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Additur: Application and Constitutionality

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NOTES

ADDITUR: APPLICATION AND CONSTITUTIONALITY

Additur is a conditional order issued on a motion for a new trial, granting a new trial unless the party relying on the verdict consents to increasing the award. Its procedural opposite is remittitur, where a new trial is granted unless a decrease in the award is agreed to by the party relying on the verdict.[1]

The granting of new trials on grounds of inadequate or excessive damages is a great hindrance in judicial administration. Resulting delays and the increase of litigant's costs are evils that courts and legislatures seek to avoid by eliminating new trials where damages are the only issue.[2] Professor McCormick has written: "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."[3]

Thus, the purpose of these devices is simply the improvement of the course of litigation by the use of expeditious corrective measures where damages are excessive or inadequate. In this day of overcrowded court calendars, devices of this type should be most welcome.

In California, remittitur has been allowed for over a hundred years,[4] and it now appears that its place as a valid procedure is thoroughly settled.[5] The status of additur, on the other hand, has been confused and unclear.

Before the relatively recent case of *Dorsey v. Barba*,[6] appellate courts in California had indicated that additur was a valid procedure[7] although the Supreme Court had recognized that a conflict of authority existed.[8] In *Dorsey v. Barba*, a personal injury action, the plaintiff, upon the rendering of the jury verdict in his favor, moved for a new trial on the ground of inadequate damages. The court issued an additur order, granting a new trial

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[1] For general surveys of additur and remittitur see Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1 (1942); Comment, 44 YALE L. J. 318 (1934). For a survey of additur in California see Comment, 40 CALIF. L. REV. 276 (1952). For notes on California cases see 28 CALIF. L. REV. 533 (1940), 14 SO. CAL. L. REV. 490 (1941), 3 STAN. L. REV. 738 (1951).

[2] See Comment, 44 YALE L. J. 318 (1934).

[3] MCCORMICK, DAMAGES 77 (1935); see also Comment, 40 CALIF. L. REV. 276, 285 (1952).

[4] Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952); Hart v. Farris, 218 Cal. 69, 21 P.2d 432 (1933); Miller v. Atchison T. & S. F. Ry., 166 Cal. App. 2d 160, 332 P.2d 746 (1958); Engle v. Farrell, 75 Cal. App. 2d 612, 171 P.2d 588 (1946).

[5] Dorsey v. Barba, *supra* note 4, at 356, 240 P.2d at 609.

[6] *Supra* note 4.

[7] Blackmore v. Brennan, 43 Cal. App. 2d 280, 110 P.2d 723 (1941) (additur recognized as established power of trial court); Secreto v. Carlander, 35 Cal. App. 2d 361, 95 P.2d 476 (1939) (additur not accepted by defendant; new trial granted); Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921) (additur held within power of trial court to make verdict conform to evidence).

[8] Taylor v. Pole, 16 Cal. 2d 668, 107 P.2d 614 (1940).

unless the defendant agreed to an increase in the award. The defendant agreed but the plaintiff appealed. The District Court of Appeal for the First District held that additur, where the damages are unliquidated, constituted a denial of plaintiff's constitutional right to have a jury determine the amount of damages.[9]

In the California Supreme Court the same result was attained in a decision based largely on the authority of Dimick v. Schiedt.[10] There, on similar facts, the United States Supreme Court held that a federal district court did not have the power to issue an additur order. Additur was viewed as an abridgment of the right to a jury trial as guaranteed by the United States Constitution.[11]

By the same token, the California Supreme Court founded its decision on the provision under the California Constitution[12] which requires the preservation of all substantive elements of jury trial as they existed at common law. The final determination of damages was found by the court to be included among those elements. The court thus concluded that there is an abridgment of the right to jury trial where a motion for a new trial is denied upon the defendant's agreement to increase an inadequate award.[13]

The *Dorsey* decision, however, did not settle the status of additur completely since it dealt only with unliquidated damages. Other California decisions were distinguished on procedural or factual grounds rather than expressly overruled.[14]

Among those cases distinguished was *Adamson v. County of Los Angeles*,[15] a condemnation proceeding, where additur was used to correct a jury verdict which had neglected to include compensation for a specific amount of fenceline. The District Court of Appeal held that a trial court had the power to issue an additur order to make the verdict conform to the evidence.[16]

The *Adamson* case is distinguished in the *Dorsey* opinion on the grounds that, in *Adamson*, the damages were certain and computable.[17] Thus, while there are few cases upholding this proposition,[18] and although the issue has never been squarely placed before the Supreme Court, it nevertheless ap-

[9] Dorsey v. Barba, 226 P.2d 677 (D.C.A. Cal. 1951).

[10] 293 U.S. 474 (1935).

[11] U. S. CONST. amend. VII.

[12] CALIF. CONST. art. I, § 7: "The right to trial by jury shall be secured to all, and remain inviolate . . . ."

[13] Dorsey v. Barba, *supra* note 4, at 358, 240 P.2d at 609.

[14] *Id.* at 356, 240 P.2d at 609.

[15] 52 Cal. App. 125, 198 Pac. 52 (1921).

[16] *Id.* at 128. 198 Pac. at 55.

[17] Dorsey v. Barba, *supra* note 4 at 357n, 240 P.2d at 608n.

[18] County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 Pac. 27 (1921); *accord*, Eaton v. Jones, 107 Cal. 487, 40 Pac. 798 (1895) (property omitted from decree in quiet title action added by conditional order), Dorsey v. Barba, *supra* note 9, at 683 (dictum); *cf.* City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1929). Reaching the same result by a different approach is United States v. Kennesaw Mountain Battlefield Ass'n, 99 F.2d 830 (5th Cir. 1938), *cert. denied* 306 U.S. 646 (1938) (guaranties of seventh amendment respecting right to jury trial held not to apply in condemnation proceeding).

pears that additur is allowable in California where the damages are certain and computable.

The question remains, though, as to the constitutional issue involved in additur. More precisely, if additur is allowed in a case where the damages are certain, is plaintiff's right to a jury trial impaired? It appears not, but the answer is incomplete without the reason behind it.

The California cases provide no answer but other jurisdictions allow additur only in situations where damages are certain [19] and a clue is provided by a case from one of those jurisdictions. In *Rudnick v. Jacobs*, [20] a Delaware personal injury case, where a verdict for special damages omitted an item which had been proved and was unquestioned, additur was allowed to the extent of the omitted item. The following quotation presents the court's rationale in allowing additur:[21]

> . . . [T]he verdict in effect reduced plaintiff's claim to one for the recovery of definite pecuniary sums which are calculable to a penny. In such a case there can be no possible injury to the plaintiff if the court should direct an additur sufficient to cover the utmost of his claims. The jury could not have properly allowed him more.

The key words in the Delaware court's analysis are, "The jury could not have properly allowed him more." They imply that there is a restricted jury function which is not encroached upon by an additur order in a case where the damages are certain and computable. This suggestion appears to be valid in the light of an analysis of the cases where the damages are certain, which analysis proposes their classification into two distinct categories.[22]

The first category is where the claim is so certain and uncontroverted that a jury could properly find only one amount, as in an action to recover a statutory penalty or an action on an ordinary promissory note. In such a case the nature of the cause of action alleged in the pleadings is determinative. Establishing the right to recover, in effect, automatically decides the amount.[23] If, by oversight or by computational error, the amount is incorrect, an additur order can properly be issued to correct the mistake. There is no infringement of the right to a jury trial since the jury has implicitly rendered the only appropriate money verdict as part of its decision regarding defendant's liability.

The second category of case where the damages are certain is marked by the definitive character of the damages, as a matter of law. This is often

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[19] Kraas v. American Bakeries Co., 231 Ala. 278, 164 So. 565 (1935) (additur allowed as to items of damage definitely established by the evidence but omitted from the verdict); E. Tris Napier Co. v. Gloss, 150 Ga. 561, 104 S.E. 230 (1920) (additur allowed, on defendant's counterclaim, to include definite and specific amounts to which defendant entitled, and which plaintiff agreed to pay, but which the jury had failed to include); Yep Hong v. Williams, 6 Ill. 2d 456, 128 N.E.2d 655 (1955) (additur limited to cases where the inadequacy of the verdict is due to the omission of some specific, definitely calculable item, and may not be extended to tort actions for recovery of unliquidated damages); Fall v. Tucker, 113 Kan. 713, 216 Pac. 283 (1923) (additur authorized when the deficiency can be ascertained by a mathematical calculation).

[20] 39 Del. (9 Harr.) 169, 197 Atl. 381 (1938).

[21] *Id.* at 171, 197 Atl. at 383.

[22] Carlin, *supra* note 1, at 25 suggests an analysis of the remittitur cases is applicable to additur as well.

[23] Carlin, *supra* note 1, at 5.