RECENT CASES

Practice—Power of Federal Court To Deny New Trial upon Defendant's Consent to Increased Damages—[Federal].—In an eminent domain proceeding the jury made an award of $9,000. On the condemnee's motion for a new trial the district court ruled that the only ground for a new trial was the inadequacy of the verdict and that the motion would be granted unless the condemnor would consent to a verdict increased to $16,000. Consent was given. On cross-appeals held, judgment affirmed. The United States, having consented to the additur, cannot complain thereof. The conditional order did not violate the condemnee's constitutional right to a jury trial; the use of the additur in the federal courts is proper where the only error lies in the inadequacy of the damages. United States v. Kennesaw Mountain Battlefield Association.2

The converse of the device employed in the present case, the practice of permitting the trial judge to refuse a new trial upon a plaintiff's consenting to a remission of that part of the verdict which the court regards as in excess of the amount which the jury might reasonably have awarded, is well-established.2 In approving the use of the remittitur, the Supreme Court has held that it does not violate the guaranty of a jury trial set forth in the Seventh Amendment.3 Despite the obvious analogy between the remittitur and the denial of the plaintiff's motion for new trial on condition that the defendant consent to an increase in the verdict to an amount which the court considers adequate, the Supreme Court, by a five-four decision, held in Dimick v. Schiedt4 that an additur violated the plaintiff's right to a jury's verdict upon the question of damages. The rather tenuous distinctions made by the Court have been adequately criticized elsewhere.5

In approving the use of the additur in the instant case, the Circuit Court of Appeals ruled that a jury was not required at common law for an eminent domain proceeding and, thus, distinguished this case from the personal injury action of the Dimick case.6 More significantly, however, the court, assuming it might be wrong on the jury issue, restricted the decision in the Dimick case to a situation in which the inadequacy of the verdict is accompanied by other serious error. Such a narrow interpretation finds little support in the facts of that case, as they appear in the Supreme Court's decision, or in the arguments advanced by the Court in support of its ruling. The majority of the Court makes no mention of error other than the inadequacy of the verdict and the case has been cited as laying down the broad rule that an additur is improper in any action falling within the scope of the Seventh Amendment.7 Although the distinction may be doubtful, it does find justification in the compelling reasons in favor of the adoption of

199 F.(2d) 830 (C.C.A. 5th 1938).
2 2 Univ. Chi. L. Rev. 154 (1934). The entire body of rules governing the use of remittiturs and additurs has been very thoroughly covered in a note, 44 Yale L.J. 318 (1934).
3 Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69 (1889).
4 293 U.S. 474 (1935).
5 83 U. of Pa. L. Rev. 684 (1935). The decision of the Circuit Court of Appeals, affirmed by the Supreme Court, was noted in 33 Mich. L. Rev. 138 (1934); 48 Harv. L. Rev. 333 (1934). See also 44 Yale L. J. 318, 323 (1934).
6 While a condemnee's right to have the award fixed by a jury has not been determined, numerous dicta in the decisions of the Supreme Court seem to indicate that the possibility that such right will be upheld is remote, Blair, Federal Condemnation Proceedings and the Seventh Amendment, 41 Harv. L. Rev. 29, 41 (1927).
7 See 3 Moore, Federal Practice 3244, n. 11 (1938); 19 Minn. L. Rev. 661, 663 (1935).
the additur in the federal courts. The additur has a definite value in facilitating judicial administration and the position taken by the Circuit Court of Appeals in the instant case may indicate to the changed personnel of the Supreme Court a method by which the unduly restrictive decision in Dimick v. Schiedt may be avoided.

Despite the apparent absence of limitation upon its adoption, the additur has received comparatively little recognition in the state courts. In a few cases its use has been expressly overruled, but these decisions may be distinguished on the ground that there was some question as to whether the defendant was liable at all since there was either an express finding of no liability, or the damages awarded by the jury were merely nominal. In Illinois 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. Some courts, however, have permitted the use of the additur in cases where the deficiency in the damages awarded cannot be accurately fixed. Thus, in Gaffney v. Illingsworth the New Jersey court approved the trial judge's conditional denial of the plaintiff's motion for a new trial. Where the trial judge is given the power to set aside a verdict and order a new trial solely on the ground of inadequate damages, there seems to be no objection to allowing the defendant to avoid the expense of retrial by consenting to an increase in the verdict to the least amount which the court would have approved in the first place.

Sales—Implied Warranty—Liability of Restaurateur to Customer's Guest—[England].—The plaintiffs, husband and wife, entered a restaurant and each ordered food. The wife's subsequent illness was caused by contaminated fish served by the defendant. She brought this action for breach of an implied warranty of fitness; her husband who paid for the meals claimed special damages for the expenses of her illness. Held, recovery granted both plaintiffs. The court found an implied contract between the wife

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8 The Seventh Amendment applies only to the federal courts, Pearson v. Yewdall, 95 U.S. 294 (1877). Most state constitutions do not follow the narrow language employed in the Seventh Amendment, 44 Yale L.J. 318, 322 (1934).

9 Note 32 Mich. L. Rev. 538 (1934).


13 Marsh v. Minn. Brewing Co., 92 Minn. 182, 99 N.W. 630 (1904); Ford v. Minn. Street Ry. Co., 98 Minn. 95, 107 N.W. 817 (1906); Bernard v. City of No. Yakima, 80 Wash. 472, 147 Pac. 1034 (1914); Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924).

14 90 N.J.L. 490, 10 Atl. 243 (1917) (an action for personal injuries).


16 Under Wisconsin practice a new trial is ordered unless the plaintiff consents to a judgment for the least amount a jury could reasonably award and the defendant consents to a judgment for the greatest amount a jury could reasonably award, Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927).