

CIVIL PROCEDURE—ADDITUR DOES NOT IMPAIR RIGHT TO JURY TRIAL AND IS A PROPER PROCEDURE SUITED TO EFFICIENT ADMINISTRATION OF JUSTICE. *Jehl v. Southern Pacific Company* (Cal. 1967).

Plaintiff, Jehl, while working as a field man in defendant Southern Pacific Company's railroad yard, was permanently injured when a rail car collision caused him to be thrown beneath the wheels of a moving car. His right leg was amputated, and at the time of trial an osteomyelitis condition posed a similar threat to the left leg. Jehl brought an action for personal injuries under the Federal Employers' Liability Act<sup>1</sup> and the Safety Appliance Act<sup>2</sup> in a state superior court.<sup>3</sup> Nineteen at the time of the accident, plaintiff's projected earnings to age sixty-five exceeded \$500,000. The jury returned a verdict for the plaintiff totaling \$100,000. Plaintiff's motion for a new trial on the ground that the damages awarded were inadequate was granted.<sup>4</sup> Defendant appealed, contending *inter alia*, that the trial court should have given him the option to consent to an additur prior to granting the motion for a new trial.<sup>5</sup> The Supreme Court of California *held*, affirmed with directions: the order granting a new trial limited to damages should stand unless the trial judge in his discretion ordered an additur. *Jehl v. Southern Pacific Company*, 66 Adv. Cal. 853, 427 P.2d 988, 59 Cal. Rptr. 276 (1967).

By its unanimous action in *Jehl*, California's highest court has clearly authorized additur and determined that such procedure does not deprive a plaintiff of the right to a jury trial as guaranteed by the

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<sup>1</sup> 45 U.S.C. §§ 51-60 (1964).

<sup>2</sup> 45 U.S.C. §§ 1-16 (1964).

<sup>3</sup> Pursuant to the Federal Employers' Liability Act, the employee may choose the forum, state or federal, in which to bring the action. 45 U.S.C. § 56 (1964). However, when an action is brought in a state court, the substantive matters are controlled by federal law and the procedural matters are governed by the law of the forum. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942).

<sup>4</sup> CAL. CODE OF CIV. PROC. § 657 (West 1955).

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:

6. Insufficiency of the evidence to justify the verdict or other decision . . . .

<sup>5</sup> The supreme court decided to consider this contention although defendant did not formally request an additur at trial level. It pointed out that in light of *Dorsey v. Barba*, 38 Cal. 2d 350, 240 P.2d 604 (1952), such a request would have been an idle act. 66 Adv. Cal. at 858-59, 427 P.2d at 991-92, 59 Cal. Rptr. at 279-80. The failure to perform an idle act does not constitute a waiver of legal right. CAL. CIV. CODE § 3532 (West 1954); *Robinson v. Puls*, 28 Cal. 2d 664, 667, 171 P.2d 430, 432 (1946).

California Constitution<sup>6</sup> or as accorded by the Federal Employers' Liability Act.<sup>7</sup> Additur, which has also been called "increscitur,"<sup>8</sup> was defined by the court as "an order by which a plaintiff's motion for a new trial on the ground of inadequate damage is granted unless the defendant consents to a specified increase of the award within a prescribed time."<sup>9</sup>

Critical to a discussion of *Jehl* is an examination of *Dorsey v. Barba*.<sup>10</sup> Until that case was decided in 1952, the California Supreme Court had never squarely faced the question of whether additur was constitutionally valid.<sup>11</sup> In *Dorsey*, the plaintiffs brought an action for personal injuries arising out of an automobile accident. The jury returned verdicts in favor of the plaintiffs, and the trial court granted plaintiffs' motion for a new trial on the ground of insufficiency of the evidence to support the verdict, unless the defendant consented to a specified increase in the amount of the verdict. The defendant consented and the plaintiffs, who did not consent, appealed from the judgement. On appeal, it was held that the additur resulted in a denial of the plaintiff's right to a jury trial as guaranteed by the California Constitution.<sup>12</sup> It was not mere formal compliance that

<sup>6</sup> CAL. CONST. art. 1, § 7. "The right of trial by jury shall be secured to all, and remain inviolate . . . ."

<sup>7</sup> The court concluded that its holding as to the validity of additur was not changed because the case was brought under the Federal Employers' Liability Act. The Act presented the court with the problem that if the seventh amendment applied to it, the ordering of an additur in cases brought pursuant to it in the state court would be unconstitutional in light of the rule laid down by the United States Supreme Court in *Dimick v. Schiedt*, 239 U.S. 474 (1935). This obstacle was avoided by the court in relying upon *Dice v. Akron, Canton & Y.R.R. Co.*, 342 U.S. 359 (1952), which the court interpreted to stand for the proposition that in actions brought in the state courts under the Federal Employers' Liability Act, the judge-jury relationship is determined by the United States Supreme Court's interpretation of the Act, not their interpretation of the seventh amendment. Therefore, the seventh amendment was inapplicable and the *Dimick* case should not control. 66 Adv. Cal. 853, 865-67, 427 P.2d 988, 996-97, 59 Cal. Rptr. 276, 284-85 (1967).

<sup>8</sup> McCORMICK, DAMAGES § 19 at 82 (1935).

<sup>9</sup> 66 Adv. Cal. at 859 n.1, 427 P.2d at 991 n.1, 59 Cal. Rptr. at 279 n.1.

<sup>10</sup> 38 Cal. 2d 350, 240 P.2d 604 (1952).

<sup>11</sup> Before *Dorsey*, the California appellate court opinions implied that additur was valid. 3 WITKIN, CALIFORNIA PROCEDURE 2094 (1954). See generally *Blackmore v. Brennan*, 43 Cal. App. 2d 280, 289, 110 P.2d 723, 738 (1940) (acceptance of the condition constitutes a waiver by the aggrieved party of his constitutional rights to resubmit his cause to the jury); *Secreto v. Carlander*, 35 Cal. App. 2d 361, 364, 95 P.2d 476, 477 (1939) (new trial was granted when the defendant refused to accept an additur); *Adamson v. County of Los Angeles*, 52 Cal. App. 125, 198 P. 52 (1921) (in a condemnation case additur was allowed where the damages were liquidated or could be easily ascertained from the evidence). But see, *Taylor v. Pole*, 16 Cal. 2d 668, 674, 107 P.2d 614, 617 (1940) (the supreme court leaving the question of additur open seemed to recognize its validity had not been finally settled).

<sup>12</sup> 38 Cal. 2d at 355-59, 240 P.2d at 607-09.

concerned the *Dorsey* majority, but the substantive right—that fundamental right to have a jury determination of the factual question of damages.<sup>13</sup>

The assessment of damages by the court where they are speculative and uncertain constitutes more than a technical invasion of plaintiff's right to a jury determination of that issue. Despite the fact that he has apparently benefitted by the increase, the plaintiff has actually been injured, if under the evidence, he could have been obtained a still larger award from the second jury.<sup>14</sup>

Additur in California after *Dorsey* and before *Jehl*, was available only if both parties consented to it.<sup>15</sup> The rationale of additur by stipulation was that plaintiff's consent thereto constituted a waiver of the right to a jury determination of the issue of damages.<sup>16</sup> In reality, the limitations placed upon additur by the *Dorsey* rule were such that it ceased to exist effectively in California.<sup>17</sup>

To reestablish additur<sup>18</sup> as an effective judicial tool, the *Jehl* court was compelled to overrule *Dorsey*.<sup>19</sup> The chief justice attacked the *Dorsey* court's strong reliance upon *Dimick v. Schiedt*,<sup>20</sup> a severely criticized,<sup>21</sup> five to four decision<sup>22</sup> in which the United States Supreme Court held that additur violated a plaintiff's right to a jury trial under the seventh amendment of the United States Constitution.<sup>23</sup> In

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<sup>13</sup> *Id.* at 358, 240 P.2d at 609.

<sup>14</sup> *Id.* at 358, 240 P.2d at 608.

<sup>15</sup> See *Hall v. Murphy*, 187 Cal. App. 2d 296, 9 Cal. Rptr. 547 (1960).

<sup>16</sup> *Id.*

<sup>17</sup> See Bender, *Additur—The Power of the Trial Court to Deny a New Trial on the Condition that Damages be Increased*, 3 CALIF. W.L. REV. 1, 18-20 (1967) noting that it is unrealistic to assume that consent of both parties may be obtained and that on only two occasions since *Dorsey* had an additur, entered without the plaintiff's consent, been appealed in California. The first, *Gearhart v. Sacramento City*, 115 Cal. App. 2d 375, 252 P.2d 44 (1953) held that *Dorsey* had settled that the trial court had no power to make such an order. The other decision, *Morgan v. Southern Pacific Co.*, 173 Cal. App. 2d 282, 343 P.2d 330 (1959) simply distinguished *Dorsey* on the ground that here there was no finding that the verdict was inadequate and lacked the support of the evidence.

<sup>18</sup> See cases cited note 11 *supra*.

<sup>19</sup> 66 Adv. Cal. at 859-60, 427 P.2d at 992, 59 Cal. Rptr. at 280 (1967).

<sup>20</sup> 293 U.S. 474 (1935).

<sup>21</sup> Some twenty-one law reviews criticized the *Dimick* case; however in one, Note, 21 VA. L. REV. 666 (1935), the author approved of the result in *Dimick*, but contended that remittitur also should be declared unconstitutional.

<sup>22</sup> The dissenting opinion was written by Justice Stone, and concurred in by Chief Justice Hughes, and Justices Brandeis and Cardozo.

<sup>23</sup> U.S. CONST. amend. VII.

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 reexamined in any Court of the United States, than according to the rules of common law.

*Dimick*, the plaintiff brought an action in the federal court for personal injuries resulting from an automobile accident. The trial judge entered an order granting the plaintiff a new trial unless the defendant consented to an increase in the jury's award of \$500 to \$1500. The defendant consented; however, the plaintiff appealed when his motion for a new trial was denied. The majority reasoned that since additur did not exist at common law, prior to adoption of the seventh amendment, its use deprived a plaintiff of his right to a jury trial as it then existed.<sup>24</sup> The rule at common law precluded a court from increasing the amount of damages awarded by a jury.<sup>25</sup> Such premise was advanced notwithstanding the Court's recognition that the historical origins of remittitur were equally as obscure as those of additur.<sup>26</sup> Further, the federal courts had allowed remittitur for decades and its constitutionality had been upheld by the Supreme Court on more than one occasion.<sup>27</sup> Hardpressed to overcome this inconsistency, the *Dimick* majority sought to distinguish remittitur from additur by announcing:

Where the verdict is excessive, the practice of submitting a remission of the excess for a new trial is not without plausible support in 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.<sup>28</sup>

Such artificial and tenuous reasoning was strongly criticized by the *Jehl* court. In reaching the larger verdict involved in remittitur, it was pointed out that the jury had rejected all smaller amounts just as they had rejected all larger amounts in reaching the smaller verdict involved in additur. In both additur and remittitur something had been taken from the litigant who was relying on the verdict.<sup>29</sup>

The court further indicated that the *Dimick* case should not have been controlling in any event, since the state court was not bound by the seventh amendment's reexamination clause.<sup>30</sup> That clause, which

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<sup>24</sup> 293 U.S. at 476-82.

<sup>25</sup> *Id.* at 482.

<sup>26</sup> See *Bender*, *supra* note 17, at 11.

<sup>27</sup> See, e.g., *Gila Valley, Glove & Northern Ry. v. Hall*, 232 U.S. 94 (1914); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Northern Pacific R.R. v. Herbert*, 116 U.S. 642 (1886).

<sup>28</sup> 293 U.S. at 486.

<sup>29</sup> 66 Adv. Cal. at 860 n.8, 427 P.2d at 992 n.8, 59 Cal. Rptr. at 280 n.8.

<sup>30</sup> See, e.g., *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877); and *Walker v. Sauvient*,

states: "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is significantly absent from the California constitutional provision.<sup>31</sup>

The California constitutional right to a jury trial was intended to accomplish two functions: First, to operate at the time of the trial, to require the submission of certain issues to the jury; and second, to operate after the verdict has been rendered, to prohibit improper interference with the jury's decision.<sup>32</sup> In moving for a new trial on the ground that the jury's determination of damages is inadequate, a plaintiff is not asking for the constitutional protection of his right to have a jury determine that issue. In making such a motion the plaintiff should be estopped from raising the constitutional protection which he has repudiated. Moreover, he should not be permitted to complain where the court, with the defendant's consent, has increased the amount of the jury's award. Indeed, the right to a jury trial in California is historical,<sup>33</sup> and early English and California cases<sup>34</sup> indicate that when the constitutional right to a jury trial was established it was regarded as protection for those relying upon a verdict, and not those attacking it.<sup>35</sup> In both additur and remittitur the parties

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92 U.S. 90, 92 (1875) (holding that the seventh amendment is not binding on the states).

<sup>31</sup> Compare note 23 *supra* with note 6 *supra*. It has been suggested that the reasons for California's omission of the reexamination clause were that the clause was entirely different in spirit and effect from the first clause in the seventh amendment, that it carried the federal Constitution beyond the substance of the common law right to trial by jury, and that it was declared by the United States Supreme Court in *Parsons v. Bedford*, 3 Pet. 433, 447 (1830) to be "substantial and independent" from the first clause. 38 Cal. 2d at 370, 240 P.2d at 616 (concurring and dissenting opinion).

<sup>32</sup> 66 Adv. Cal. at 861, 427 P.2d at 993, 59 Cal. Rptr. at 281.

<sup>33</sup> *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 287, 231 P.2d 832, 835 (1951).

It is the right to trial by jury as it existed at common law which is preserved; and what that right is is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. It is necessary, therefore, to ascertain what was the rule of the English common law upon this subject in 1850.

See also Comment, 2 U.C.L.A.L. REV. 370 (1955). In California the jury trial guarantee originally was in the Constitution of 1849, Art. I, Sec. 3, but California was not formally admitted to the Union until 1850. 1 CAL. JUR. 2d xix, xxxii (1952).

<sup>34</sup> For a thorough discussion and development of these early English and California cases establishing the judge-jury relationship as it existed in 1849, see the scholarly concurring and dissenting opinion of Justice Traynor in *Dorsey v. Barba*, 38 Cal. 2d at 364-69, 240 P.2d at 612-15.

<sup>35</sup> 38 Cal. 2d at 363, 240 P.2d at 611-12 (concurring and dissenting opinion).

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.

moving for a new trial are not relying on the verdict, they are attacking it, and the constitutional right to complain of additur lies with the defendant until he agrees to pay more than the verdict, just as the constitutional right to complain of remittitur lies with the plaintiff, until he agrees to accept less than the verdict.

Chief Justice Traynor readily acknowledged that additur ultimately results in an award based on a finding made by the trial judge and not the jury.<sup>36</sup> However, he pointed out, judges constitutionally may, and do, under appropriate circumstances, determine issues of fact.<sup>37</sup>

It is conceded that additur does impinge upon a plaintiff's right to a new trial as prescribed by Section 657 of the California Code of Civil Procedure, but a defendant has been subjected to the same limitation by the practice of remittitur for over one hundred years.<sup>38</sup> Moreover, the reasons that prevent constitutional guarantees from yielding to modern procedures promoting efficiency and economy are not present where a purely statutory right is concerned.<sup>39</sup> Neither additur nor remittitur is primarily involved with a plaintiff's or defendant's constitutional right to a jury trial since in every applicable situation each has had that right in the first instance. What is involved is the procedural and statutory right to a new trial and the limitations that may be placed upon that right in the name of the efficient administration of justice.

Probably the strongest argument in favor of rejecting *Dorsey* is based on logic and fairness. As Chief Justice Traynor has remarked, "[t]o hold remittitur constitutional and additur unconstitutional is not only illogical—it is unfair."<sup>40</sup> Even the majority in *Dorsey* admitted that, "[t]here may be no real distinction between the powers to increase and decrease an award of damages."<sup>41</sup> Both additur and remittitur are conditional orders issued by the trial court to bring the verdict within permissible bounds. Additur is conditioned upon the defendant consenting to an increase in the verdict, while remittitur

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<sup>36</sup> 66 Adv. Cal. at 862, 427 P.2d at 994, 59 Cal. Rptr. at 282.

<sup>37</sup> The court gives such examples as admitting and excluding evidence, determining the sufficiency of pleadings, the interpretation of documents, and the quasi-judicial fact finding found in equity, admiralty, probate, divorce, bankruptcy, and administrative proceedings.

<sup>38</sup> See, e.g., *George v. Law*, 1 Cal. 363, 365 (1851) (plaintiff's consent authorized remittitur and defendants could not complain, because the judgment stands for but one-half the amount, for which the verdict of the jury was rendered).

<sup>39</sup> 38 Cal. 2d at 365-67, 240 P.2d at 613-14 (concurring and dissenting opinion).

<sup>40</sup> *Id.* at 368, 240 P.2d at 614-15 (concurring and dissenting opinion).

<sup>41</sup> *Id.* at 359, 240 P.2d at 609.

is conditioned upon the plaintiff consenting to a reduction in the verdict. Thus both involve the question of whether the trial court has the power to *alter the amount of damages* awarded by the jury. The conclusion is inescapable:

[I]n neither does the jury return a verdict for the amount actually recovered, and in both the amount of recovery was fixed, not by the verdict but by the consent of the party resisting the motion for a new trial.<sup>42</sup>

The practical considerations of additur are evident, and are the same as remittitur. Often at the termination of lengthy and costly litigation one or both of the parties is dissatisfied with the amount of the verdict. To require a new trial in every case where only the amount of the verdict was in question was not only dilatory but an added expense to all concerned. It became obvious that a more expedient device was required; thus, as a means of achieving this end, and to secure substantial justice by bringing the litigation to a more speedy and economical conclusion, the practices of remittitur and additur were developed.<sup>43</sup>

The *Dorsey* case was an obstacle to the efficient administration of justice in California, and with the constant increase of civil litigation<sup>44</sup> it was destined to be overruled. Moreover, serious doubt was cast on the efficacy of the *Dorsey* decision by the sound and persuasive dissenting opinion written by Justice Traynor in that case. It was the substance of that dissent which emerged as the foundation of *Jehl*, with Chief Justice Traynor, speaking for a unanimous court, establishing as law that which he proclaimed in dissent some fifteen years earlier.

The old familiar saying seems peculiarly applicable: "What is sauce for the goose, is sauce for the gander"; if remittitur is allowed, so must be additur.

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<sup>42</sup> 293 U.S. at 494 (dissenting opinion).

<sup>43</sup> See generally Comment, 40 CALIF. L. REV. 276 (1952); Comment, 44 YALE L.J. 318 (1934).

<sup>44</sup> In *Jehl*, the court notes that just since 1952, the year *Dorsey* was decided, the total dispositions in ordinary civil litigation increased more than four times by the year 1964. 66 Adv. Cal. at 860-61, 427 P.2d at 993, 59 Cal. Rptr. at 281.