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Constitutional Law - Right to a Trial by Jury-Power of Trial Court to Use Additur

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CONSTITUTIONAL LAW—RIGHT TO A TRIAL BY JURY—POWER OF TRIAL COURT TO USE ADDITUR—The plaintiff brought suit against two defendants, claiming $56,000 for personal injuries suffered in an accident. Upon return of a jury verdict for the plaintiff in the amount of $3,000, the plaintiff moved for a new trial on the issue of damages. The trial court denied the motion on condition that defendants consent to the entry of a judgment of $9,830.92. Both defendants consented. Plaintiff appealed on the ground that the use of an additur constituted an infringement of his constitutional guarantee of a jury trial. *Held,* affirmed. Conditioning the denial of a new trial upon the defendant's consent to an increase in the judgment does not violate the Minnesota state constitution which states that the right of trial by jury shall remain inviolate.[1] *Genzel v. Halvorson,* (Minn. 1957) 80 N.W. (2d) 854.

Most American jurisdictions allow a trial court to deny a new trial on condition that the plaintiff agrees to a remission of the excess damages above an amount which the court considers reasonable.[2] This procedure

[1] MINN. CONST., art 1, §4.

[2] Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69 (1888); Gila Valley Ry.

is called remittitur. Its advantage is elimination of the delays and costs to litigants which are inherent in a new trial. Courts have been almost unanimous in finding that this process does not infringe the guarantee of jury trial in the Seventh Amendment of the Federal Constitution[3] or in similar provisions of state constitutions.[4] Conditioning the denial of a new trial upon the defendant's acceptance of increased damages is known as additur. Although additur would appear to be analogous to remittitur, the United States Supreme Court ruled in *Dimick v. Schiedt*[5] that its use in a federal court violates the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[6] Since the Seventh Amendment has not been incorporated into the due process clause of the Fourteenth Amendment, *Dimick v. Schiedt* applies only to federal courts.[7] State constitutions ordinarily do not contain provisions similar to the Seventh Amendment but simply provide that the right to a

Co. v. Hall, 13 Ariz. 270, 112 P. 845 (1911), affd. 232 U.S. 94 (1914); Hepner v. Libby, McNeill and Libby, 114 Cal. App. 747, 300 P. 830 (1931); Noxon v. Remington, 78 Conn. 296, 61 A. 963 (1905); Brause v. Brause, 190 Iowa 329, 177 N.W. 65 (1920).

[3] Blunt v. Little, (C.C. Mass. 1822) 3 Fed. Cas. 760, No. 1,578; Arkansas Valley Land and Cattle Co. v. Mann, note 2 supra.

[4] Alabama Power Co. v. Talmadge, 207 Ala. 86, 93 S. 548 (1921); Sewell v. Sewell, 91 Fla. 982, 109 S. 98 (1926); Burdict v. Missouri Pacific Ry. Co., 123 Mo. 221, 27 S.W. 453 (1894); Henderson v. Dreyfus, 26 N.M. 541, 191 P. 442 (1919). *Contra,* Louisville & Nashville Ry. Co. v. Earl, 94 Ky. 368, 22 S.W. 607 (1893). A few states permit remittitur only when the amount of the excess can be exactly computed. City of East Point v. Christian, 40 Ga. App. 81, 149 S.E. 50 (1929).

[5] 293 U.S. 474 (1935).

[6] U.S. CONST., Amend. VII. The majority felt that this provision invalidated practices which had not been sanctioned in the English common law courts prior to 1791. Dimick v. Schiedt, note 5 supra, at 488. There is some dispute as to whether the majority of the Court was correct in concluding that the English practice did not recognize additur. See note 13 infra and authorities cited therein. Justice Stone dissented on the ground that the Seventh Amendment did not attempt to prescribe any particular procedure by which the trial of facts was to be obtained. Dimick v. Schiedt, note 5 supra, at 491. Earlier Supreme Court decisions had appeared to support his view by recognizing procedures which were not known in the English common law courts. See Walker v. N.M. and S. Pac. Ry. Co., 165 U.S. 593 (1897), in which a federal court set aside a general verdict on the basis of facts found in a special verdict. In Ex parte Peterson, 253 U.S. 300 (1920), the Court sustained the appointment of auditors as an aid to the jury in arriving at its verdict. See also Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931), sustaining the constitutionality of partial new trials. These cases may be distinguished on the ground that none of these procedures actually prevents a jury from making a finding of fact in the way that an additur does. Recent federal cases have shown a tendency to ignore the rule of Dimick v. Schiedt. See United States v. Kennesaw Mountain Battlefield Assn., (5th Cir. 1938) 99 F. (2d) 830, cert. den. 306 U.S. 646 (1939), limiting the rule to cases where the trial court had committed some other error which would demand that a new trial be given; Cummings v. Boston & M. Ry. Co., (1st Cir. 1954) 212 F. (2d) 133. See also Pierre v. Eastern Air Lines, (D.C. N.J. 1957) 152 F. Supp. 486, where the court held that the $8,300 limitation on damages provided by the Warsaw Convention did not violate the Seventh Amendment. Dimick v. Schiedt was not cited.

[7] Walker v. Sauvinet, 92 U.S. 90 (1875); Pearson v. Yewdall, 95 U.S. 294 (1877).

jury trial shall remain inviolate.[8] In the principal case the Minnesota court ruled that this difference in wording permitted an additur under the state constitution.[9] While a growing body of decisions favors this interpretation,[10] most states that have considered the problem have reached the opposite conclusion.[11] Courts in these latter cases have argued that the trial by jury guaranteed is a trial according to common law principles which preclude the use of an additur.[12] This argument seems weak since there is some indication that the additur practice was used by the early English common law courts.[13] In any event, there is little reason to assume that the drafters of the various state constitutions intended to restrict trial procedure to that practiced in the common law courts of England prior to 1791,[14] or in their state courts at the time when the state constitutions were enacted.[15] Not so easily dismissed are the arguments that a

[8] Clauses prohibiting reexamination by methods differing from those known at common law are found in ORE. CONST., art. 1, §17, and W. VA. CONST., art. 3, §13. Louisiana is the only state which has no constitutional guaranty of jury trial in civil cases.

[9] It is this difference in the language of the federal and state constitutions which has enabled state courts to render judgments non obstante verdicto when a directed verdict has been improperly refused below, although this procedure has been invalidated in the federal courts under the Seventh Amendment. See Wayland v. Latham, 89 Cal. App. 55, 264 P. 766 (1928); Bothwell v. Boston Elevated Ry. Co., 215 Mass. 467, 102 N.E. 665 (1913); Vandenberg v. Kaat, 252 Mich. 187, 233 N.W. 220 (1930); 38 YALE L. J. 971 (1929).

[10] Clausing v. Kershaw, 129 Wash. 67, 224 P. 573 (1924); Gaffney v. Illingsworth, 90 N.J.L. 490, 101 A. 243 (1917). See Morrell v. Gobeil, 84 N.H. 150, 147 A. 413 (1929) (apparently assuming that additur is constitutional); Markota v. East Ohio Gas Co., 154 Ohio St. 546, 97 N.E. (2d) 13 (1951). Some courts will allow additur when the damages are liquidated or can be easily ascertained. See Yep Hong v. Williams, 6 Ill. App. (2d) 456, 128 N.E. (2d) 655 (1955); Rudnick v. Jacobs, 9 W.W. Harr. (39 Del.) 169, 197 A. 381 (1938); 95 A.L.R. 1163 (1935).

[11] Lorf v. Detroit, 145 Mich. 265, 108 N.W. 661 (1906); Raymond L.J. Riling, Inc. v. Schuck, 346 Pa. 169, 29 A. (2d) 693 (1943); Dorsey v. Barba, 38 Cal. (2d) 350, 240 P. (2d) 604 (1952); 95 A.L.R. 1163 (1935).

[12] Dorsey v. Barba, note 11 supra. It is difficult to determine whether the court felt that the procedure which must be followed by a trial court is that which the English courts used in 1791, or that which was in use in California at the time when the state constitution was enacted.

[13] A court upon viewing a wound might grant extra damages. BULLER'S NISI PRIUS 21 (1806); MAYNE, TREATISE ON DAMAGES, 9th ed., 571 (1920); SAYER, LAW OF DAMAGES 173 (1792). Cf. Beardmore v. Carrington, 2 Wils. K.B. 244, 95 Eng. Rep. 790 (1764). It is possible that this practice had fallen into disuse in England prior to 1791. See Carlin, "Remittiturs and Additurs," 49 W. VA. L. Q. 1 (1942).

[14] The failure of state constitutions to follow the language of the Seventh Amendment may indicate a desire to avoid restricting the right to a jury trial to those procedures which were known prior to 1791. See dissenting opinion of Traynor, J., in Dorsey v. Barba, note 11 supra, at 614. The state court decisions sanctioning judgment non obstante verdicto support this conclusion.

[15] It is extremely difficult to determine whether the guarantees of a trial by jury in the state constitutions were intended to restrict state courts to those procedures in common use at the time when the state constitution was ratified. See Hickman v. Baltimore & Ohio Ry., 30 W. Va. 296, 4 S.E. 654 (1887); Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927) so holding. Most decisions do not deal with the question of whether additur or remittitur were in common use at the time when the particular state con-

remittitur differs from an additur in that the jury, although awarding an erroneously excessive verdict, has approved the amount to which damages are reduced, while an additur results in damages beyond the scope of the jury verdict;[16] and that plaintiff may be injured by an additur if he is forced to accept less than the maximum amount which a jury might have granted on a retrial.[17] The Minnesota court dismissed these problems, observing that the plaintiff would be able to appeal if the trial judge should fix the damages at a figure which was wholly inadequate as a matter of law.[18] A possible alternative to the Minnesota procedure would be to give the defendant a choice between accepting a new trial and paying the maximum damages which a jury would be permitted to find as is done in New York.[19] Since a larger jury verdict for him would be set aside, the plaintiff would lose nothing by this procedure and since the defendant could elect a new trial, he would not be injured. However, since an extremely low verdict is often the result of a compromise, the jury finding liability only because it could also set low damages,[20] it may be asked if the defendant would ever fail to gamble on the new trial with its possibility of a different result.[21] If his alternative is to pay the maximum permissible damages, his only possible loss on a new trial is its cost to him, although this would undoubtedly be a deterrent in some cases.[22] In any event the practice approved in the principal case, although expediting law suits, seems somewhat unjust. The court rules that the plaintiff has not been treated fairly by the jury, but requires him to forego the privilege of another jury trial because the court and the defendant have agreed upon another way of settling the case. The maximum damage practice, though resulting in more new trials, better protects a plaintiff's rights.

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stitution was enacted. See Carlin, "Remittiturs and Additurs," 49 W. VA. L. Q. 1 (1942). It is noteworthy that additur had been sanctioned in one British court prior to the adoption of many American state constitutions. Armytage v. Haley, 4 Q.B. 917, 114 Eng. Rep. 1143 (1843). Similarly, remittitur had been used in American courts prior to the enactment of many state constitutions. See Dimick v. Schiedt, note 5 supra, at 484; and Dorsey v. Barba, note 11 supra.

16 Yep Hong v. Williams, note 10 supra, at 459.

17 Lorf v. Detroit, note 11 supra, at 267.

18 Principal case at 859.

19 O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E. (2d) 883 (1956). A similar procedure is used in Wisconsin practice. A new trial will be ordered unless the plaintiff consents to judgment for the smallest sum or the defendant consents to judgment for the greatest sum an impartial jury could reasonably award. Risch v. Lawhead, 211 Wis. 270, 248 N.W. 127 (1933); Reuter v. Hickman, Lauson & Diener Co., 160 Wis. 284, 151 N.W. 795 (1915).

20 Cf. note, p. 117 of this issue.

21 See 18 IOWA L. REV. 404 (1933).

22 It is quite possible too that the maximum damage figure set by the judge would still be less in practice than the highest jury verdict he would permit as reasonable, although the two figures would theoretically be the same.