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Santa Clara Law Review

Volume 8 | Number 1 Article 7

1-1-1967

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Daniel J. Kelly, Case Note, *California Restores Additur: Jehl v. Southern Pacific Co. (Cal. 1967)*, 8 Santa Clara Lawyer 123 (1967).
Available at: http://digitalcommons.law.scu.edu/lawreview/vol8/iss1/7

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CASE NOTE

CALIFORNIA RESTORES ADDITUR: *JEHL V. SOUTHERN PACIFIC CO.* (CAL. 1967)

INTRODUCTION

Additur refers to the power of a court to grant a new trial conditionally where the award of damages was inadequate, *i.e.*, granting it unless the defendant consents to an increase of damages to a specific amount within a prescribed time.[1] Closely analogous to additur is the practice of remittitur in which defendant's motion for a new trial on the grounds of excessive damages will be denied if plaintiff waives the part of the award considered excessive by the court.[2]

In 1952, the California Supreme Court held in *Dorsey v. Barba*,[3] that additur would deny a plaintiff's right to a jury trial on a factual issue (amount of damages), and was therefore in violation of the state constitution.[4]

Recently, the California Supreme Court, in *Jehl v. Southern Pacific Co.*,[5] expressly overruled the *Dorsey* decision in a unanimous opinion. *Jehl* held that additur does not impair the right to a jury trial and is a proper procedure suited to efficient administration of justice.

The purpose of this note is to examine the *Jehl* decision, its background, rationale and possible consequences.

BACKGROUND

The practice of remittitur has long been regarded as an established part of California law.[6] Prior to 1952, the existence of the judge's power to grant conditional additur was assumed[7] but never firmly established.[8]

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1 *See generally* Bender, *Additur—The Power of the Trial Court to Deny a New Trial on the Condition that Damages Be Increased*, 3 CAL. WESTERN L. REV. 1 (1966).

2 *See generally* Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1 (1942).

3 38 Cal. 2d 350, 240 P.2d 604 (1952).

4 CAL. CONST. art. I, § 7 provides: "The right of trial by jury shall be secured to all, and remain inviolate. . . ."

5 66 A.C. 853, 427 P.2d 988, 59 Cal. Rptr. 276 (1967).

6 *See, e.g.*, Davis v. Southern Pacific Co., 98 Cal. 13, 32 P. 646 (1893); George v. Law, 1 Cal. 363 (1851).

7 *See, e.g.*, Blackmore v. Brennan, 43 Cal. App. 2d 280, 110 P.2d 723 (1941); Secreto v. Carlander, 35 Cal. App. 2d 361, 95 P.2d 476 (1939).

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

A. *Dorsey v. Barba*

The first time the question of additur was squarely presented before the California Supreme Court was in *Dorsey v. Barba*.[9] Plaintiff sought to recover damages for personal injuries sustained in an automobile accident. The jury returned verdicts against defendant and judgment was entered accordingly. Plaintiff's motion for a new trial on the ground of insufficiency of the evidence to support the verdict[10] was denied on the condition that defendant consent to an increase of the amount of damages in a sum determined by the court. Defendant consented and plaintiff appealed from the modified judgment. On appeal the California Supreme Court held that, in a case involving unliquidated damages, the denial of a new trial on condition of defendant's consenting to an increase of the amount of an inadequate award abridged plaintiff's right to a trial by jury.[11]

In reaching its conclusion the court reasoned that final determination of a fact by a jury was necessary to protect the constitutional right of a jury trial, and that, even though plaintiff was benefited by the action of the trial court, he could actually be prejudiced, since there remained the possibility that a second jury might have given him a larger award than the modified judgment.[12]

Dorsey drew support for its position from the decision of the Supreme Court of the United States in *Dimick v. Schiedt*,[13] which held that additur, since it was not part of the common law, deprived the plaintiff of his right to a trial by jury as guaranteed by the seventh amendment.[14] The reasoning in *Dimick* was approved in *Dorsey* even though the seventh amendment of the United States Constitution is not binding upon the states.[15]

The *Dorsey* court admitted that "there may be no real distinction between the powers to increase and decrease an award of damages,"[16] but, the court concluded that remittitur was too firmly entrenched in the law to be questioned.

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9 38 Cal. 2d 350, 240 P.2d 604 (1952).

10 Prior to 1967, inadequacy of damages awarded by the jury was not an explicit ground for granting a new trial. Thus, "insufficiency of the evidence to justify the verdict" was the specific ground relied upon in such situations. *See* p. 125 *infra*.

11 38 Cal. 2d at 358, 240 P.2d at 609.

12 *Id.* at 358, 240 P.2d at 608.

13 293 U.S. 474 (1935).

14 U.S. CONST. amend. VII provides that: "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 the common law."

15 *See, e.g.*, Pearson v. Yewdall, 95 U.S. 294 (1877); Walker v. Sauvinet, 92 U.S. 90 (1875).

16 38 Cal. 2d at 359, 240 P.2d at 609.

Dissent as to the issue of additur in *Dorsey* was registered by Justice Traynor, now Chief Justice. He contended that there was a logical similarity between additur and remittitur, saying, "to hold remittitur constitutional and additur unconstitutional is not only illogical—it is unfair. . . . I doubt whether such a procedure accords a defendant the equal protection of the laws."[17]

B. *Additur Subsequent to* Dorsey

The *Dorsey* decision did not preclude additur where both parties consented to a suggested increase in the amount of the verdict.[18] Where the plaintiff consented to additur, his consent operated as a waiver of his right to jury trial; his refusal to consent resulted in his obtaining a retrial of the case.

In *Morgan v. Southern Pacific Co.*,[19] the trial court's use of additur with only defendant's consent was sustained by distinguishing the *Dorsey* case. The court noted that in *Dorsey* it was clear from the record that the jury award lacked support in the evidence and therefore, a new trial should have been granted,[20] whereas in the *Morgan* case, the court could not determine whether plaintiff was injured or aggrieved by the increase in the verdict since the only record the plaintiff-appellant furnished was a clerk's transcript.[21] Therefore, since there was no finding that the verdict was inadequate and lacked support in the evidence, the judgment was affirmed.

In 1967, the California Legislature explicitly established inadequate damages as a ground for new trial.[22] Prior to this addition, the ground of "insufficiency of the evidence to justify the verdict" was the only ground available for granting a new trial where damages were inadequate.

The 1967 legislative session also approved of additur in civil actions where the jury's verdict on damages was supported by substantial evidence but an order granting a new trial limited to the issue of damages was nevertheless proper.[23] The legislature in adopting this procedural provision sought to limit the adherence to the rule in *Dorsey* to only those cases where the jury award lacked support in the evidence. This legislative distinguishing of the *Dorsey* case was rather

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17 *Id.* at 368, 240 P.2d at 614-15.

18 *See* Mullin v. Kaiser Foundation Hospitals, 206 Cal. App. 2d 23, 23 Cal. Rptr. 410 (1962); Hall v. Murphy, 187 Cal. App. 2d 296, 9 Cal. Rptr. 547 (1960).

19 173 Cal. App. 2d 282, 343 P.2d 330 (1959).

20 *Id.* at 284, 343 P.2d at 332.

21 *Id.*

22 CAL. CODE CIV. PROC. § 657 (Deering 1 Advance Leg. Serv. 1967).

23 CAL. CODE CIV. PROC. § 662.5 (Deering 1 Advance Leg. Serv. 1967).

short-lived, since the *Jehl* decision ended any need to circumvent the *Dorsey* holding.

JEHL

In the *Jehl* case, plaintiff, a 19 year old railroad worker, sued under the provisions of the Federal Employers' Liability Act for personal injuries sustained in an on-the-job accident. Due to a coupling malfunction plaintiff was thrown from the railroad car he was riding and fell under the wheels of a moving car. Plaintiff's right leg was amputated below the knee and, at the time of appeal, the left leg remained in jeopardy because osteomyelitis developed in it. Hospitalized for 16 months, plaintiff underwent 18 operations and still may require recurrent treatment. His projected earnings from the date of the accident to age 65 would have exceeded $500,000 and the projected costs of his prosthetic appliances exceeded $15,000. Plaintiff successfully moved for a new trial on the issue of damages on the ground that the evidence was insufficient to sustain the verdict in that the damages awarded were inadequate. One of the defendant's contentions on appeal was that the trial court should have given defendant the option to consent to additur before granting plaintiff's motion for a new trial.

The district court of appeal held that the trial court did not abuse its discretion in granting a new trial and found no reason to disturb the *Dorsey* case holding that additur abridged plaintiff's right to trial by jury.

In hearing the appeal, the Supreme Court of California considered the main issue to be whether the *Dorsey* decision should be overruled. Chief Justice Traynor, writing for a unanimous court, answered in the affirmative.

The decision viewed additur as a means of efficiently and expediently administering justice without impairing the right to a jury trial. The court noted that the California constitutional guarantee of a jury trial operates at the time of trial, requires certain issues to be submitted to the jury and prohibits improper interference with the jury's decision once the verdict is returned.[24] Using an historical analysis the court reasoned that the right to a jury trial was regarded as a protection to parties relying upon a verdict.[25] This last statement of the court suggests indirectly that the constitutional protection of a jury trial did not extend to parties attacking a verdict. This point was

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[24] 66 A.C. at 861, 427 P.2d at 993, 59 Cal. Rptr. at 281.

[25] *Id.* at 862, 427 P.2d at 994, 59 Cal. Rptr. at 282.

raised in Chief Justice Traynor's dissenting opinion in the *Dorsey* case.[26]

Stressing the need for problems of efficient administration of justice to be viewed in proper context, the court refused to be bound by exacting rules formulated over 150 years ago. To refute the argument that the framers of the constitution regarded the jury as the only competent finder of fact, the *Jehl* decision pointed to the acceptance of court involvement in factual determinations in admitting or excluding evidence, factual determinations regarding jurisdiction and other judicial fact finding practiced in equity, admiralty, probate, divorce, bankruptcy and administrative proceedings.[27]

The decisional guidelines in *Jehl* for determining the amount of an additur appear to be quite simple. If the court orders an additur, it should set the amount it determines from the evidence to be fair and reasonable, exercising its completely independent judgment. No formula for fixing a minimum and/or maximum amount that would be supported by the evidence is required. If the defendant objects that the increased amount is excessive, he may reject it and seek to sustain the jury's award on an appeal from the new trial order. Plaintiff, if he deems the amount insufficient, may appeal the modified judgment.[28]

Analysis and Discussion

The court in *Jehl* sought to add symmetry to the law by approving additur. The reasoning of the court was that since defendants have been required for over 100 years in California to submit to remittitur, they should also have the advantages of its "fraternal twin," additur.[29] In other words, since judges have the power to subtract, they should also be given the power to add. A review of the dubious rationalizations used to support remittitur subjects this argument to criticism.

In *Dimick*, the United States Supreme Court noted that the historical validity of remittitur was obscure and concluded that "if the question of remittitur were now before us for the first time, it would be decided otherwise."[30] The California Supreme Court in *Dorsey* pointed out that remittitur seemed to develop through a misconception of common law procedure, but the court concluded that the power of remittitur was too firmly entrenched to be questioned.[31] In-

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26 38 Cal. 2d at 363, 240 P.2d at 612.
27 66 A.C. at 862, 427 P.2d at 994, 59 Cal. Rptr. at 282.
28 *Id.* at 864, 427 P.2d at 995, 59 Cal. Rptr. at 283.
29 *Id.* at 863, 427 P.2d at 995, 59 Cal. Rptr. at 283.
30 293 U.S. 474, 484 (1935).
31 38 Cal. 2d at 359, 240 P.2d at 609.

deed, the first federal decision recognizing the power of remittitur, *Blunt v. Little*,[32] cited no authorities supporting this assumption of power. It is also interesting to note that in 1905, the House of Lords in England, the birthplace of remittitur, held that courts did not have the power to conditionally alter the amount of the verdict with an additur or remittitur without the consent of both litigants.[33] It appears, therefore, that remittitur has been recognized and upheld in California and other jurisdictions merely because it has become so deeply entrenched in the law that the courts have been unwilling to disturb it. In view of this tenuous argument for remittitur, it does not necessarily follow that because courts have this power, they should also have the power of additur.[34] While symmetry in the law may have been achieved by approving additur, it is submitted that a more logical symmetry might have been achieved by repudiating remittitur.[35]

Now that trial judges have the power of both additur and remittitur, there is raised the possibility of a trial court exerting a coercive power that could result in serious atrophy of the right to trial by jury. In actions for unliquidated damages it frequently happens that the question of settlement is discussed between counsel and the trial judge. With both the power of additur and remittitur, the judge's suggestions to facilitate settlement could take on a more powerful meaning, particularly since he now has the power to bring about a final determination in accordance with the court's own view concerning damages. Under these circumstances, counsel would be faced with a choice that, at best, could be termed illusory.

It is only natural and probable to expect that judges will make effective use of all the powers which are entrusted to them. Use of the power of additur and remittitur in this manner would result in an expeditious disposition of cases. The more success achieved by such a "technique," the more frequently it would be used. This seems particularly true in light of the constant importuning made to trial judges to speed up their work. Nonetheless it is obvious that such a use of additur and remittitur would prejudice the rights of the litigants, in particular, and would, in general, attenuate the right to a jury trial. Such forced settlements cannot be tolerated. In *Rosenberg v. Vosper*,[36] this point was clearly made when the court reasoned that, "Although efforts on the part of a trial judge to expedite proceedings

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[32] 3 F. Cas. 760 (No. 1578) (C.C. Mass. 1822).

[33] Watt v. Watt [1905] A.C. 115.

[34] *See* 21 VA. L. REV. 666 (1935).

[35] *Cf.* West v. City of San Diego, 54 Cal. 2d 469, 353 P.2d 929 (1960) wherein the rights of husbands and wives were made "symmetrical" by denying the right of either to sue for loss of consortium, notwithstanding the common law rule giving such a right to the husband.

[36] 45 Cal. App. 2d 365, 114 P.2d 29 (1941).

and to encourage settlements are ordinarily to be commended, such efforts should never be so directed as to compel either litigant to make a forced settlement."[37]

When the trial judge and counsel discuss the question of settlement during the course of the trial, the dollar figures of offer and demand are often mentioned. *Jehl* clearly points out that the trial judge in fixing the amount of additur is to exercise his completely independent judgment.[38] If during settlement talks, the judge becomes aware of the amount demanded and offered, it will be almost impossible for him to make a completely independent judgment when faced with a subsequent granting of additur. It is therefore submitted that, if trial judges are to exercise their completely independent judgments in setting the amount of additur, they then should be precluded from participating in any settlement discussions taking place during the litigation in which dollar figures of demand and offer are mentioned. For similar reasons of objectivity the judge in the pre-trial conference is generally not the same judge to hear the case, unless manpower shortage prohibits such an arrangement.[39] And even in cases of single judge courts, "[T]he judge's participation in the settlement discussions may be intentionally curtailed—especially with respect to dollar figures of offers and demands—so that no possible doubt can be held as to his full objectivity at the trial."[40]

The court in *Jehl* notes that the California constitution prohibits improper interference with the jury's decision and then proceeds to show that the rather modern practice of granting new trials for inadequate damage awards constitutes an accepted limitation to the former broad powers of the jury. The court concludes that additur is but a logical step in the growth of the law relating to unliquidated damages. To fortify such reasoning the court stresses the need for expediency in administering justice. Additur is naturally looked upon as a means of accomplishing this goal of expediency because it reduces the number of new trials.

In light of *Jehl*, doubt is raised as to the meaning and significance of the California constitutional provision regarding right to jury trial. Obviously, there must be a controlling factor for sanctioning and protecting this right in the constitution. One writer has suggested that:

> [A]s long as the law, particularly in the form of constitutional sanctions, gives to a party the *right* to a jury trial, it would seem that the

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37 *Id.* at 371, 114 P.2d at 33.

38 66 A.C. at 864, 427 P.2d at 995, 59 Cal. Rptr. at 283.

39 CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA PRETRIAL AND SETTLEMENT PROCEDURES, 193 (1963).

40 *Id.* at 194.

> right should carry with it the privilege of determining its expediency. The only object in protecting the right with constitutional sanctions must have been to give a litigant power to make an arbitrary choice and prevent legislators and courts from determining any question of expediency. Otherwise, the whole matter would have been trusted to legislative and judicial regulation.[41]

It is submitted that the California Supreme Court has indeed determined the question of expediency for the litigants. It seems obvious that the concept of trial by jury went through a great deal of judicial regulation in *Jehl*. Whether *Jehl* marks the limits of judicial regulation of jury trials or serves as a pivotal case that may eventually lead to unliquidated damages being determined solely by the court, remains to be seen. The latter may well be the result if expediency and efficiency control the meaning and substance of the right to jury trial.

CONCLUSION

The *Jehl* case presented the California Supreme Court with the difficult problem of deciding whether to approve the practice of additur. To reverse an earlier decision is never an easy task, particularly when that decision was based largely on a holding of the United States Supreme Court. Nor is it a simple decision to approve the counterpart of a procedure that is largely supported in the law by rather dubious rationalizations and arguments. Yet, by far the most difficult problem confronting the court in *Jehl* was determining that additur did not impair the right to trial by jury. The decision, which mainly stresses the need for modern interpretation in this area so as to solve practical problems of efficiency, fails to meet the question head on. Perhaps the court's difficulty in supporting their conclusion can best be understood if the following language is used as a framework:

> If there ever was anything which needed the aid of sophistry and artificial logic, it would seem to be a demonstration that the court, when it allows a remittitur or an additur under ordinary circumstances in a personal injury case, does not substitute its judgment for that of the jury. If the substitution takes place, how can it be asserted with any semblance of realism that the jury has tried the case and the parties have had a jury trial?[42]

The decision in *Jehl* serves to indicate that the right to trial by jury may not be quite so inviolate as once believed. It is certainly true that additur will serve to expedite the present voluminous amount of litigation. Yet, the question remains as to whether the end

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[41] Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1, 36 (1942).
[42] *Id.* at 36-37.

will justify the means. The answer to that question rests with the trial judges, for indeed, the ultimate success or failure of additur lies with them. If this practice is used in a coercive manner, the result could be a serious atrophy of the right to a jury trial. If used with proper discretion, where the trial judge exercises his completely independent judgment, it could serve as an aid in the efficient and expeditious administration of justice. However, the latter result can occur only if the search for expediency is not permitted to interfere with or control sound judicial discretion.

Daniel J. Kelly