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ADDITUR—PROCEDURAL BOON OR CONSTITUTIONAL CALAMITY

STATEMENT OF OBJECTIVES

The right to trial by jury is an integral part of the interstitial fabric of Anglo-American jurisprudence. The constitutional provisions, both state and federal, ensuring this right were enacted to preserve the historic line separating the province of the jury from that of the judge, without at the same time preventing procedural improvement which does not transgress this line. Judge and jury are not antagonistic, but rather are complementary forces. Theirs is a kind of symbiotic relationship. Perhaps all too often this is forgotten, and courts, in defining the right to trial by jury, have had a tendency to erect rigid lines of stratification between their spheres of operation. Yet, in reality, no such precise demarcation is possible. As a consequence, the interaction and dependence between the two is lost sight of and relegated to a place of secondary importance, and inordinate emphasis is placed upon the jury as a fact finding body without due regard for the judge's role in such determinations.

This improper emphasis has had the unfortunate effect of partially proscribing certain procedural devices which are predicated upon the harmonious interaction between judge and jury and which seek to promote the fair and efficient administration of justice in our courts. One such device is the additur. Additur will be used in this comment to describe an order of the trial court by which a plaintiff's motion for a new trial on the ground of inadequate damages is granted unless the defendant consents to an increase of the award to an amount specified by the court. It is analogous to the converse practice of remittitur. In remittitur situations, it is the defendant who moves for a new trial, alleging that the damages awarded against him by the jury are excessive. The court may grant the motion unless the plaintiff consents to a decrease in the amount of the verdict rendered in his favor, sufficient in the judge's opinion to cure the excess. Both additur and remittitur are designed to inject greater parsimony into the judicial process by bringing an excessive or inadequate award within the bounds of permissible recovery without resort to a new trial with its concomitant temporal and economic expense.

In both remittitur and additur situations the court, in concert with the jury, plays a salient role in the ultimate determination of the monetary award. However, since the issue of damages, like the issue of liability, is an issue of fact to be determined by the jury, the use of an additur or remittitur would seem to raise the constitutional issue of whether either party is deprived of his constitutional right to a jury determination on the issue of

damages. The constitutionality of remittitur, as will be seen, has long been upheld in this country, and since additur is the converse manifestation of remittitur, one would expect its constitutionality to be equally settled. Paradoxically, it is said that because the court has taken part in the ultimate determination of the monetary award, the additur procedure deprives a non-consenting plaintiff of his right to trial by jury. Although the same objection may be asserted against remittitur, it has not been accepted by our courts.

This comment will demonstrate that additur, like its fraternal twin, remittitur, is a constitutionally permissible, as well as an expeditious procedural device. It will analyze the soundness of the arguments which seek to sustain additur and will illustrate the specious nature of those which would obviate it. Any consideration of additur must necessarily entail an examination of several related, though distinct and independent concepts. Since the justification for, and the essence of, additur are inextricably linked to that of remittitur, both conceptually and historically, any discussion of the former must be preceded by an account of the genesis and growth of the latter. Furthermore, since the practice of both remittitur and additur emanated from the power of a court to grant an unconditional new trial, antecedent to an analysis of additur must also necessarily be an exploration of the historical development of a court's common law power to grant such new trials. Accordingly, this comment will first discuss the history of the English and American courts' power to grant new trials outright where the award was excessive or inadequate. It will then proceed to a discussion of the development of and justifications for the remittitur, an understanding of which is, indeed, the *sine qua non* of any proper evaluation of additur. With this necessary background, it will then be possible to examine the additur in detail, to show the line of its growth in the United States with special emphasis on the Illinois posture, which is, it is submitted, not as yet finally resolved in cases involving unliquidated damages. Finally, it will attempt to determine the probable effects of the recent California Supreme Court's decision in *Jehl v. Southern Pacific Co.*,¹ which sustained the constitutionality of additur in California.

COMMON LAW ORIGIN OF THE POWER TO GRANT A NEW TRIAL
FOR AN EXCESSIVE OR INADEQUATE AWARD

The now familiar Anglo-American system of damages had not developed prior to 1066. Rather, a system of fixed money payments for various wrongs flourished until about 1200 A.D.² Subsequently, in the English courts there

¹ — Cal. App. 2d —, 427 P.2d 988 (1967).

² 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 37, 50 (3d ed. 1923); HOLMES, THE COM-

began slowly to evolve the modern system of damages. Contemporaneous with the development of the remedy of damages was the courts' use of juries.³

The jury was, at its inception, the very antithesis of what we know it today. It was often quite large and was composed of men of the vicinage where the transaction occurred. Their functions at this early date were primarily those of witnesses and assessors of the damages. Thus, the trial judge, a stranger to the actual affair, could hardly feel justified in correcting or overturning the findings of the "witnesses" against one of their own neighbors.⁴ This is but an adumbration of the history of the jury; however, it will suffice to illustrate the etiology of, and what was then the practical necessity for, the doctrine that the amount of damages is a "fact question" to be decided by the jury.

The measure of damages was at that time a fact which the jury initially determined with little restraint from the judge.⁵ Yet, as time passed, and the law became more sophisticated and orderly, and the function of the jurors was transmuted from that of witness to judicial fact finder, the courts sought to exercise a tighter rein, and hence they began to weave an elaborate web of doctrine to use in the process of close and careful supervision and control of the jury's function of assessing damages. Ironically, their initial attempts were circumscribed by their own earlier rule that damages was a fact question for the jury. This rule, though originally the result of historical and pragmatic exigencies, had become petrified, and at last elevated to the throne of dogma. It seems not to have occurred to the early masters to investigate the genesis of their rules of law, to compare them with their present needs, and to discard the anachronisms. Rather, they were content to function as judicial automatons, mindlessly repeating the shibboleths of their predecessors.⁶ However, the frequent injustices wrought by intemperate and uncontrolled jurors could not be long endured. This, coupled with the courts desire to increase its power

MON LAW 3-32 (1881). 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 46-48 (2d ed. 1913).

³ See Treatises, *supra* note 2.

⁴ MCCORMICK, DAMAGES § 6 (1935).

⁵ GRAHAM, NEW TRIALS 2 (1854).

⁶ "Indeed, viewed macroscopically, the situation presents a common phenomenon well known to the student of history. The customs, beliefs, or needs of a primitive time establish a rule or formula. In the course of centuries, the custom, belief, or necessity disappears, but the rule remains inviolate. It becomes canonized; its origins and therefore its meaning are ignored, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule having been accounted for, enters upon a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning it has received. The subject under consideration illustrates this course of events very clearly." See HOLMES, *supra* note 2, at 8.

and influence, prompted the courts to devise exceptions to the scholastic formula that the assessment of damages was within the exclusive province of the jury.

Thus, perhaps as early as 1351, the English courts began to exercise the power to grant new trials where misconduct of the jury was involved.⁷ Soon this became an inherent power of the courts and an accepted procedural device. Still, the courts were loathe to extend this power into the area of damages, and thus a jury determination, no matter how excessive or inadequate, could not be set aside. Gradually an alternative form of relief known as the attaind developed.⁸ Seemingly by the end of the fourteenth century, the attaind was being used where the amount of damages given by the first jury was excessive.⁹ The attaind was harsh and thus was given a limited operation. It could be used only to reduce, not to increase damages, and it could be barred if the plaintiff were to release the excess.¹⁰ By the sixteenth century, the attaind was extinct, but it was destined to leave its odious imprint on later procedure.¹¹

It is important to note that almost from the beginning the judges had played a part, small though it was, in the assessment of damages, and by the fourteen hundreds the judges had made distinct inroads upon the jurors' province of damages.¹² Finally in 1655, a court set aside a verdict on the ground of excessiveness of amount of damages awarded by the jury.¹³ This is the first reported case in which a new trial was granted on the basis of error in the amount of the verdict.¹⁴ Eventually excessive damages became an inde-

⁷ POUND & PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 167 (3d ed. 1927); BEALE, CASES ON DAMAGES 1-9 (3d ed. 1928). See also Washington, *Damages In Contract At Common Law*, 47 LAW Q. REV. 345 (1931).

⁸ The attaind was a proceeding by which one complaining of a jury verdict could have a second jury of twenty four knights retry the case. See McCORMICK, *supra* note 4.

⁹ Washington, *supra* note 7.

¹⁰ Washington, *supra* note 7.

¹¹ *Id.* See also text accompanying notes 21-23 *infra*.

¹² Washington, *supra* note 7, at 354; See also Dimick v. Schiedt, 293 U.S. 474, 477 (1934).

¹³ Wood v. Gunston, 82 Eng. Rep. 867 (K.B. 1655); See also Washington, *supra* note 7, at 362; Comment, *Additur in California—The Meaning of Dorsey v. Barka*, 40 CALIF. L. REV. 276 (1952).

¹⁴ In *Wood v. Gunston, id.*, Chief Justice Glyn stated: "It is in the discretion of the court in some cases to grant a new tryal, but this must be a judicial and not an arbitrary discretion, and it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them, and it is for the peoples benefit that it should be so . . ." There were numerous incidents of the courts granting new trials on grounds other than jury misconduct prior to 1655. In fact, it appears to have been common in Common Pleas long before this. "The reason why this matter can't be traced further back is, 'that the old reports do not give any accounts of de-

pendent and self-sufficing ground for granting a new trial. For many years, however, new trials were limited to cases in which damages were liquidated, and it was not until the seventeenth hundreds that they were granted with regularity in tort actions.¹⁵ By the middle of the eighteenth century, the tendency toward extending the scope of the courts' control over the jury's power to assess damages was manifest. Indeed in 1757, Lord Mansfield noted that:

Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials. If unjust verdicts were to be conclusive for ever, the determination of civil property in this method of trial would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should . . . be opportunities of reconsidering the cause . . .¹⁶

Finally, by the latter part of the eighteenth century, the common law courts of England had shorn their cloak of reticence and were unhesitatingly exercising their power to grant new trials where the verdict violated some rule of the law of damages.

Thus, by the time of the founding of the United States it was firmly established in English common law that the courts possessed the discretionary power to grant a new trial where the verdict was excessive as well as for a melange of other reasons.¹⁷ This power was seen as a power to examine the whole case on the law and the evidence with a view to attaining a result consonant with justice. It was a power exercised in pursuance of a sound judicial discretion without which the jury system would devolve into a perfidious and intolerable tyranny.¹⁸

The considerations involved in determining whether a verdict is inadequate are manifestly the same as those involved in determining whether a verdict is excessive.¹⁹ Thus, one would expect the courts to have granted

termination made by the Court upon motions." *Bright v. Eynon*, 97 Eng. Rep. 365, 367 (K.B. 1757).

¹⁵ 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, 4 (1967).

¹⁶ *Bright v. Eynon*, *supra* note 14, at 366.

¹⁷ See *Lincoln v. Power*, 151 U.S. 436, 438 (1894); *Wilson v. Everett*, 139 U.S. 616, 621 (1891); See also MAYNE, *DAMAGES* 457-462 (2d ed. 1872); James, *Remedies For Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur*, 1 DUQUESNE L. REV. 143 (1963).

¹⁸ See *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941). See also text accompanying note 16.

¹⁹ *Nussbaum v. Warehime*, 333 F.2d 462 (7th Cir. 1964), *cert. denied*, 379 U.S. 979 (1964); *DeFoe v. Duhl*, 286 F.2d 205 (4th Cir. 1961); *Kilmer v. Parrish*, 144 Ill. App. 270 (1908); *Emmons v. Sheldon*, 26 Wis. 648 (1870). See also *Wilkie, Personal Injury Damage Verdicts: Supreme Court Rulings Since the Powers Rule*, 47 MARQ. L. REV. 368, 376 (1964).

new trials for inadequacy of damages just as they had come to do for excessiveness of award. The courts, however, uniformly refused to grant new trials where the verdict was inadequate. One prominent authority noted in 1792 that "no case is to be met with, in which a new trial has in fact been granted on Account of the Smallness of the Damages."²⁰ The reason most commonly accepted by the authorities as to why the English courts refused to grant new trials for inadequacy of award was "that new trials come only in the room of attaints, as being an easier and more expeditious remedy, and no attaint would lie for giving too small damages."²¹ Whether the courts were aware of the amorphous though continuing presence of the attaint in their procedure is not known. In any event the rule became immutable, and its genesis lost in the evanescent and protean shadows of the past.

The courts in the United States, from their inception, granted new trials where the verdict was clearly excessive.²² However, undoubtedly influenced by the English precedents and the noxious traces of the attaint, the granting of a new trial as a remedy for an inadequate jury verdict was somewhat slower in developing.²³ In fact, early statutes in several of the states expressly prohibited inadequacy of damages as grounds for a new trial.²⁴ However, the rule has been for many years that the trial court has the same discretion, power and duty in passing upon motions for a new trial on the grounds of inadequacy of the damages as where the motion is predicated upon excessiveness.²⁵

HISTORY AND DEVELOPMENT OF REMITTITUR

The development of a court's power to grant a new trial unconditionally was closely paralleled by the early development of a power to grant a condi-

²⁰ MAYNE, *supra* note 17, at 455; SAYER, DAMAGES 201 (1792); 4 SEDGWICK, DAMAGES § 1368 (9th ed. 1912).

²¹ It is also sometimes said that no verdict would be overturned on grounds of inadequacy because juries did not underestimate damages. See *Bolles v. Bloomington & Normal Ry., Elec. & Heating Co.*, 130 Ill. App. 263 (1907). This of course begs the question. Such reasoning is offered because of a court's lack of historical perspective and/or to conciliate the mind to an illogical and invidious state of affairs.

²² *The Commerce*, 83 U.S. (16 Wall) 33 (1872); *Blanchard v. Morris*, 15 Ill. 35 (1853). See also *Carlin, Remittiturs and Additurs*, 49 W. VA. L. REV. 1, 9 (1942).

²³ MCCORMICK, *supra* note 4.

²⁴ MCCORMICK, *supra* note 4, at § 18.

²⁵ See *Dimick v. Schiedt*, *supra* note 12, at 488 (dissenting opinion); *Rosiello v. Sellman*, 354 F.2d 219 (5th Cir. 1965); *DePinto v. Provident Life Insurance Co.*, 323 F.2d 826 (9th Cir. 1963); MCCORMICK, *supra* note 4, at § 18.

tional new trial.²⁶ The American courts, state²⁷ and federal,²⁸ trial²⁹ and appellate,³⁰ early embraced the practice of remittitur, under which they possessed the power to deny a defendant's request for a new trial on the grounds of excessiveness of the damages awarded on the condition that the plaintiff consented to remit that part of the award which the court regarded as excessive. What was excessive was determined as a "matter of law" by the court.³¹ This power emanated both as a necessary antecedent and inevitable consequence from its common law discretionary power to set aside an excessive or inadequate verdict.³² Since the court had a general discretion as to whether it would set aside a verdict and grant a new trial because of an excessive verdict, it is not surprising to find that the court likewise came to have the same discretion as to whether it would allow a remittitur, or, in lieu thereof, order a new trial.

It is doubtful whether the practice of remittitur was extant in England when the Federal Constitution was adopted in 1791.³³ Thus, since the seventh amendment³⁴ preserves trial by jury as it "existed under the English common law when the amendment was adopted,"³⁵ it was early argued that to make the decision of the motion for a new trial depend upon a remission of part of the verdict is in effect a reexamination by the court, in a mode not known to the common law, of facts tried by the jury and therefore violative of the seventh amendment.

²⁶ See Bender, *supra* note 15, at 5; Scott, *The Progress of the Law—Civil Procedure*, 33 HARV. L. REV. 236 (1919).

²⁷ *Sandy v. Lake Street Elevated Ry. Co.*, 235 Ill. 194, 85 N.E. 300 (1908); *North Chicago St. Ry. v. Wrixon*, 150 Ill. 532, 37 N.E. 895 (1894). See also Annot., 95 A.L.R. 1163 (1935); Annot., 53 A.L.R. 779 (1928); McCORMICK, *supra* note 4, at § 19; SEDGWICK, *supra* note 20, at § 1330; Carlin, *supra* note 22; Comment, 10 WASH. & LEE L. REV. (1953); Comment, 44 YALE L.J. 318 (1934); 21 VA. L. REV. 666 (1935).

²⁸ The leading case is *Blunt v. Little*, 3F. Cas. 760 (No. 1578) (C.C.D. Mass. 1822). See also *Northern Pacific R.R. v. Herbert*, 116 U.S. 642 (1885); *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U.S. 69 (1889). See collection of cases in 6 MOORE, FEDERAL PRACTICE § 59.05(3) (2d ed. 1948).

²⁹ McCORMICK, DAMAGES § 19 (1935).

³⁰ *Id.*

³¹ *Id.*

³² *Arkansas Valley Land and Cattle Co. v. Mann*, *supra* note 28, at 74.

³³ *Dimick v. Schiedt*, *supra* note 12, at 484.

³⁴ "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 re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

³⁵ *Baltimore & Conn. Line v. Redman*, 295 U.S. 654, 657 (1935).

This contention was rejected by the United States Supreme Court in *Arkansas Valley Land & Cattle Co. v. Mann*.³⁶ In substance, the Court's justification for the practice of remittitur was that since the court had the power to determine whether the damages awarded were excessive, it necessarily had the authority to determine an amount that would not be excessive. Consequently, in giving the plaintiff an option to remit the excess or submit to a new trial, the court is not usurping the function of the jury by fixing the amount of the recovery, but is merely indicating the greatest amount which could be allowed to stand. The plaintiff, who has voluntarily accepted the remittitur, is not prejudiced and therefore cannot complain of the court's action. The defendant is deprived of no right, and since he is benefited by the reduction he cannot object. The so called logical justification for remittitur was advanced in *Dimick v. Schiedt*, where the Court said: "Where the verdict is excessive, the practice of substituting 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 it has been found by the jury. . . ."³⁷ Notwithstanding the many serious objections leveled against the justifications for remittitur,³⁸ it has become too deeply ingrained in the fabric of American law to be abolished.

ADDITUR

As noted earlier, additur is the trial court's power to deny a plaintiff's motion for a new trial on the ground of inadequacy of the jury verdict if the defendant consents to an addition to that verdict. It would seem to be but the converse of the remittitur power as well as a logical step in the growth of the law relating to unliquidated damages as remittitur was at an earlier date. By simple parity of reasoning it would seem to follow that if a court can refuse to grant a new trial to the defendant if the plaintiff will remit part of an excessively high award, it can refuse to grant a new trial to the plaintiff if the defendant will agree to add to an unreasonably low award. The plaintiff may argue that he is denied his constitutional right to a second trial in which a jury could set a properly high award, but this contention is no more persuasive than the defendant's corresponding argument in the converse case of remittitur.

Despite the logical nexus between remittitur and additur, the American courts did not manifest the same solicitude for the latter as for the former.

³⁶ *Supra* note 28.

³⁷ *Dimick v. Schiedt*, 293 U.S. 474, 486 (1934).

³⁸ See Carlin, *supra* note 22, at 16. *But see* Comment, 44 YALE L.J. 318 (1934); 48 HARV. L. REV. 333 (1934); 33 MICH. L. REV. 138 (1934); 32 MICH. L. REV. 538 (1934); 21 NOTRE DAME LAW. 55 (1945).

Indeed, additur did not make its first appearance until 1866 in the Illinois case of *Carr v. Miner*,³⁹ which was a case involving liquidated damages. Additur did not appear in cases involving unliquidated damages or unascertainable amounts until almost the turn of the twentieth century.⁴⁰

The attitudes of the state courts toward additur were and continue to be pluralistic.⁴¹ In 1935 in *Dimick v. Schiedt*,⁴² the question of the validity of additur with reference to the plaintiff's constitutional right to a jury trial on the issue of damages was presented before the United States Supreme Court for the first time. The Court, in a five to four decision, condemned the practice of additur as unconstitutionally contravening the seventh amendment's command that "no fact tried by a jury shall be otherwise reexamined . . . than according to the rules of the common law." While the seventh amendment is not binding on the states through the "due process" clause of the fourteenth amendment,⁴³ the decision in *Dimick* has had a profound effect on almost all state court decisions which have considered the question of additur. Thus, it is imperative that this decision be examined before an understanding can be gained of the attitude of the Illinois and other state courts toward additur.

Dimick was decided in what the late Justice Frankfurter has so aptly called the "era of great, big, sterile absolutes."⁴⁴ Once one understands the mood of the times and the fact that the parochialism of some of the members of the Court was translated into constitutional doctrine, it is not surprising to find that "*Dimick* was based on an historical and logical analysis that was open to serious question."⁴⁵ In fact, the decision has been criticized by almost every commentator who has considered it. The Court's holding in *Dimick* seems predicated on the "re-examination" clause of the seventh amendment which states: "[N]o fact tried by a jury shall be otherwise reexamined . . . than according to the rules of the common law." The majority opinion entered into a protracted historical analysis of the common law prior to 1791 as it applied to the power of a court to grant new trials. Since the power to order a conditional new trial based on inadequate damages, as contemplated by additur, is obviously dependent upon the antecedent power to order such a new trial unconditionally, the Court felt itself inexorably drawn to the conclusion that since the latter did not exist the former could not.⁴⁶ In effect, the

³⁹ 42 Ill. 179 (1886).

⁴⁰ See *Volker v. First Nat'l Bank*, 26 Neb. 602, 42 N.W. 732 (1889).

⁴¹ See cases collected in *Bender*, *supra* note 15, at 20.

⁴² *Supra* note 37.

⁴³ *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Tegtmeyer v. Tegtmeyer*, 292 Ill. App. 434, 11 N.E.2d 657 (1937).

⁴⁴ PHILLIPS, FELIX FRANKFURTER REMINISCES 293 (1960).

⁴⁵ *Jehl v. Southern Pacific Co.*, 59 Cal. Repr. 276, 280, 427 P.2d 988, 992 (1967).

⁴⁶ See text accompanying notes 19-21 *supra*.

procedure would constitute a reexamination of a jury question by a method unknown to the common law.

The analogy of remittitur was urged, but the Court differentiated the practices on two grounds: (1) the existence of some—though inconclusive—English remittitur practice prior to 1791; and (2) the fact that in the case of the remittitur “what remains is included in the verdict along with the unlawful excess—in that sense it has been found by the jury—and the remittitur has the effect of merely lopping off an excrescence.”⁴⁷ In contrast, the additur is the “bald addition of something which in no sense can be said to be included in the verdict.”⁴⁸ It is obvious from the general tenor of the whole opinion in *Dimick* that the majority would have preferred to have disapproved the additur on principles that would have equally condemned the remittitur. However, realizing that the latter had become too firmly established by prior decisions to be disturbed, they found it necessary to resort to the specious differentiation they ultimately employed. The logical schism, which to the majority was so patent, can only be described as the product of tendentious sophistry. The verdict arising out of the remittitur procedure obviously is no more that of the jury than that arising out of additur. In fact, it is only the additur which retains all that was contained in a jury’s verdict, and in both additur and remittitur something is taken away from the litigant who is relying on the verdict.⁴⁹

It is submitted that the opinion in *Dimick* is most unsatisfactory and should be carefully reexamined. It was the product of an era of inveterate conservatism⁵⁰ and of a Court with a parochial scope.⁵¹ It employed an historical method which was dissonant with the hypostasis of enlightened

⁴⁷ *Dimick v. Schiedt*, *supra* note 12, at 486.

⁴⁸ *Dimick v. Schiedt*, *supra* note 12, at 482.

⁴⁹ See *Caudle v. Swanson*, 248 N.C. 249, 103 S.E.2d 357 (1958).

⁵⁰ Mr. Justice Frankfurter has described the situation thusly: “On the whole, courts were looked to as our saviours. . . . It was the era in which the pretensions of the courts in enforcing absolutes, which too often were dogmas, regarding arrangements that were familiar in the judges’ minds and lay warm in their assumptions, were put out of their heads, out of their assumptions, and into the Constitution. . . .” PHILLIPS, *supra* note 44.

⁵¹ The majority opinion was written by Justice Sutherland and he was joined by Justices VanDevanter, McReynolds, Butler, and Roberts. It was this same group who, in *Morehead v. Tripaldo*, came to the incredible, though ephemeral conclusion that “[T]he State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid.” 298 U.S. 587, 611 (1936). Yet, contrast the majority with the dissenters. Mr. Justice Cardozo and Mr. Justice Brandeis joined Mr. Chief Justice Hughes and Mr. Justice Stone to form what Professor Prichett has called: “as distinguished a foursome as ever sat on the high court.” PRICHETT, *THE AMERICAN CONSTITUTION* 577 (1959).

judicial scholarship and with prior Supreme Court opinions.⁵² For the majority in *Dimick*, the fact that there was no specific, concrete, recorded, tangible precedent in English common law relating to additur settled the question. The historical approach was for them merely to search the Year Books for cases. They failed to notice that the Court had often sanctioned practices as being consistent with the seventh amendment even though they were found not to have been employed by the common law judges.⁵³ The method employed by the majority would result in blind reproduction and imitation of the past. It would preclude all growth in the law. Their view of history, in ignoring its dynamic aspects, was false and one-sided.⁵⁴ "The Year Books can teach us how a principle or a rule had its beginnings. They cannot teach us that what was the beginning shall also be the end."⁵⁵

As noted earlier, remittitur was said not to deprive a defendant of his constitutional right to have a jury assess the damages he must pay, because he will pay less under such procedure than the amount which a jury initially awarded by its verdict against him. Thus, he has been ostensibly benefited by the procedural device of remittitur. By the additur procedure, the plaintiff, by consent of the defendant, receives no less, but in fact more, than the jury awarded him by its verdict. To hold that the former method benefits the defendant but that the latter does not benefit the plaintiff is incongruous. And if constitutionality is to be, in the final analysis, partially predicated on benefit,⁵⁶ then additur as well as remittitur is seen to be clearly consonant with the right to trial by jury.

If the arguments used to sustain the constitutionality of remittitur are

⁵² In *Dimick*, the historical method was the organon of judgment for both the majority and minority, but its application by each led to antithetical results. The majority, in its interpretation of legal history, was content to treat as finalities antiquarian precedents. The majority, however, found a stream of thought, a tendency, a movement toward a goal. Which then is the truer use of historical method? Which exhibits the saner and sounder loyalty? Shall the significance of events be determined by transporting them to our own times and viewing them as if they were the product of our own day and thought, or by viewing them as of the time of their occurrence, the product of their era, the expression of its beliefs and habits? Shall we look for the rules by which we are to live only in the past admitting of no encroachment save that sanctified by history? It is inconceivable that anyone should, at this stage of constitutional development, wonder about the answers.

⁵³ See *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494 (1930); *Ex parte Peterson*, 253 U.S. 300 (1919); *Walker v. New Mexico & Southern Pacific R.R.*, 165 U.S. 593 (1896).

⁵⁴ CARDOZO, *THE GROWTH OF THE LAW* (1924).

⁵⁵ *Id.* at 104-05.

⁵⁶ There is some indication, all the casuistry aside, that this may be one of the justifications for additur as well as remittitur. See *Arkansas Valley Land and Cattle Co. v. Mann*, *supra* note 28, at 74; *Dimick v. Schiedt*, *supra* note 12, at 492 (dissenting opinion); *Caudle v. Swanson*, *supra* note 49.

legally cogent, vis-à-vis the right to trial by jury, then corresponding arguments used to sustain the additur process must also be since the two are indistinguishable. To hold otherwise necessarily leads to the inequitable and absurd conclusion that the plaintiff has a greater right to a jury verdict than the defendant.⁵⁷

It has been suggested by Professor Carlin that the argument in remittitur cases that the defendant cannot object since he is benefited is specious.⁵⁸ Since, as noted above, the arguments applicable to remittitur are likewise applicable to additur, if there is no benefit to the defendant in the former there can be no benefit to the plaintiff in the latter. Professor Carlin believes that there is no benefit in either case since it is possible that a second jury might award a verdict differing in amount from that which is finally determined by the court to be not excessive or not inadequate as the case may be. It is believed that the efficacy of this hypothesis depends upon an incorrect assessment of that to which the litigants are entitled under a constitutional provision granting the right to trial by jury.

In his noted article, Professor Carlin takes the posture that only "if the amount of the verdict should be reduced [in remittitur cases] to the minimum which the court would stand to permit, . . . [could it truly] be said that the defendant had benefited by the reduction."⁵⁹ Conversely, it follows that in additur cases, the plaintiff would actually be benefited only if the amount of the verdict should be enhanced to the maximum which a court would allow to stand. If we accept this thesis, we are inescapably led to the conclusion that the defendant in a case involving remittitur is constitutionally entitled to pay only the legal minimum, while a plaintiff in an additur case is constitutionally entitled to receive the legal maximum; for, if any other sum were awarded, his right to trial by jury would be violated since he might receive a greater or have to pay a lesser sum, as the case may be, if the matter were decided by a second jury. It is believed that these contentions are incorrect, and it will be shown that they are not supported by either sound logic or by the case law of those states where additur has been approved.

If, to satisfy the non-consenting plaintiff's right to trial by jury in additur cases and the equally recalcitrant defendant's right in remittitur cases, only the receipt of the legal maximum and the payment of the legal minimum respectively will suffice, then it follows that these must be also the only amounts to which each would be entitled and which would satisfy their constitutional right had the jury functioned in a legally permissible fashion in

⁵⁷ Caudle v. Swanson, *supra* note 49, at 257, 103 S.E.2d at 363.

⁵⁸ Carlin, *supra* note 22, at 17.

⁵⁹ Carlin, *supra* note 22, at 17. Professor James has reached this same conclusion. See James, *supra* note 17.

rendering their verdict at the outset, for surely the right remains the same in each case. It will be demonstrated that it is not the maximum and minimum sums to which the parties are entitled in a so-called "normal" jury trial situation. It is submitted that they are entitled at once to each and every specific amount between and including the legal maximum and minimum and to none of these.

Upon close scrutiny, this apparent antinomy is readily resolved. Let us assume that in a case involving unliquidated damages the legal maximum that the court would permit to stand is three thousand dollars and that the minimum is one thousand dollars. It is therefore clear that a jury could properly and legally return a verdict for either of these two amounts or any of the literally thousands of amounts existing between one and three thousand dollars, *viz.* between the ends of the legal spectrum. Thus, it is undeniable that the winning party is entitled to a verdict of no specific dollar amount but merely to what might be called a "legally permissible amount." A fortiori, the defendant may only have rendered against him a verdict for this same "legally permissible amount." The amount therefore to which each litigant is entitled to have assessed either for or against him is but an abstract concept and amount, having infinite specific dollar values which may be assigned to it depending on the ad hoc determination of the jury in each individual case. A properly functioning jury will, in all cases, theoretically render a verdict for the "legally permissible amount."

One can imagine two identical cases involving different protagonists and different juries in which the legal maximum and minimum are identical, yet in which the plaintiffs receive different dollar verdicts. If both are within the permissible ambits, then each party's right to trial by jury, as regards the assessment of damages, has been satisfied, notwithstanding the disparity in actual dollar amounts. This necessarily follows once it is realized that the litigating parties are entitled respectively to receive and to pay only the "legally permissible amount," rather than any specific dollar amount.

Assenting to the proposition that the parties' right to trial by jury remains constant throughout judicial proceedings whether the situation be that of a "normal" jury trial or that in which the procedure of additur is involved, then that which satisfies the right in the former will most assuredly do so in the latter. It has been demonstrated that in the "normal" jury situation the verdict returned will be the "legally permissible amount." Hence, if this same verdict would result from the invocation of the additur or remittitur procedure, then that procedure cannot be said to offend the right to trial by jury, for surely there has been no detriment suffered by the parties. Yet, Professor Carlin's hypothesis tacitly, though inexorably, draws in its wake the conclusion that a plaintiff's right to trial by jury would be satisfied if a properly functioning jury were to return a verdict for less than the legal

maximum, but that this same plaintiff, for whose benefit the court invoked the additur, would have the same constitutional right denied if the same award were presented to him in an additur situation. This is now seen to be an untenable position. It results in and carries to a wasteful and impractical extreme the logic of an absolute right of jury trial.

Professor Carlin seems to conclude that the right to trial by jury would be satisfied in both additur and remittitur situations if there were benefit conferred even though "the court and not the jury" had determined the actual dollar verdict. This would seem to be correct since as the result of a new trial nothing would be gained. In cases of remittitur where the verdict is reduced to the "legally permissible recovery," it can scarcely be denied that the defendant has been benefited by the procedure. He is required to pay less in terms of dollars and cents than he was originally, but more importantly, he is now obligated to pay only the "legally permissible amount," which is all he would have had to pay had there initially been a properly functioning jury. Conversely, in additur cases, the plaintiff, by virtue of the additur procedure, has been awarded the "legally permissible recovery," which is all he would have been entitled to had the jury not acted improvidently by returning a legally impermissible verdict.

It would seem obvious that in both additur and remittitur cases the respective procedures result in awarding the parties precisely what a properly functioning jury would have given them. It is difficult, therefore, to understand how anyone's right to trial by jury has been violated. The superfluity of a new trial where the additur procedure is available is manifest.⁶⁰

ADDITUR IN ILLINOIS

The practice of allowing remittitur in actions *ex delicto* was embraced very early by the Illinois courts and was accepted here as elsewhere without much question.⁶¹ Today, the practice is given explicit recognition by the Illinois Civil Practice Act.⁶² The practice of additur seems to have made its initial

⁶⁰ While not enunciated in this fashion, this hypothesis has received implicit recognition in several noteworthy state court opinions. See *Caudle v. Swanson*, *supra* note 49, at 257, 103 S.E.2d at 363; *Powers v. Allstate Insurance Co.*, 10 Wis. 2d 78, 102 N.W.2d 393 (1960); *Jehl v. Southern Pacific Co.*, *supra* note 45.

⁶¹ See *Libby, McNeil & Libby v. Scherman*, 146 Ill. 540, 34 N.E. 801 (1893); *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52 (1881).

⁶² ILL. REV. STAT. ch. 110 § 68.1(7) (1965): "A party who consents to a remittitur as a condition to the denial of a new trial is not thereby precluded from asserting, on appeal by the opposite party, that the amount of the verdict was proper." See also ILL. REV. STAT. ch. 110 § 92(1)(e): "In all appeals, the reviewing court may, in its discretion, and on such terms as it deems just, . . . (e) give any judgment and make any order which ought to have been given, or made, and make any other and

appearance in the United States in the Illinois case of *Carr v. Miner*.⁶³ In that case, a suit in assumpsit was brought to recover a liquidated sum of money wrongfully appropriated by the defendant. The jury allowed interest at six percent. However, the evidence clearly established that the defendant had always recognized his liability to pay ten percent, which was lawful at that time. The plaintiff filed a motion for a new trial, which, upon the defendant agreeing that the verdict should be raised was overruled and judgment entered for the plaintiff for the increased amount. On appeal it was urged that the trial court did not have the power to overrule the motion. In denying this contention, the court responded:

If there were no other grounds requiring a new trial to be granted, and we see none, then, when that was corrected, there was no error in overruling the motion. It was a case in which the amount could be calculated with certainty when the basis was found. The practice is one that should be sparingly indulged, and should never be adopted except in clear cases.⁶⁴

One year later, came the case of *James v. Morey*,⁶⁵ in which, in an action for rent, the jury returned a verdict for \$26.48. Yet, the evidence showed that if there were any liability it should be for the sum of \$144.54. The plaintiff petitioned the court for a new trial. It was denied when the defendant agreed to an additur for the amount of the difference between the jury's verdict and what was patently due under the evidence. On appeal, it was again urged that the trial court was without authority to order such an increase, and that its only action was to grant a new trial. On the authority of *Carr*, the Illinois Supreme Court upheld the trial judge's action.

There can be no question that in Illinois, as in Alabama, Delaware, Kansas, and Missouri, additur may be employed when the amount of damages is liquidated or ascertainable from the evidence.⁶⁶ Both the *Carr* and *Morey* cases posit this proposition. Yet, are they authority for denying the court the additur power in cases where damages are unliquidated? It is submitted that they cannot serve as precedent for those who seek to proscribe additur. The holdings in both these early Illinois decisions were addressed to sustaining additur in a particular type of case, *viz.* that involving liquidated damages, and not to denying it in other types of cases. Hence, it is a *non*

further orders and grant any relief, including . . . the entry of a remittitur. . . ." It is important to note that while remittitur is given explicit recognition by the Illinois Civil Practice Act, additur is nowhere mentioned.

⁶³ 42 Ill. 179 (1866).

⁶⁴ *Id.* at 192.

⁶⁵ 44 Ill. 352 (1867).

⁶⁶ See cases collected in 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, 21 (1967).

sequitur to say that they expressly or inferentially are authority for denying the additur power where the case involves unliquidated damages. Indeed, a careful reading of the *Carr* case seems to dispel this notion, for the court noted that the amount of the additur might not be exactly the amount which would be required to give the plaintiff that to which he was legally entitled under the evidence. The court observed that the additur only "seems to be about the difference in the two rates of interest."⁶⁷ It is vital to note the enabling or positive nature of these two early Illinois cases and to note that they are devoid of any language from which it can be inferred that additur is an improper procedure in any case not involving liquidated damages.

In 1955, in *Yep Hong v. Williams*,⁶⁸ an Illinois court was apparently first presented with a case in which additur was employed by a trial court where unliquidated damages were at issue. The plaintiff brought an action against the defendant for injuries sustained as the result of the defendant's alleged negligence. The jury returned a verdict for the plaintiff for one thousand dollars. There was sufficient evidence to warrant the trial judge to grant unconditionally the plaintiff's motion for a new trial on the grounds of inadequacy of the verdict.⁶⁹ However, the court ordered an additur as a condition to denying the plaintiff's motion. The defendant refused to consent, and the motion for a new trial was granted. The defendant appealed from the lower court's ruling. The plaintiff, in the instant case, did not argue that the trial court had the authority to impose an additur. He merely urged that since the verdict was against the manifest weight of the evidence, the trial court had not abused its discretion in awarding him a new trial. The Illinois Appellate Court agreed with this contention and confirmed the order of the trial court granting a new trial. However, they went on to consider the question of whether the courts in Illinois possessed the additur power in cases involving unliquidated damages.

Justice Burke's opinion was laconic and wholly inappropriate in view of the gravity of the issues involved. It relied on the triune of *Dimick*, *Carr* and *Morey*. It quoted at length from the United States Supreme Court's opinion in *Dimick*, which has been shown to be most unpersuasive. In *Yep Hong* critical analysis is conspicuous by its absence. The court made no mention of the excoriations to which *Dimick* has been subjected nor of the tendency of the state courts to depart from its questionable rationale.⁷⁰

⁶⁷ *Carr v. Miner*, 42 Ill. 179, 192 (1866).

⁶⁸ *Yep Hong v. Williams*, 6 Ill. App. 2d 456, 128 N.E.2d 655 (1955).

⁶⁹ While in Illinois, as in the other American jurisdictions, new trials were originally not allowed for inadequate verdicts, the modern rule here and elsewhere is that a new trial may be granted where the verdict is inadequate. See *Williams v. Reynolds*, 86 Ill. 263 (1877); *Harris v. Minardi*, 74 Ill. App. 2d 262, 220 N.E.2d 39 (1966); *Codey v. Commercial Fire Insurance Co.*, 13 Ill. App. 110 (1883).

⁷⁰ See collection of cases in *Bender*, *supra* note 66, at 20.

The appellate court's reliance on *Carr* and *Morey* is to lean upon a slender reed. Neither of these cases supports the court's conclusion that "a trial court in a tort action for the recovery of unliquidated damages is without power to enlarge the verdict of a jury by . . . additur."⁷¹ These cases merely *sustain* the additur power under a particular set of circumstances; they do not *deny* it under others. There are further considerations which the court failed to take into account. Neither the plaintiff nor the defendant consented to nor requested the additur order. On this basis *Yep Hong* is distinguishable from those cases on which it was predicated.⁷² It is strange that the court nowhere mentioned the Illinois Constitution nor even why a trial court may not order an additur. It is clear, of course, that the only objection to additur is that it may result in a deprivation of the right to trial by jury, which is guaranteed by the Illinois Constitution.⁷³

Dimick was based on the "re-examination" clause of the seventh amendment rather than the "shall be preserved" clause.⁷⁴ If additur is precluded in the federal courts by virtue of a provision in the Federal Constitution having no counterpart in the Illinois Constitution, it is difficult to understand how *Dimick* can serve as the basis for holding additur to be beyond the ambits of an Illinois trial court's powers. Perhaps in the final analysis the court saps the decision of authority by its own words. The court did not obviate the use of additur in cases of unliquidated damages. It did not assert that additur was unconstitutional; it merely stated: "The device *seems* to be limited to cases where the inadequacy of the verdict is due to the omission of some specific, definitely calculable item."⁷⁵

It is believed that *Yep Hong* does not preclude the use of additur by a trial court in Illinois, and that its dichotomous import should not be so interpreted. It is submitted that the decision promulgated but two propositions both of which have received prior enunciation. The first proposition is that additur may be employed by a trial court in a case where the jury's verdict is inadequate, and the damages are liquidated or ascertainable.⁷⁶ This hold-

⁷¹ *Supra* note 68, at 460, 128 N.E.2d at 657.

⁷² As to the power of a trial court to order an additur or remittitur over the objections of one or both the litigants, see Annot., 56 A.L.R.2d 213 (1957).

⁷³ "The right to trial by jury as heretofore enjoyed, shall remain inviolate" ILL. CONST., art. 2, § 5 (1870).

⁷⁴ *Bender*, *supra* note 66, at 11 n.53; *Jehl v. Southern Pacific Co.*, *supra* note 45, at 285 n.17, 427 P.2d at 997 n.17.

⁷⁵ *Supra* note 71 (emphasis added).

⁷⁶ It is assumed that the verdict is not the result of passion or prejudice and is not a compromise verdict, for in such cases, in Illinois, remittitur as well as additur would be improper. The court's action in such a situation is to order a new trial on all issues. See *Manus v. Feist*, 76 Ill. App. 2d 99, 221 N.E.2d 418 (1966); *Kinsel v. Hawthorne*, 27 Ill. App. 2d 314, 169 N.E.2d 678 (1960).

ing, therefore, merely reaffirms *Carr* and *Morey*. The second and more important holding is that a trial court is without power to "enlarge the verdict of a jury by an arbitrary additur"⁷⁷ in actions *ex delicto* where unliquidated damages are involved. The court's use of the word "arbitrary" is believed not to refer to the action of the trial court in setting the quantum of the award, but rather to the officiousness of the court's action in ordering the additur. That is, where the plaintiff has not requested or the defendant not assented to an additur, it is improper for the court, *sua sponte*, to attempt to impose one. The recognition by the appellate court that neither party was privy to, nor the efficient cause of, the trial court's action is most significant. Yet, this posture is not novel nor is it peculiar to additur.

Unquestionably, in Illinois, on motion for a new trial, it is not error for the trial court either to allow or to require the plaintiff to enter a remittitur as a condition to its denial of the defendant's motion for a new trial based on excessiveness of award. However, the court may not, *sua sponte*, enter or impose a remittitur upon the plaintiff without his consent; to do so is reversible error.⁷⁸ It is submitted that the holding in *Yep Hong* in no way militates against the use of additur in Illinois in cases of unliquidated damages provided the court does not act on its own motion and without the defendant's consent.

Thus, it is believed that the status of additur in Illinois in cases involving unliquidated damages is not as yet settled. The final word remains to be spoken. Before it is, however, the Illinois courts will surely examine the attitudes of their sister states, several of which have held that additur does not deprive a plaintiff of his constitutional right to a jury determination of the amount of damages. This group of decisions includes not only the more recent but the better reasoned opinions on the subject.⁷⁹ In each case, the trial court entered an additur order the effect of which was to increase the verdict and deny the plaintiff's motion for a new trial because the defendant consented. The plaintiff's contention on appeal of deprivation of the right to a jury trial was rejected. In general, the opinions stressed the fact that it was in the interest of the sound administration of justice to determine the rights of litigants in one trial and avoid new trials, and that additur does not prejudice the rights of a plaintiff any more than remittitur prejudices the rights of a defendant.

To the impressive array of state supreme court opinions upholding additur may now be added one more, and one which promises to have a profound and far reaching influence on future decisions in Illinois and other forums. In

⁷⁷ *Supra* note 71.

⁷⁸ *Andres v. Green*, 71 Ill. App. 2d 375, 129 N.E.2d 430 (1955); *Hesse v. Zaffke*, 183 Ill. App. 160 (1913).

⁷⁹ See cases collected in *Bender*, *supra* note 66, at 20.

June, 1967, Mr. Chief Justice Traynor, speaking for the California Supreme Court, announced the decision in *Jehl v. Southern Pacific Co.*,⁸⁰ sustaining the constitutionality of additur in California. In so doing, the court expressly overruled its prior contrary decision in *Dorsey v. Barba*.⁸¹

Justice Traynor's majority opinion in *Jehl* closely parallels his dissenting opinion in *Dorsey*. In essence, the court could find no reason why "defendants should be denied the advantage of additur when they are required to submit to remittitur."⁸² The court, in reevaluating *Dimick* and *Dorsey* found their "arguments unpersuasive when considered in the light of the demands of fair and efficient administration of justice."⁸³ The court concluded by asserting that additur does not detract from the substance of the common law trial by jury.⁸⁴ When the Illinois Supreme Court finally examines the question of additur in its entirety, their ultimate determination may well be influenced by Justice Traynor's opinion in the *Jehl* case.

CONCLUSION

The efficacy of remittitur in promoting the fair and efficient administration of justice without detracting from the substance of the right to trial by jury is no longer seriously questioned. In light of the arguments adduced earlier, it is difficult to fathom why additur would not be an equally salutary device. The demands of a fair and efficient administration of justice must be considered in the context of the pressures placed upon the judicial machinery by the incessant rise in the number of civil cases filed each year.⁸⁵ The social and economic costs of overcrowded court dockets increase in geometric proportions to this annual rise. The situation is rapidly becoming critical and solutions such as additur must be speedily employed.

This is not to say that additur's justification is mere expediency, for expediency will never suffice to overcome valid constitutional objections nor render benign that which is legally dysgenic. It is merely to take cognizance of reality and to attempt to devise ameliorating methods and procedures which are consonant with the contemporary requirements of our society. It is believed that additur is such a procedure, that it is constitutional, and that its use within a proper and responsible judicial framework should not be discouraged.

Jeffrey Cole

⁸⁰ *Supra* note 45.

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

⁸² *Supra* note 45, at 280-81, 427 P.2d at 992-93.

⁸³ *Id.*

⁸⁴ *Id.* at 283, 427 P.2d at 995.

⁸⁵ *Id.* at 281, 427 P.2d at 993. See also Fitzgerald, *The Problem of Delay In the Courts: Cook County* 1962 U. ILL. L.F. 137.