ADDITUR IN IOWA

Introduction

Additur is the court's power to deny a plaintiff's motion for a new trial on condition that the defendant consent to an increase in the amount of damages awarded.[1] It is distinguished from remittitur in that the latter involves the court's power to deny a defendant's motion for a new trial on condition that the plaintiff consent to a decrease in the amount of damages awarded. The basic policy reason for additur and remittitur is the court's control over the jury by determining the bounds within which the jury may operate, and by modifying the verdict so that it comes within these bounds—providing the prejudiced party consents. In this manner litigation may be brought to a speedy and economical conclusion by avoiding the time and expense of a new trial. If no constitutional objection presented itself, there is little doubt that many courts would take advantage of both additur and remittitur. However many courts are troubled by the exercise of control over the jury verdict in this manner, and the constitutionality of such control has been and still is seriously questioned.

Constitutionality

The Seventh Amendment to the United States Constitution provides that ". . . in suits at common law where the value in controversy shall exceed $20.00, 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 common law". Based on this provision, the United States Supreme Court has held unconstitutional the practice of additur in federal courts where common law jury actions are involved.[2] However, this rule applies only to situations which would have required a jury trial at common law as it existed at the time of the adoption of the federal constitution; the rule has no application to situations unknown at common law, such as controversies arising out of workman's compensation laws or condemnation proceedings.[3] In these latter type of cases, the right of trial by jury may be a statutory right, but it is not a constitutional right.

Neither the Seventh amendment nor the "due process" clause, of the federal Fourteenth amendent govern the right of trial by jury in state actions.[4] Although trial by jury might satisfy the "due process" requirement of the Fourteenth amendment,[5] it does not necessarily follow that "due process" requires a jury trial[6] since the states are free to regulate the procedure of their courts in accordance with their own conceptions of policy,[7]

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1 See BLACK, LAW DICTIONARY, (4th ed. 1951).
2 Dimick v. Schiedt, 293 U.S. 474 (1935).
3 See United States v. Kennesaw Mountain Battlefield Assn., 99 F.2d 830 (5th Cir. 1938), *certiorari denied*, 306 U.S. 646 (1938).
4 Walker v. Sauvinet, 92 U.S. 90 (1875).
5 *Ibid;* see also Brown v. State of Mississippi, 297 U.S. 278 (1936); Chicago, R. I. & P. R. Co. v. Cole, 251 U.S. 54 (1919).
6 Walker v. Sauvinet, *supra*, note 4.
7 Brown v. State of Mississippi, *supra*, note 5.

unless in so doing such procedure offends some fundamental principle of liberty and justice.[8]

Although state jury trials are not governed by the Seventh amendment, most states have a somewhat similar amendment in their constitutions. For example, Article I, Section 9 of the Iowa Constitution requires that the right of trial by ". . . jury shall remain inviolate." But the Seventh amendment and the State amendments differ in one major respect. The second phrase of the Seventh amendment[9] relating to reexamination of fact issues submitted to a jury is not found in any state constitution. The federal court's interpretation of this second clause is that it is "substantial and independent of the first" and not merely explanatory of the first part.[10] So considered, this second phrase precludes the application of additur in federal court common law jury cases because additur was unknown to the rules of the common law at the time of the adoption of the Constitution, with the single exception of mayhem.[11] Were this second clause merely explanatory of the first, states would have to decide whether or not it was contained in their constitution by implication. Since it is independent of the first part, they do not have to consider it at all.

Arguments For

The argument for additur may be summarized as follows:

(1) Right of trial by jury does not include the right to a new trial since at the time of the adoption of the Constitution there was no right to reassessment of damages by a second jury. The first jury's determination of the amount of damages was conclusive.[12]

(2) The court at common law has the power to determine as a matter of law the upper and lower limits within which recovery will be permitted, and the authority to set aside a verdict which is not within these limits.[13]

(3) Although at common law a plaintiff has no right to a new trial, the court has the power to act upon a motion to set aside a jury verdict if inadequate or excessive, and in its discretion to grant or deny a new trial.[14]

(4) Judicial discretion in denying a motion for a new trial on the grounds that a verdict is too large or too small is not subject to review on appeal or writ of error.[15]

Based upon these premises, the court could deny a new trial subject to conditions it might impose—such as remittitur or additur, and a plaintiff could not complain since, in requesting a new trial he was appealing to the

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[8] See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

[9] ". . . and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law."

[10] Parsons v. Bedford, 3 Pet. 432 (1830).

[11] Dimick v. Schiedt, 293 U.S. 474 (1935).

[12] Beardmore v. Carrington, 2 Wils. K.B. 244, 95 Eng. Rep. 790 (1764); see also dissenting opinion, Dorsey v. Barba, *supra*, note 8.

[13] Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889).

[14] New York, C. & H. R.R. Co. v. Fraloff, 100 U.S. 24 (1879); Wilson v. Everett, 139 U.S. 616 (1891); Lincoln v. Power, 151 U.S. 436 (1894).

[15] *Ibid;* see also Wabash Ry. Co. v. McDaniels, 107 U.S. 454 (1883); Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U.S. 98 (1890); Luckenbach S.S. Co. v. United States, 272 U.S. 533 (1926).

conscience of the court and therefore could not object to the method undertaken to remedy the alleged injustice of the verdict.[16]

This argument is as equally applicable to remittitur as it is to additur. Generically, both notions proceed from the same common law premises. If a certain jurisdiction accepts the practice of remittitur, it is logical that the jurisdiction should also accept the practice of additur.[17] If remittitur is not construed to be in conflict with the right of trial by jury, therefore, neither should additur.

A related argument for additur follows from a court's power to render a judgment *non obstante veredicto*. In federal courts, a judgment *n.o.v.* cannot be rendered after a jury has brought in a verdict where a common law jury action is involved.[18] Many states however, by statute or case law have approved judgments *n.o.v.* It is consistent for a court to consider that a judgment *n.o.v.* breaches the right of trial by jury every bit as much as an additur verdict since the jury's verdict is ignored in either case. It is inconsistent, therefore, for a court to approve the practice of rendering judgment *n.o.v.* and for the same court to disapprove of additur. If a judgment *n.o.v.* is not construed to be in conflict with the right to trial by jury, neither should additur.

Arguments Against

The principal argument against the use of additur is simply that it is unconstitutional, whether the court is governed by the Seventh amendment or by a particular state constitutional amendment covering the question of jury trials. Where the Seventh amendment governs, additur has been declared unconstitutional in common law jury actions.[19] Where state constitutions govern, emphasis is placed on the fact that the provision for a jury trial is a substantive right and not merely a declaration of procedure to be followed.[20] Since this provision is a substantive right, a party to an action is entitled to a *jury decision* no matter how many jury trials are had. It is not the mere form of a jury trial to which one is entitled under the constitution, but the fundamental right to have a jury determination of a question of fact. Although at common law there was no right to a new trial as such, there existed a right to have matters of fact determined by a properly functioning jury.[21] Should a jury verdict be tainted by passion or prejudice or compromise, it would not be that of a properly functioning jury. Such a verdict should be set aside and the controversy tried anew—by a jury.

Other arguments against the use of additur center around the additur-remittitur relationship. No problem is presented where a jurisdiction does not accept remittitur at all.[22] In such a case it would logically follow that it

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16 See dissenting opinion Dimick v. Schiedt, *supra*, note 2; and dissenting opinion Dorsey v. Barba, *supra*, note 8.

17 Gaffney v. Illingsworth, 90 N.J.L. 490, 101 Atl. 243 (1917); Caudle v. Swason, 248 N.C. 249, 103 S.E.2d 357 (1959); Markota v. East Ohio Gas Co., 154 Ohio St. 456, 97 N.E.2d 13 (1951); Middleton & Co. v. Atlantic Coast Line R. Co., 133 S.C. 23, 130 S.E. 552 (1925).

18 Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913).

19 Dimick v. Schiedt, 293 U.S. 474 (1935).

20 Dorsey v. Barba, 38 Col. 2d, 350, 240 P. 2d 604 (1952).

21 Barber & Co. v. Deutsche Bank, A.C. 304 (1919); Schwickerath v. Maas, 230 Iowa 329, 297 N.W. 248 (1941).

22 Siebel v. Byers, 344 P.2d 129 (Mont. 1959).

would not adopt additur either. Remittitur, however, is generally accepted practice in most jurisdictions and courts have the problem of reconciling the fact that remittitur is practiced with the contention that additur should not be. This problem has been resolved in several ways:

(1) Remittitur is tolerated only because it has been accepted practice for so long, but it is argued that the principle should not be extended into the additur area merely because the two principles seem to be related.[23]

(2) Remittitur is "good law" but it does not necessarily follow that for the same reasons additur is "good law." There are important differences between the two principles. In remittitur the jury has passed on the total amount received by the plaintiff, only the excrescence having been lopped off, whereas in additur the jury has passed on only a portion of the recovery —the balance representing a bold addition by the court.[24] In remittitur, it is the winning non-negligent plaintiff which is given the choice of remitting a portion of the verdict or of submitting to a new trial, whereas in additur it is the losing negligent defendant who is given the option of adding to the verdict or of submitting to a new trial.[25]

Application in General

The question of whether or not additur should be adopted has been considered by several states with varying results. Some states permit additur by statute.[26] Some courts accept additur without reservation.[27] Some accept additur where the damages are calculable or subject to reasonable mathematical computation but reject it where damages are uncertain and unliquidated.[28] Finally, some courts reject additur altogether.[29]

One of the premises generally accepted in states where additur has been adopted is that the defendant agree to the additional damages or submit to a new trial—on the question of damages only.[30] In addition some states permit a new trial on the question of damages alone, even if the original verdict was the result of passion or prejudice.[31] A second group of states does not permit a new trial on the question of damages alone in the event the original verdict was considered to have been influenced by passion or

[23] Dimick v. Schiedt, 293 U.S. 474 (1935); Dorsey v. Barba, 38 Col. 2d 350, 240 P.2 604 (1952).

[24] Lorf v. City of Detroit, 145 Mich. 265, 108 N.W. 661 (1906).

[25] Lemon v. Campbell, 136 Pa. Super. 370, 7 A.2nd 643 (1939).

[26] *See, e.g.,* R.I. GEN LAWS 9-23-1 (1956); UTAH URCP 59 (c) 5; WASH. RCW 4.76.030.

[27] *See, e.g.,* Genzel v. Halvorson, 248 Min. 527, 80 N.W.2d 854 (1957); Fisch v. Manger, 24 N.J. 66, 130 A.2d 815 (1957); Caudle v. Swanson, *supra,* note 17; Markota v. East Ohio Gas Co., *supra,* note 17; Middleton & Co. v. Atlantic Coast Line R. Co., *supra,* note 17.

[28] *See, e.g.,* Kraus v. American Bakeries Co., 231 Ala. 278, 164 So. 565 (1936); Dorsey v. Barba, *supra,* note 8; E. Tris Napier Co. v. Gloss, 150 Ga. 561, 104 S.E. 230 (1920); Yep Hong v. Williams, 6 Ill. App.2d 456, 128 N.E.2d 655 (1955); Marsh v. Kendall, 65 Kan. 48, 68 Pac. 1070 (1902); Grand Rapids v. Voit, 149 Mich. 668, 113 N.W. 362 (1907); Woodmansee v. Garrett, 153 So.2d 812 (Miss. 1963).

[29] Sarvis v. Folsom, 114 So.2d 490 (Fla. App. 1959); King v. Kansas City Life Ins. Co., 350 Mo. 75, 164 S.W.2d 458 (1942); Lemon v. Campbell, *supra,* note 25; Siebel v. Byers, *supra,* note 22.

[30] See Moran v. Feitis, 69 N.J. Sup. 531, 174 A.2d 618 (1962), and cases there cited.

[31] See Baros v. Kazmierczwk, 68 N.M. 421, 362 P.2d 798 (1961), and cases there cited.

prejudice.[32] A third group of states do not permit a new trial on the question of damages alone in any event.[33]

Application in Iowa — Case Law

As previously indicated, one of the premises upon which the additur principle rests is that a court has discretion to grant or deny a new trial on the issue of damages alone, depending on whether the court is convinced the jury damages are outside the lower or upper limits the court has determined to be reasonable. In Iowa, if such variance from these limits is the result of passion and prejudice, a new trial must be awarded on all issues and not merely on the issue of damages alone.[34] If passion and prejudice affect the verdict in any particular, there is no certainty that it won't affect other issues involved, particularly the question of liability itself, and consequently the fairest method of resolving the problem seems to award a new trial on all issues.[35] But the size of the verdict alone does not necessarily indicate passion or prejudice,[36] it is possible to have a jury verdict that is without the bounds of what the court would consider reasonably to be the lower and upper limits awardable, and for this verdict not to be the result of passion and prejudice.[37] In such a case a new trial properly could be awarded on the issue of damages alone.[38] Also, in disposing of a motion for a new trial, the trial court is invested with reasonable discretion which will not be disturbed on appeal unless obviously an abuse of this discretion.[39]

Another premise upon which the additur principle rests, is that the court in exercising its discretion on whether or not to award a new trial, may do so conditionally. Iowa has long held that a court might impose terms upon a party in order to avoid the granting of a new trial, and that this power is based upon common law principles.[40] Further this power is applicable to tort cases as well as to contract.[41] Based on this right, defendants have been denied new trials when they properly could have been granted because of excessive damages, on condition that the plaintiff remit what the court considered to be excess damages. Such remittiturs have been applied in tort cases where damages have been unliquidated as well as in contract cases where damages are liquidated and calculable.[42] Also, based on this right, a defendant has been denied a new trial because of inadequate damages awarded on his counterclaim, on condition that the plaintiff remit what the court considered an adequate additional amount defendant was entitled to on his counterclaim.[43] This "hybrid" remittitur-additur situation reflects the essential relationship which exists between the two principles. Another

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32 Book v. Erskine & Sons, 154 Ohio St. 391, 96 N.E.2d 289 (1951), and cases there cited.
33 Siebel v. Byers, 344 P.2d 129 (Mont. 1959).
34 Ahrens v. Fenton, 138 Iowa 559, 115 N.W. 233 (1908); Castner v. Wright, 127 N.W.2d 583, *rehearing denied* 128 N.W.2d 885 (Iowa 1964).
35 See Larimer v. Platte, 243 Iowa 1167, 53 N.W.2d 262 (1952).
36 Conners v. Chingren, 111 Iowa 437, 82 N.W. 934 (1900).
37 Brause v. Brause, 190 Iowa 329, 177 N.W. 65 (1920).
38 Feldhahn v. VanDeventer, 253 Iowa 1194, 115 N.W.2d 862 (1962).
39 Utilities Holding Corp. v. Chapman, 210 Iowa 994, 232 N.W. 116 (1930).
40 Brockman v. Berryhill, 16 Iowa 183 (1864).
41 *Ibid.*
42 *See* cases collected in Note, *Remittitur of Jury Verdicts in Iowa*, 48 Iowa L. Rev. 649, 653 (1963).
43 Dawson v. Wisner, 11 Iowa 6 (1860).

case analagous to additur involved an action between adjoining property owners as to how much each would maintain of a fence dividing their properties. Plaintiff's request for a new trial was denied on condition that defendant consent to a modification of the jury verdict so as to require defendant to maintain more than half of the fence.[44] It is interesting that this latter case was cited by the South Carolina Court as authority when that Court made its determination that if remittitur is permissible, so should additur be.[45] Finally in a mortgage forecloseure action, the Iowa court upheld the trial court's power to deny plaintiff's request for a new trial on condition that defendant agree to an increase in the verdict.[46] In addition to these instances which recognize, at least in principle, additur, there are at least two Iowa cases containing dictum to the effect that additur might be permissible.[47]

None of the cases discussed above involved a tort action where damages are unliquidated. Rather all damages involved in these cases were calculable. It may therefore be argued that Iowa has approved the practice of additur but limited its application to cases in which liquidated and calculable damages are concerned. A close look at *Callanan* v. *Shaw*,[48] however, indicates that the court was not restricting itself to calculable situations. It there held that the very same reasons given to sustain the power of the court to render judgment for a sum less than the verdict where the jury verdict is found to be excessive through mistake or any other cause (nemittitur), are equally applicable and conclusive in support of the right to render judgment for more than the jury verdict in proper cases where the court feels the verdict is inadequate and the defendant elects to submit to such judgment in lieu of a new trial (additur). If a plaintiff complains to the court because of inadequate damages awarded by a jury, and if the court determines that he is entitled to an additional amount which is conceded by the defendant, a new trial could not be ordered without violation of justice. To allow a new trial in such circumstances would no more than aid the plaintiff in an attempt to recover more than the jury determined he should recover; and more than the conscience of the court determined he should recover. It therefore would render the judicial determination subservient to his own claims.

This reasoning is applicable to any additur situation where speculative damages are involved. Lest there by any doubts, however, the court further stated, in effect, that since a calculable item is involved there is the more reason to deny a new trial.[49] So we have the matter decided on two different rules of law, one affecting damages in general and the other calculable damages in particular. Where there are two grounds upon which appellate court may rest its decision, and it adopts both, the ruling of neither is obiter, but each is the judgment of the court of equal validity with the other.[50]

Although the rule, as expressed in *Callanan* v. *Shaw*, would seem to

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[44] Smith v. Ellyson, 137 Iowa 391, 115 N.W. 40 (1908).
[45] Middleton & Co. v. Atlantic Coastline R. Co., 133 S.C. 23, 130 S.E. 552 (1925).
[46] Callanan v. Shaw, 24 Iowa 441 (1868).
[47] Tathwell v. City of Cedar Rapids, 122 Iowa 50, 97 N.W. 96 (1903); Rueber v. Negles, 147 Iowa 734, 126 N.W. 966 (1910).
[48] *Supra*, note 46.
[49] *Id.* at 451.
[50] Waddell v. Bd. of Dir. of Aurelia Consol. Ind. School Dist., 190 Iowa 400, 175 N.W. 65 (1919).

cover all situations whether damages are liquidated or unliquidated, the fact remains that additur cases in any form are scarce, in addition to which additur has never been directly approved by the Iowa Court in a tort case where speculative damages are involved. Insofar as the scarcity of cases of additur as compared to remittitur is concerned, it is generally conceded that courts feel that juries rarely underestimate damages.[51] Therefore, possible additur applications rarely present themselves. Further, where damages are speculative they may be so speculative that the court could feel on safer ground, especially on the question of passion or prejudice, if it exercised its power to grant a new trial rather than to conditionally deny a new trial. The reason no tort cases have been reported is also due in great part to the fact that from 1860 until 1897 Iowa had a statute denying a new trial on account of inadequate damages in an action for an injury to a person or reputation.[52] As explained earlier in this article, additur is generally applicable only where the alternative of a new trial on the issue of damages alone is available.[53] Therefore, during this period the application of additur to tort situations was impossible because of this statute. The reasons why it has not been applied since 1897 are at best speculative. Perhaps, since the relationship between the statute and additur is not immediately apparent, the removal of the statute would not immediately signal the go ahead on the use of additur. It seems plausible that, without a thorough analysis of the additur problem, very few would realize that doing away with this statute now made additur possible. Nationally, the additur concept was just beginning to be considered and applied. Finally, *Dimick* v. *Schiedt*[54] in which the United States Supreme Court rejected the doctrine in federal cases affecting common law jury actions very likely dampened the acceptance of the doctrine of additur.

Iowa Statutes

At the present time, R.C.P. 250 provides that the court may permit a party to avoid a new trial under Rule 243 or Rule 244 by agreeing to such terms or conditions as it may impose. This rule, in its present form first appeared in 1943.[55] Until 1943, therefore, the power of a court to permit the avoidance of a new trial by agreement of the adverse party to certain conditions was a common law principle and not based on statute.[56] However, present R.C.P. 250 may furnish statutory basis for additur in that its terms permit a party to avoid a new trial under R.C.P. 244. R.C.P. 244 lists various circumstances under which an aggrieved party may have a new trial. Subsection (d) of R.C.P. 244 includes inadequate damages resulting from passion and prejudice in addition to excessive damages resulting from passion and prejudice as grounds for a new trial. Subsection (e) of R.C.P. 244 provides

51 Sullivan v. Vicksburg S. & P. R. Co., 39 La. Ann. 803, 2 So. 586 (1887); Allbee v. Berry, 254 Iowa 712, 119 N.W.2d 230 (1963); 25 C.J.S. *Damages* Sec. 196 at 912.

52 IOWA CODE, Rev. of 1860, Sec. 3113; Rev. of 1873, Sec. 3113; Rev. of 1880, Sec. 2839.

53 *Supra*, note 30, and accompanying text material.

54 *Supra*, note 2.

55 Iowa Rule C. Proc. 250 superceded IOWA CODE § 1156 (1939) which was the same as IOWA CODE § 3118 (1860) which provided that a court could determine that a new trial would not be granted unless certain conditions were agreed to — which is a different matter.

56 Brockman v. Berryhill, 16 Iowa 183 (1864).

that error in fixing the amount of recovery, whether too large or too small, in an action upon contract or for injury to or detention of property is grounds for a new trial. Neither subsection (d) or (e) provide for a new trial when excessive or inadequate damages are not the result of passion or prejudice nor when a personal injury action is involved—but new trials have been awarded in such cases.

Two approaches have been taken to justify the granting of a new trial under such circumstances. The first approach is that a new trial may be ordered by a trial judge by virtue of his inherent power eventhough the R.C.P. 244 provides a procedure for the granting of new trials upon application of the party aggrieved. Following this reasoning, new trials have been granted because of excessive damages in tort cases notwithstanding the absence of a finding of passion or prejudice and inadequacy of damages.[57] The second approach is that such circumstances are covered by other subsections of R.C.P. 244 which authorize the granting of a new trial for irregularity or misconduct of the jury, or because the verdict is not sustained by sufficient evidence or is contrary to law. Under this second approach the court, in a personal injury action, could set aside the verdict on the grounds of inadequacy of damages because this procedure is provided for by the rules authorizing the granting of a new trial if the verdict is not sustained by sufficient evidence.[58] If we justify the granting of a new trial in a personal injury action because of inadequate damages though not the result of passion or prejudice on the basis of the second approach outlined above—the granting of such a trial would be under R.C.P. 244. R.C.P. 250 provides statutory basis for the court permitting a party to avoid a new trial under Rule 244 by agreeing to terms imposed by the court. Therefore, there is statutory basis under R.C.P. 250 for the court's power to deny a plaintiff's motion for a new trial on condition that the defendant consent to an increase in the amount of damages awarded.

Other Problems Arising Out Of Additur

Establishing the fact that additur may validly be practiced in Iowa does not end the discussion. Another aspect of the problem involves the question of what rule should be followed by the court in determining just how much should be added to the verdict. Where calculable damages are involved no problem is presented. Where speculative, unliquidated damages are involved, the answer is not so simple. Ohio has indicated that additur should be in an amount which is more than the least that a jury would have awarded.[59] In Minnesota additur must increase the verdict to the extent that it reasonably comports with the proof in the record.[60] Wisconsin, until 1960, followed the rule that if a verdict was not within the lower and upper limits as the court would determine an unprejudiced jury would award, a plaintiff could avoid a new trial by accepting the lower limit and a defendant could avoid a new trial by accepting the upper limit.[61] Since 1960, however, Wis-

[57] Thomas v. Ill. Cent. R. Co., 169 Iowa 337, 151 N.W. 387 (1915).
[58] Tathwell v. City of Cedar Rapids, *supra*, note 47.
[59] Markota v. East Ohio Cas Co., 154 Ohio St. 456, 97 N.E. 13 (1951).
[60] Seydel v. Reuber, 254 Min. 168, 94 N.W.2d 265 (1959).
[61] Risch v. Lawhead, 211 Wis. 270, 248 N.W. 127 (1933).

consin has followed the "reasonable amount" rule,[62] adopted in Minnesota. New Jersey on the other hand seems to be headed toward the upper limit rule.[63] New York also seems to follow the upper limit rule in setting additur amounts at a figure "as high as any jury would be warranted in going".[64] And oddly enough, in the California case of *Dorsey* v. *Barba*[65] often cited by courts refusing to accept additur, there is dictum to the effect that additur would be acceptable in the event it would represent "the highest award a jury could be allowed to find".

Iowa, as previously indicated, has never had any reported cases involving increases in the jury verdict except when the amount was calculable. However, where remittitur is concerned, the trial court's discretion extends to the amount as well as to the decision to grant or refuse a new trial.[66] Iowa could then be said to apply in effect the "reasonable amount" or Minnesota rule.

One more problem remains affecting possible additur applications in Iowa. This pertains to a recent addition to R.C.P. 250 which calls for reinstatement or the original jury verdict in the event there is appeal of a judgment entered pursuant to terms and conditions imposed by the trial court per the original (and now the first paragraph of) R.C.P. 250. In a recent case involving application of this new provision a remittitur case was appealed and a new trial denied. Plaintiff then asked the court to reinstate the original excessive verdict per the second provision of R.C.P. 250, conceding at the same time that the Court had the right to order a remittitur of its own as a condition for a new trial. The Iowa Court ordered a remittitur.[67] Undoubtedly, should an additur judgment be appealed, this rule could be similarly applied. Following this application of the rule gives the appealing plaintiff no advantage in an additur situation in the event the Supreme Court sets the additur amount as the same figure the trial court determined. The appealing plaintiff would be in a more advantageous position if the Supreme Court amount is more than that of the trial court, since the defendant is less likely to accept the increased award. Finally, the appealing plaintiff would be in a less advantageous position if the Supreme Court amount is less than that of the trial court additur since the defendant is more likely to accept the decreased award. If the Supreme Court assumes that the amount of additur is really a matter of discretion for the trial court which should not be disturbed unless there is an abuse of that discretion, the effect of the provision would be neutralized. If it should decide to permit the reinstatement of the original jury verdict without prescribing additur or remittitur on its own, there certainly should be a reduction of cases appealed in this area. If, however, it should decide to use its independent judgment in prescribing additur or remittitur amounts after the original jury verdicts are reinstated it would appear that more cases would be appealed. If the Supreme Court were to change the amounts as determined by

62 Powers v. Allstate Ins. Co., 10 Wis.2d 78, 102 N.W.2d 393 (1960).
63 Lehner v. Interstate Motor Lines, Inc., 70 N.J. Sup. 215, 175 A.2d 474 (1962).
64 O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E.2d 883 (1956).
65 *Supra*, note 8.
66 Grant v. Thomas, 118 N.W.2d 545 (Iowa 1962).
67 Castner v. Wright, 127 N.W. 2d 583 (Iowa 1964).

the trial court often enough or drastically enough, trial courts could well take the attitude that they would not bother with additur or remittitur and simply order new trials in most cases where they find verdicts to be inadequate or excessive.

Conclusion

Iowa, by case law and by statute probably has adopted the additur principle without distinction between actions involving liquidated damages and those involving unliquidated damages. The application of this principle, however, is restriced to those situations where the original jury verdict cannot be said to have been tainted by passion or prejudice, or compromise. This restriction is important because it precludes the consideration of additur in those cases where most objections to it would be made. By applying this restriction one of the prime arguments against additur is by-passed—that a litigant is entitled to the verdict of a properly functioning jury. He then cannot complain if the defendant agrees to an addition to the amount of damages originally determined by a properly functioning jury because it is only this original amount he is entitled to.

The principal argument against additur—that it is unconstitutional—has never been directly considered by the Iowa Supreme Court. The Iowa amendment providing that the right of trial by jury shall remain inviolate has received little interpretation. The Iowa Court once indicated that right of trial by jury shall "remain inviolate" is not to be construed differently than the provision of the Federal Constitution that such right shall be "preserved".[68] This does not clarify the situation, however, since it is not the meaning of "remain inviolate" clause which is in controversy. What needs to be determined is precisely how "right of trial by jury" is to be interpreted. Is it a procedural right or is it a substantive right? If it is procedural, changes in procedure could be adopted without becoming unconstitutional. If it is substantive, is it subject to the modification that the court has the power to control the jury verdict within certain limitations?

It is submitted that, should the Iowa Supreme Court interpret the "right of trial by jury" and find it to be a substantive right, that it should and would at the same time find that it is subject to the modification that the court has the power to control the jury verdict within certain limitations such as by the conditional or unconditional granting of a new trial, by the conditional denial of a new trial, or by permitting a judgment *non obstante veredict* to be rendered. The United States Supreme Court interpreted right of trial by jury to be that right as it existed at common law at the time the Federal Constitution was adopted.[69] Several state courts have interpreted this right to be that right as it existed as common law at the time their constitutions were adopted. In Iowa, since the constitution was adopted in 1841, reference would be had to the common law as it existed at that time—and at that time the conditional denial of a new trial was considered a proper power of the court over the jury verdict.[70]

In the meantime, pending any Supreme Court decision which may be

[68] Schloemer v. Uhlenhopp, 237 Iowa 279, 21 N.W.2d 457 (1946).
[69] Dimick v. Schiedt. 293 U.S. 474 (1935).
[70] See Brockman v. Berryhill, 16 Iowa 183 (1864).

forthcoming on the subject, in view of the fact that Iowa Statutes and case law permit the conditional denial of a new trial and the rendering of judgments notwithstanding the verdict, in addition to the fact that the Supreme Court itself has engaged in the practice of conditionally denying a new trial, there exists a strong presumption that the additur principle is constitutional, and beneficial.

BERTRAND GIONET (June, 1966)