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Damages - Inadequate and Excessive - Additur

Rodney S. Webb

of the right of privacy.[8] At present, many states, including North Dakota, have passed legislation which limits the courts and law enforcement agencies in procurring evidence by use of chemical tests without consent.[9]

The instant case held that the absence of conscious consent, without more, does not render the taking of fluid a violation of a constitutional right.[10] In *Rochin v. California*[11] the Court would not sanction the use of evidence procurred by forcibly pumping the stomach of the accused. The Court stated that this procedure violated the due process clause as it "shocks the conscience of the courts and is bound to offend even hardened sensibilities". The dissent in the instant case points out that in both the *Rochin* case and the instant case evidence which had been obtained from the accused involuntarily was used to convict him. The dissenting Justices refuse to distinguish between involuntary extraction of: words from the lips of the accused, contents of his stomach, and fluids of his body, when the evidence obtained is used to convict him.

No doubt, it is socially desirable to supress crime, but there is a greater social need the law shall not be flouted by enforcement agencies.[12] It is submitted that the majority decision in the instant case places undue emphasis on the needs of speedy and efficient law enforcement at the expense of personal integrity and other constitutional guarantees.

DENNIS M. SOBOLIK

DAMAGES — INADEQUATE AND EXCESSIVE — ADDITUR. — Plaintiff, a guest, sued his host and the driver of another automobile for injuries sustained in an automobile accident. The trial judge denied plaintiff's motion for a new trial on the condition that the defendants consent to an increase in the jury's verdict from $3,000 to $9,830.92. The defendants consented to the "additur" and the plaintiff appealed from the resulting order of the trial court. The Supreme Court of Minnesota, in affirming the lower court's decision, *held*

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8. Bednarik v. Bednarik, 18 N.J.Misc. 633, 16 A.2d 80 (1940). This case represents very sound logic and should be considered in future litigation of this type, however, the case was over-ruled in Cortese v. Cortese, 10 N.J.Super. 152, 76 A.2d 717 (1950). Justice Douglas in Rochin v. Calif., 342 U.S. 165, 179 (1952) (concurring opinion) stated that ". . . words taken from his lips, capsules taken from his stomach and blood taken from his veins are all inadmissible provided they are taken from him without his consent."

9. See N.D. Rev. Code § 39-0801 (1953 Supp.). However, in State v. Severson, 75 N.W.2d 316 (N.D. 1956) the court held that evidence of refusal of defendants to take blood test is inadmissible.

10. Still, the courts do protect certain fundamental rights and will not permit articles to be introduced in evidence which have been obtained without a valid search warrant, United States v. Di Re, 332 U.S. 581 (1948), nor do they permit the use of involuntary confessions, Brown v. Mississippi, 297 U.S. 278 (1936), McNabb v. United States, 318 U.S. 332 (1943).

11. 342 U.S. 165 (1952).

12. People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). In Watts v. Indiana, 338 U.S. 49 (1949), the Court pointed out that society carries the burden of proving its charge against the accused. Justice Jackson in United States v. Di Re, 332 U.S. 581, 595 (1949) stated in regard to finding incriminating evidence without a search warrant that, "It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of a few criminals from punishment."

that the practice of "additur" is within the constitutional power of the courts and does not violate the Minnesota constitutional provision which guarantees that "the right of trial by jury shall remain inviolate".[1] *Genzel v. Halvorson*, 80 N.W.2d 854 (Minn. 1957).

Additur is "the court's power to deny plaintiff's motion for new trial on condition that the defendant consent to an increase in the amount of damages awarded".[2] It has been the subject of much controversy in this country and the decisions regarding its constitutionality are conflicting.[3]

In the leading federal case of *Dimick v. Schiedt*,[4] the United States Supreme Court, with four Justices dissenting, held that "additur" was unconstitutional as an infringement of plaintiff's right to jury trial as guaranteed by the seventh amendment.[5] The majority opinion rested its decision upon two bases: (1) "additur" was not practiced at common law,[6] (2) the issue of increased damages is one of fact which the jury has not considered.[7] This precedent is followed[8] in federal courts but certain cases have shown the influence of the dissent in the *Dimick* case.[9]

The seventh amendment to the Federal Constitution is not binding upon the states;[10] however, the reasoning of the majority holding in the *Dimick* case has been followed in some states.[11]

The Minnesota Supreme Court,[12] along with many other state courts,[13] has reasoned with the view expressed in the dissenting opinion of the *Dimick*

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1. Minn. Const. art. 1 § 4.
2. Black, Law Dictionary (4th ed. 1951).
3. See Comment, 44 Yale L. J. 318 (1953); 32 Mich. L. Rev. 538 (1943).
4. 293 U.S. 474 (1935).
5. Dimick v. Schiedt, 293 U.S. 475 (1934).
6. *Id.*, at 482. (". . . [C]ommon law, as it existed in England at the time of the adoption of the United States Constitution forbade the court to increase the amount of damages awarded by the jury . . ." The right of jury trial shall be according to common law rules. Additur has no precedent according to rules of the common law.)
7. *Id.*, at 485. ("A jury has already awarded a sum in excess of that fixed by the court as a basis for a remittitur, . . . while, in the second case [additur], no jury has ever passed on the increased amount."); See Patton v. United States 281 U.S. 276 (1930) (Courts determine the law . . . jury the facts . . . Damages are fact . . .)
8. *E. g.*, Milprint Inc. v. Donaldson Chocolate Co., 222 F.2d 898 (8th Cir. 1955); Springer v. J. J. Newberry Co., 94 F.Supp. 905 (M.D.Pa. 1951); (additur was disallowed in both cases).
9. See United States v. Kennesaw Mt. Battlefield Ass'n., 99 F.2d 830 (5th Cir. 1938) (The court distinguished the Dimik Case by reasoning that condemnation proceedings are not common law actions within seventh amendment but are statutory proceedings in which no jury is required. Additur allowed.); Cummings v. Boston & M. Ry., 212 F.2d 133 (1st Cir. 1954) (Additur allowed to correct trial courts erroneous instructions).
10. *E. g.*, Pearson v. Yewdall, 95 U.S. 294 (1877); Walker v. Sauinet, 92 U.S. 90 (1875).
11. See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952); Riling Inc. v. Schunk, 346 Pa. 169, 29 A.2d 693 (1943).
12. See Genzel v. Halvorson, 80 N.W.2d 854 (Minn. 1957).
13. See Rudnick v. Jacobs, 39 Del. 169, 197 Atl. 381 (1938); Gaffney v. Illingsworth, 90 N.J.L. 490, 101 Atl. 243 (1917); Attrep v. Horecky, 177 So. 379 (La. App. 1937); O'Connor v. Papetsian, 309 N.Y. 465, 131 N.E.2d 883 (1956) (Damages may be increased to the highest amount awardable as a matter of law by an "additur".); Lewis v. City of New York, 270 App. Div. 821, 59 N.Y.S.2d 892 (1946); Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1942) (Additur is provided for by statute in Washington. Rev. Code of Wash. § 4.76.030); Yep Hong v. Williams, 6 Ill. App.2d 456, 128 N.E.2d 655, 657 (1955) (dictum). Massachusetts, Illinois and Deleware hold "additur" is within the power of the trial court when liquidated damages are involved; Pub. Laws of R. I. 1939-40, C. 946, § 1. (Statute requires the trial court to permit the losing party to consent to an "additur" before it can grant a new trial for inadequacy of damages.)

case. This view rests on the following reasons: (1) "additur" would bring the litigation to a more speedy and economical conclusion; (2) discretionary power given a judge in remittitur cases should not be denied in comparable "additur" situations; (3) even though "additur" was not practiced at common law, other modern trial procedures such as the requirement of both a special and general verdict and the granting of a new trial on the issue of damages alone were equally unknown to the common law.[14]

There is no North Dakota Statute expressly granting to the courts the power to use an "additur" and research has not revealed any North Dakota case sanctioning "additur"; however, remittitur is clearly allowable in North Dakota[15] and a trial court has the power to correct a verdict when it is insufficient as not covering the issues.[16] North Dakota courts have customarily extended relief in cases of inadequate damages by granting a new trial;[17] but, it would seem there is a legal basis which would permit the use of "additur" by North Dakota Courts.[18] It is submitted that adoption of the holding of the instant case would increase the efficiency of the courts without violating the discretionary power of the court or depriving the litigants of their rights.

RODNEY S. WEBB

DIVORCE — ALIMONY — RIGHT TO ALIMONY SURVIVES DIVORCE WHERE COURT LACKED PERSONAL JURISDICTION OVER ABSENT SPOUSE. — A Nevada court granted a divorce to a husband although the wife had not been served with process, was not domiciled in the state, and did not appear in the action. Subsequently the wife instituted proceedings for separation and maintenance in New York. On writ of certiorari to the Court of Appeals, the Supreme Court of the United States *held,* two Justices dissenting, that a decree granting alimony to the wife did not deny full faith and credit to the Nevada divorce, even though such divorce purported to terminate the wife's right to alimony, *Vanderbilt v. Vanderbilt,* 77 Sup. Ct. 1360 (1957).

Since *Williams v. North Carolina I,*[1] it has been settled that a divorce granted by a court to one of its domiciliaries is entitled to full faith and credit[2] nothwithstanding that the defendant spouse was not subject to the in personam

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14. See Gebzel v. Halvorson, 80 N.W.2d 859 (Minn. 1957); *supra* note 5 at 490, (dissent); Blunt v. Little, 3 Fed.Cas. 760, No. 1578 (C.C.D.Mass. 1822) (Remittitur was first allowed in the United States . . . Justice Story presiding.).

15. N. D. Rev. Code § 28-1902 (5) (1943); Zisgler v. Ford Motor Co., 67 N.D. 286, 272 N.W. 743 (1937); Emery v. Midwest Motor, 79 N.D. 27, 54 N.W.2d 817, 823 (1952) (Dictum).

16. N. D. Rev. Code § 28-1507 (1943).

17. N. D. Rev. Code § 28-1907 (1943); Haser v. Pape, 78 N.D. 481, 50 N.W.2d 240 (1951); Jacobson v. Horner, 49 N.D. 741, 193 N.W. 327 (1923); (In Deschane v. McDonald, Dist. Ct. of 1st Judicial Dist., N. D. 1956, the court held that the verdict was inadequate and granted a new trial on the issue of damages alone. Court stated that the decision did not pass upon the question of "additur.").

18. N. D. Const. art. 1, § 7, "The right of trial by jury shall be secured to all, and remain inviolate"; (It should be noted that this provision is substantially identical to the Minnesota Constitution cited footnote 1, *Supra.*)

1. 317 U.S. 287 (1942).
2. U.S. Const. Art. IV, § I.