the amount of the damages. 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. See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

In Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952), the California Supreme Court held that a 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 damages awarded by the jury. The Supreme Court held that this practice--known as additur--violated the nonconsenting plaintiff's constitutional right to have a jury determine the amount of the damages to which he is entitled.

Additur as an Alternative to a New Trial

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

In California, the grounds for granting a new trial are set out in Section 657 of the Code of Civil Procedure. "Excessive damages, appearing to have been given under the influence of passion or prejudice" and "insufficiency of the evidence to justify the verdict" are separately stated as independent grounds for granting a new trial. An inadequate award of damages is not explicitly recognized as a separate ground for granting a new trial. However, an inadequate award of damages constitutes a sufficient basis for granting a new trial on the ground of "insufficiency of the evidence to justify the verdict." Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954); 3 WITKIN, CALIFORNIA PROCEDURE, Attack on Judgment in Trial Court § 20 (1954). See also Phillips v. Lyon, 109 Cal. App. 264, 292 Pac. 711 (1930). Also, an excessive award of damages constitutes a basis for granting a new trial on the ground of "insufficiency of the evidence to justify the verdict," and neither passion nor prejudice need be shown. E.g., Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941 (1938). See Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3 (1949).

The right to a jury trial--guaranteed by Section 7, Article I, of the California Constitution--does not preclude a court from exercising its judicial authority to grant a new trial in appropriate circumstances. E.g., Estate of Bainbridge, 169 Cal. 166, 146 Pac. 427 (1915); Ingraham v. Weidler, 139 Cal. 588, 73 Pac. 415 (1903).

In determining whether to grant a new trial on the ground of "insufficiency

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

The granting of new trials on the ground of inadequate or excessive damages tends to hinder the efficient operation of our system of judicial administration. "The consequences [of granting new trials] have 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 Rr v. Roberts, 113 Tenn 488, 493, 82 S. W. 314, 315 (1904). "It is thus held in reserve as a last resort, because it is more expensive and inconvenient than other remedies . . ." Lisbon v. Layman, 49 N. H. 553, 600 (1870). See also MC CORMICK, 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 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, 44 YALE L. J. 318 (1934); Note, 6 U.C.L.A. L. REV. 441 (1959); Note, 40 CALIF. L. REV. 276 (1952); Note, 12 HASTINGS L. J. 212 (1960); Case comment, 28 CALIF. L. REV. 533 (1940); Case comment, 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 for they serve to avoid congestion in our courts.

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 the law relating to the circumstances when this device may be used is unclear as a result of the decision in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). This has resulted in giving the plaintiff an unfair advantage over the defendant for remittitur is available to correct an excessive verdict but additur is not available to correct an inadequate verdict. Dorsey v. Barba, 38 Cal.2d at 368, 240 P.2d at (dissenting opinion)("To hold remittitur constitutional and additur unconstitutional is not only illogical--it is unfair. In the present case plaintiffs are being given a new trial [on the ground of inadequate damages] as a matter of right, and yet, if the second jury allows excessive damages, the trial judge, with the plaintiff's consent can select a lesser amount and require defendant to pay it.").

Extent to Which Additur Permitted in California

In view of the Dorsey case, the availability of additur in California as an alternative to granting a new trial on the issue of damages is somewhat uncertain. It seems reasonable to conclude, however, from the earlier cases as well as from the Dorsey opinion itself, that additur is not unconstitutional per se and is permissible in the following cases:

(1) In any case where damages are certain and ascertainable by a fixed standard. In effect, the court by an additur order merely fixes damages in the only amount justified by the evidence and the only amount that 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 conditional order granting a new trial requires the consent of both plaintiff and defendant. Failure of either party to consent will result in granting a new trial; hence, the plaintiff retains control over whether 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 fixes damages in the highest amount justified by the evidence even though only the consent of the defendant is obtained. Since any amount in excess of this sum would be excessive as a matter of law, the plaintiff could not possibly receive a higher amount from any jury. Dorsey v. Barba, 38 Cal.2d 350, 358, 240 P.2d 604, 608 (1952) ("the plaintiff has actually been injured if, under the evidence, he could have obtained a still larger award from a second jury"); Dorsey v. Barba, 226 P.2d 677, 690 (Cal. Dist. Ct. App. 1951).

Use of Additur Where Jury Verdict Supported by Substantial Evidence

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

No constitutional problem is presented insofar as the defendant is concerned if additur is ordered in such a case, for judgment will be entered in an amount in excess of the jury verdict only if the defendant consents. If he fails to consent, the condition upon which the court's order denying a new trial is predicated will not have been satisfied; hence, the order granting a motion for a new trial will become effective as the order of the court. See Secreto v. Carlander, 35 Cal. App.2d 361, 95 P.2d 476 (1939). If the defendant consents to the addition, his consent removes the grounds for any objection he may have regarding the amount of damages reflected in the judgment entered on an additur order. Blackmore v. Brennan, 43 Cal. App.2d 280, 110 P.2d 723 (1941). See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). See also Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951 (1950).

If the plaintiff's consent to additur is not required, he might object

to the amount of damages awarded pursuant to such an additur order on the ground that he has been deprived of his right to have a jury determine the amount of his damages. Here alone might it be thought that a constitutional question of some substance would be presented. 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 concerned only with the use of additur in cases where the jury verdict on the issue of damages is supported by substantial evidence. The constitutional problem presented in this situation requires a careful analysis of the Dorsey case.

In the Dorsey case, the jury returned a verdict for plaintiffs in amounts that were "insufficient to cover medical expenses and loss of earnings" (38 Cal.2d at 355, 240 P.2d at 607); no allowance was made for pain and disfigurement. The trial court denied plaintiffs' motion for new trial based on an inadequate jury award upon defendant's consent to pay additional sums that resulted in a judgment being entered for amounts that "exceeded the special damages proved and apparently included some compensation for pain and disfigurement"(38 Cal.2d at 355, 240 P.2d at 607). Upon plaintiffs' appeal from the judgment entered on the basis of the additur order, the California Supreme Court held that the trial court's action violated plaintiffs' constitutional right to a jury trial on the issue of damages. After noting that "the evidence would sustain recovery for pain and disfigurement well in excess of the amounts assessed by the

court," the court held that a "court may not impose conditions which impair the right of either party to a reassessment of damages by the jury where the first verdict was inadequate, and the defendant's waiver of his right to jury trial by consenting to modification of the judgment cannot be treated as binding on the plaintiff" (38 Cal.2d at 358, 240 P.2d at 608-609 (emphasis added)).

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

Although it is not entirely clear from either opinion, it seems reasonable to conclude that the fundamental difference between the majority and minority positions in the Dorsey case stemmed from differing views of the original verdict that was rendered in the case--the majority viewing the verdict as one not supported by the evidence so that plaintiffs never had a valid jury determination of the issue of damages and the minority justice viewing the verdict as one sufficiently supported by the evidence so as to satisfy plaintiffs' constitutional right to a jury determination of this factual question. Taking the view of the majority opinion on the conflicting evidence, the original verdict awarded damages in amounts that were less than the proven special damages and contained no awards for pain or disfigurement. See Dorsey v. Barba, 226 P.2d 677 (Cal. Dist. Ct. App. 1951). Hence, it is reasonable to conclude (as the majority must have

concluded) that the jury failed to make a finding on a material issue and returned a verdict that was not supported by the evidence because of its inadequacy. In this view, the plaintiffs did not receive a proper jury determination on the issue of damages, for there was no determination of the damages for pain and disfigurement. Accordingly, the trial court could not enter a judgment based upon its own determination of this question without violating plaintiffs' constitutional right to have his damages determined by a jury. This interpretation of the Dorsey opinion is supported by the court's statement that "a court may not impose conditions which impair the right of either party to a reassessment of damages by the jury where the first verdict was inadequate" (38 Cal.2d at 358, 240 P.2d at 609 (emphasis added)). This interpretation also is consistent with Gearhart v. Sacramento City Lines, 115 Cal. App.2d 375 (1953)(jury verdict for exact amount of special damages; trial court made an additur order increasing damages by $1,000).

It seems reasonable to conclude, therefore, that an additur practice can be authorized by statute, without a supporting constitutional amendment, in those cases where there is substantial evidence to support the jury verdict and a judgment entered on the verdict could not be reversed for inadequacy. In such a case, the plaintiff could not successfully contend that he had been deprived of a jury determination of the issue of damages if judgment were entered on the verdict. Lambert v. Kamp, 101 Cal. App. 388, 281 Pac. 690 (1929). Hence, the plaintiff cannot possibly be injured by a judgment entered on an additur order in an amount that exceeds the verdict.

It is essential, therefore, to distinguish the situation where the verdict is supported by substantial evidence and the situation where it is,

as a matter of law, for an inadequate amount. Where the verdict is so contrary to the evidence that it cannot stand as a matter of law, the trial court cannot constitutionally be granted authority by statute to substitute for the verdict its own determination of a question of fact upon which the parties are entitled to a jury's determination; even though the defendant may consent to an increase in the amount to be awarded and thereby waive his right to complain of deprivation of jury trial on this issue (Blackmore v. Brennan, 43 Cal. App.2d 280, 110 P.2d 723 (1941)), his consent can in no way bind the plaintiff to forego his constitutional right to have the issue properly decided by a jury. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). However, as the foregoing discussion demonstrates, where a verdict is supported by substantial evidence, both parties' right to a jury determination of the issue of damages has been satisfied. Accordingly, the Commission has concluded that trial courts can 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 jury trial is logically and constitutionally satisfied.

RECOMMENDATION

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 court is convinced from the entire record, including reasonable inferences therefrom, that the verdict, although supported by substantial evidence, is clearly inadequate. Explicit statutory recognition of additur authority in this type of case will eliminate the uncertainty that now exists. There is no need, however, to detail by statute the variety of other circumstances in which various forms of additur are permissible under existing case law; these exist and will continue to exist on a common law basis just the same as remittitur authority will continue to exist without benefit of explicit statutory recognition.

The new section will make 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 will thus avoid the delay and expense of retrials. See the discussion at pages 3-4 supra.

The recommended section authorizes additur only in cases where the jury verdict is not inadequate as a matter of law. By way of contrast, remittitur is now available in any appropriate case, including one where the jury verdict is excessive as a matter of law. E.g., Livesey v. Stock, 208 Cal. 315, 281 Pac. 70 (1929); Babb v. Murray, 26 Cal. App.2d 153, 79 P.2d 159 (1938). The Commission recommends no change in the law relating to remittitur to make it

consistent with the recommendation on additur. Remittitur has proved extremely useful because it avoids the delay and expense of a new trial in cases where the court upon reviewing the evidence can fix a proper amount of damages and it would be undesirable to limit the existing remittitur practice merely because of constitutional limitations on the extent to which additur can be authorized.

(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 evidentiary matters whose sufficiency may be questioned. Second, elimination of excessive damages as an independent ground for granting a new trial would cast doubt upon its continued 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:

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 ~~is~~ 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 ~~is~~ 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 ~~is~~ 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. Under existing law, 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 existing 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 so sufficient (both present and of such probative force) that the court is convinced that a contrary verdict is clearly required by the evidence. Estate of Bainbridge, 169 Cal. 166, 146 Cal. 427 (1915); Sharp v. Hoffman, 79 Cal. 404 (1889). Conforming changes are made in two other places in the section.

Fourth, an explicit reference to "excessive 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. This paragraph, which was added as a part of the 1965 revision of Section 657, directs the court not to grant a new trial upon the ground of insufficiency of the evidence unless the court is convinced that a contrary verdict should have been rendered. The reference to "excessive or inadequate damages" recognizes that the true basis for granting a new trial on either of these grounds 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.

SEC. 2. Section 662.5 is added to the Code of Civil Procedure, to read:

662.5. (a) In any civil action where there has been a trial by jury, the trial court may, as a condition of denying a motion for new trial on the ground of inadequate damages, order an addition of so much thereto as the court in its discretion determines if:

(1) The only ground upon which a new trial could be granted is inadequate damages and the granting of a new trial on that ground is otherwise appropriate;

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

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

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

(c) Nothing in this section affects the authority of a court to order a reduction in the amount of damages as a condition for denying a motion for a new trial on the ground of excessive damages.

Comment. This section makes it clear that additur may be used in certain cases as an alternative to granting a motion for a new trial on the ground of inadequacy of damages. The section is permissive in nature; it does not require that additur be resorted to merely because the conditions stated in the section are satisfied. The section does not preclude the use of additur

in any other case where it is appropriate. Nor does the section affect existing remittitur practice.

Subdivision (a). Subdivision (a) authorizes additur only where after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the verdict, although supported by substantial evidence, is clearly inadequate. See CODE CIV. PROC. § 657 (as proposed to be amended). In addition, the defendant must consent to the additional damages or the condition upon which the court's order denying the new trial is predicated will not have been satisfied and hence insofar as the order grants a new trial it will become effective as the order of the court. These conditions are designed to meet the constitutional objections to additur in unliquidated damages cases that were raised in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). See the discussion in 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES ***-*** (1967)[supra at 6-10].

The exercise of additur authority under subdivision (a) is limited to cases "where the only ground upon which a new trial could be granted is inadequate damages and the granting of a new trial on that ground is otherwise appropriate." Thus, if an error in the amount of damages can be cured without the necessity of a new trial, whether or not the curative action actually results in increasing the amount awarded, a new trial is not otherwise appropriate and the section is not applicable. The section does not, however, affect the existing additur practice in unliquidated damages cases where the amount to be awarded can be fixed with certainty. See Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921).

Subdivision (a) applies only to civil actions 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. CT. RULES Rule 24(b). This grant of additur authority is restricted to trial courts because of the difference between trial and appellate functions. Extension to the appellate level of the additur authority granted to the trial court by this section would require an appellate court to exercise discretion in the same manner as a trial court but without benefit of seeing the witnesses and hearing the testimony.

Subdivision (b). This subdivision makes it clear that the proposed section does not preclude the exercise of additur authority in any other case in which it may appropriately be exercised. It appears from the earlier cases as well as from the opinion in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952) that additur is permissible not only under the circumstances specified in subdivision (a) but also in the following cases:

(1) In any case where damages are certain and ascertainable by a fixed standard. In effect, the court by an additur order merely fixes damages in the only amount justified by the evidence and the only amount that 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 conditional order granting a new trial requires the consent of both plaintiff and defendant. Failure of either party to consent will result in granting a new trial; hence, the plaintiff retains control over whether or not he will receive a second jury trial. Since consent of both parties operates to waive each party's right to a jury

trial, there can be no complaint to this form of additur. Hall v. Murphy, 187 Cal. App.2d 296, 9 Cal. Rptr. 547 (1960).

(3) In any case where the court fixes damages in the highest amount justified by the evidence even though only the consent of the defendant is obtained. Since any amount in excess of this sum would be excessive as a matter of law, the plaintiff could not possibly receive a higher amount from any jury. Dorsey v. Barba, 38 Cal.2d 350, 358, 240 P.2d 604, 608 (1952) ("the plaintiff has actually been injured if, under the evidence, he could have obtained a still larger award from a second jury"); Dorsey v. Barba, 226 P.2d 677, 690 (Cal. Dist. Ct. App. 1951).

Subdivision (b) also leaves the California Supreme Court free to modify, limit, or even overrule Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952) 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.