#55 7/12/66

Memorandum 66-38

Subject: Study 55(L) - Additur

Attached are two copies of the Tentative Recommendation Relating to Additur (December 31, 1965). The fact that this tentative recommendation has been available for distribution was noted in State Bar publications and in the legal newspapers. The entire recommendation (excluding the proposed legislation and Comments) was printed in at least one legal newspaper in Los Angeles. (We read only one.) The tentative recommendation also was sent to the State Bar and the Judicial Council for comment. Neither sent us comments on the tentative recommendation. Mr. Harvey visited the office of the National Bureau of Casualty Underwriters in San Francisco and went over the recommendation with Perry Taft, their legislative representative in Sacramento. We understand that the tentative recommendation also was sent to the National Bureau of Casualty Underwriters office in New York for review. We received no comments from the National Bureau and Mr. Taft presently plans to take no position on the recommendation.

Mr. Elmore, Special Counsel of the State Bar, who provides service to the Committee on the Administration of Justice, has advised us orally and informally that the Committee considered this tentative recommendation but was unable to come up with a report on it. He reports that the Committee was generally of the feeling that additur should be authorized, but that some of the members of the Committee felt that additur should be authorized without limitation (despite the Dorsey decision). He reports further that the Committee got bogged down on the phrasing of new Section 662.5 and because of the pressure of other work the Committee never had time to prepare a report for transmittal to us.

We suggest that you read the entire tentative recommendation and mark any suggested changes on one copy to turn in to the staff at the July meeting. We plan only to approve the bill for preprinting at the July meeting, but we plan to approve the recommendation for printing in our pamphlet published for the 1967 Legislature at the August meeting. By giving us your suggested changes in the recommendation at the July meeting, we can prepare a revised recommendation that can be approved for printing at the August meeting. Mr. Elmore advises us that the Committee on the Administration of Justice will give this subject a priority, but that it is unlikely that we will receive any comments until November or December. This is long after the time when it must be sent to the printer.

The only suggestion we received for revision of the proposed legislation concerns Section 662.5. Mr. Elmore advised us orally that some members of the Committee on the Administration of Justice took the view that Section 662.5 would be clearer if it were stated in terms of the order that the court would make. In other words, the section should state that the court may order a new trial or, in the alternative, order an increase in the amount of damages, and that the new trial order would be effective only if the party opposing the motion for a new trial fails to consent to the addition in damages. This is the clear implication of the section as drafted and the Comment to the section also states in part: "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."

We present the following redraft of Section 662.5 for your consideration:

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.

We have no other changes to suggest in the statute. We expect to have a revised research study in your hands prior to the time we will ask you to approve the printing of the pamphlet containing this recommendation.

Respectfully submitted,

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.

January 1, 1966

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

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

#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 amount 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. Section 657 lists "excessive damages, appearing to have been given under the influence of passion or prejudice" (subdivision 5) and "insufficiency of the evidence to justify the verdict" (subdivision 6) as independent grounds for granting a new trial. An inadequate award of damages is not explicitly recognized as an independent ground for granting a new trial. However, an inadequate award of damages has long been held to constitute a sufficient basis for granting a new trial on the ground of "insufficiency of the evidence to justify the verdict." Crowe v. Sacks, 44 Cal.2d 590, 599, 283 P.2d 689, 694 (1955) (dictum); Spencer v. Young, 194 Cal. App.2d 252, 14 Cal. Rptr. 742 (1961); Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954); Phillips v. Lyon, 109 Cal. App. 264, 292 Pac. 711 (1930) (dictum)(by implication); 3 WITKIN, CALIFORNIA PROCEDURE 2066-68 (1954). It has also been held that 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 that neither passion or 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). Thus, in effect, subdivision 5 of Section 657 has been read out of the statute insofar as it may be more restrictive than subdivision 6.

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 set aside the jury verdict and 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). This is true even though, in determining whether to grant a new trial on the ground of "insufficiency of the evidence to justify the verdict" (which includes the ground of excessive or inadequate damages), the trial judge acts as "a thirteenth juror" who has not only the power but also the duty to weigh the evidence to determine whether it supports the verdict, judge the credibility of witnesses, and exercise his independent judgment in determining whether to set aside the jury verdict. See, e.g., Weinman v. Gray, 206 Cal. App.2d 817, 24 Cal. Rptr. 189 (1962); Norden v. Hartman, 111 Cal. App.2d 751, 758, 245 P.2d 3, 8 (1952); Tice v. Kaiser Co., 102 Cal. App.2d 44, 226 P.2d 624 (1951); Parks v. Dexter, 100 Cal. App.2d 521, 224 P.2d 121 (1950). The trial court's ruling granting a motion for a new trial will not be disturbed on appeal unless there is no substantial evidence to support a contrary verdict, or an abuse of discretion clearly appears. E.g., Malkasian v. Irwin, 61 Cal.2d 738, 40 Cal. Rptr. 78, 394 P.2d 822 (1964); Yarrow v. State of California, 53 Cal.2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960); Spencer v. Young, 194 Cal. App.2d 252, 14 Cal. Rptr. 742 (1961). As amended in 1965, however, the California statute now indicates 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.").

Although some corrective device must be available to the judge when he 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 consequences [of granting new trials] have been to prolong litigation,

to swell bills of cost, to delay final adjudications, 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 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); Note, 40 CALIF. L. REV. 276 (1952); Comment, 44 YALE L. J. 318 (1934); 28 CALIF. L. REV. 533 (1940); 12 HASTINGS L. J. 212 (1960); 14 SO. CAL. L. REV. 490 (1941); 6 U.C.L.A. L. REV. 441 (1959). 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 decision 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. Dorsey v. Barba, 38 Cal.2d at 368, 240 P.2d at 614 (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."); Note, 40 CALIF. L. REV. 276, 285 (1952).

Extent to Which Additur is Now Available in California

Dorsey v. Barba is perhaps thought by some to preclude additur in California under all circumstances. In fact, however, the opinion in that case is susceptible of a narrower reading. Indeed, it seems reasonable to conclude, from the earlier cases as well as from the Dorsey opinion itself, that additur is not unconstitutional per se and is permissible in at least 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 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, 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); Note, 40 CALIF. L. REV. 276, 285-86 (1952).

Use of Additur Where Jury Verdict Supported by Substantial Evidence

In addition to the cases listed above, additur would appear to be constitutionally permissible without the plaintiff's consent in any case where granting a new trial on the ground of inadequate damages is appropriate but the jury verdict is supported by substantial evidence and would be affirmed on appeal from the judgment (hereinafter referred to as "substantial evidence cases"). The Law Revision Commission believes that additur should be available in substantial evidence cases and hereinafter recommends that legislation expressly authorizing its use in such cases be enacted. California trial judges do not appear, however, to be using additur as an alternative to ordering a new trial in substantial evidence cases, apparently because of doubts concerning its constitutionality. Moreover, in view of the Dorsey decision, lawyers and judges alike will no doubt question whether it would be constitutional to permit the use of additur in substantial evidence cases, even if such use were expressly authorized by statute. Because the Commission's recommendation that additur be available in such cases may appear to present 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 substantial evidence cases, 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 the motion for a new trial will become effective. 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 neither required nor given, 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. However, a careful analysis of the Dorsey case indicates that it neither holds nor requires a holding that an objection would be well taken if made in a case where the jury verdict on the issue of damages is supported by substantial evidence.*

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

*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.

pain and disfigurement. The plaintiff's 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 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 as to the original verdict that was rendered in the case. The majority apparently viewed the verdict as one subject to reversal on appeal because the plaintiffs had not had a jury determination of the issue of damages supported by substantial evidence.

The minority justice apparently viewed the verdict as being sufficiently supported by the evidence so that the plaintiff had no constitutional right to a new trial and, hence, the verdict satisfied his constitutional right to a jury trial.

That this is a correct interpretation of Dorsey is suggested by the majority's statement that the original verdict awarded damages in amounts that were less than the proven special damages and contained no award whatsoever for pain or disfigurement (38 Cal.2d at 355, 240 P.2d at 607). Upon that interpretation of the verdict, it would follow that the jury had failed to make a finding on a material issue--the issue of damages for pain and disfigurement. In this view, the plaintiffs had not received a proper jury determination on the issue of damages and, when the trial court entered a judgment based upon its own determination of this issue, it denied the 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)).*

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.

---

*In Gearhart v. Sacramento City Lines, 115 Cal. App.2d 375, 252 P.2d 44 (1953), the jury verdict was for exact amount of special damages. The appellate court held that the trial court erred when it made an additur order increasing the damages by $1,000. This result is consistent with the Commission's analysis of the Dorsey decision.

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 it was satisfied by the rendition of a jury verdict supported by substantial evidence. He is appealing, rather, to the trial judge for a review of the jury's determination, sitting as a thirteenth juror. 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 he has no constitutional ground of objection.

It is essential, therefore, to distinguish the situation where the verdict is supported by substantial evidence from 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--so long as Dorsey v. Barba stands--constitutionally be granted authority by statute to substitute for the verdict its own determination of damages, even though the defendant consents. However, as the foregoing discussion demonstrates, where a verdict is supported by substantial evidence, both parties' right to a jury trial of the issue of damages has been satisfied. 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 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 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 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 available in any appropriate case, including one where the jury verdict is excessive as a matter of law. See, 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). Thus, if the Commission's recommendation is adopted, there will continue to be a disparity between additur and remittitur in California law. Nevertheless, the Commission recommends no change in the law relating to remittitur to make it

consistent with the recommendation on additur, i.e., to limit the use of remittitur to cases where the jury verdict is not excessive as a matter of law. 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 ~~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. 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 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 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) A new trial limited to the issue of damages 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 "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).

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 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 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, 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); Note, 40 CALIF. L. REV. 276, 285-86 (1952).

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.