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rule to that effect, determined that the state rule conflicted therewith, and by virtue of the supremacy doctrine held that the state rule could not be applied.

CONCLUSION

It would seem that an injured seaman's attorney has a choice of courses to pursue, and may stress any one or a combination of the three doctrines, depending upon the position of his client. If, for instance, he is seeking to prosecute an unseaworthiness claim (not joined with a Jones Act count) after the local statute of limitations has run but before three years had passed from the date of his injury, he could stress the uniformity argument advanced by Justice Brennan, contending that the three year limitation period of the Jones Act was intended to be applied to all unseaworthiness actions, conjoined with a Jones Act count or not. If, on the other hand, he is attempting to prosecute a claim before the state statute has run, but after three years time, he could point out that the holding of *McAllister* is confined to situations in which unseaworthiness counts are joined with Jones Act counts and is therefore inapplicable to his case. In either case he could probably successfully invoke the "humanitarian" doctrine, contending in the first instance, that the *McAllister* decision was intended to give all maritime workers the benefit of at least three years time in which to begin the prosecution of their claims, and in the second instance that if he isn't allowed to prosecute his claim beyond three years, as the state statute allows, he is being deprived of "full benefit" of his federal right.

However, if supremacy and uniformity are to mean anything at all, it is submitted that a court called upon to construe this decision should use Justice Brennan's opinion as a guide, and strictly apply the three year Jones Act limitation by analogy. The security to litigants, if not deference to Congress, afforded by this approach would more than justify giving such a "legislative" interpretation to the holding. Certainly, in the light of the recent judicially-wrought metamorphosis of the maritime law, it would cause few blushes.

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Civil Procedure—Additur—Power of Court to Increase Jury Award

Generally, courts have long accepted remittitur[1] as a procedural device by which they can, with the plaintiff's consent,[2] reduce the

[1] Neese v. Southern Ry., 350 U.S. 77 (1955); Gila Valley, G. & N. Ry. v. Hall, 232 U.S. 94 (1914); Blunt v. Little, 3 Fed. Cas. 760, No. 1578 (C.C.D. Mass., 1822); New Hampshire Fire Ins. Co. v. Curtis, 264 Ala. 137, 85 So. 2d 441 (1955); Stallcup v. Rathbun, 76 Ariz. 63, 258 P.2d 821 (1953); Hyatt v. McCoy, 194 N.C. 760, 140 S.E. 807 (1927); Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956).

[2] Defendant's consent is not needed. If both plaintiff and defendant consent to the judgment, the need for remittitur is eliminated and the court may enter

amount of an excessive jury award as a condition to denying defendant's motion for a new trial on the ground of excessive damages. They have, however, been reluctant[3] to accept additur.[4] Additur is a procedural device by which courts, with the defendant's consent, increase the amount of an inadequate jury award as a condition to denying plaintiff's motion for a new trial on the ground of inadequate damages.[5]

When the validity of additur is questioned in a jurisdiction which permits the use of remittitur, three courses are open to the court: it may (1) permit the use of additur in light of its accepted use of remittitur,[6] (2) deny the use of additur, yet allow the use of remittitur[7] or (3) deny the use of additur with an indication that the use of remittitur will be denied in the future.

In the recent case of *Caudle v. Swanson*,[8] additur received its first examination by the North Carolina court. Plaintiff-builder brought suit to recover the unpaid building costs of a house. The jury returned a verdict of $6,192 for the plaintiff. The trial court found that the award was inadequate,[9] and, with the defendant's consent, increased it by $500. The plaintiff excepted to the use of this procedure, contending that it deprived him of his right to trial by a jury as guaranteed by the Constitution of North Carolina.[10] Rejecting the plaintiff's contention, the court approved the use of additur on the basis of its established recognition of remittitur.[11]

The same constitutional objection as raised by the plaintiff in the principal case is voiced by defendants in remittitur cases.[12] In those

a consent judgment. King v. King, 225 N.C. 639, 35 S.E.2d 893 (1945); Jones v. Griggs, 223 N.C. 279, 25 S.E.2d 862 (1943).

[3] Some states have provided for the use of additur by statute. See, *e.g.*, R.I. GEN. LAWS ANN. Ch. 23 § 9-23-1 (1956); WASH. REV. CODE § 4.76.030 (1952).

[4] This Note is limited to the use of additur in cases involving unliquidated damages. An increase in damages by the court, in cases involving liquidated damages, is not subject to the same criticism since in those cases the amount of damages is fixed and the only issue for the jury is the fact of liability. Fornara v. Wolpe, 26 Ariz. 383, 226 Pac. 203 (1924); Harris v. McLaughlin, 39 Colo. 459, 90 Pac. 93 (1907).

[5] Dimick v. Schiedt, 293 U.S. 474 (1935); Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952); Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854 (1957); Bodon v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826 (1958).

[6] Genzel v. Halvorson, *supra* note 5; Bodon v. Suhrmann, *supra* note 5.

[7] Dimick v. Schiedt, 293 U.S. 474 (1935); Dorsey v. Barba, 38 Cal. 2d 350, 250 P.2d 604 (1952).

[8] 248 N.C. 249, 103 S.E.2d 357 (1958).

[9] Generally, the plaintiff makes a motion for a new trial because of inadequacy of damages and the court, as a condition to denial of this motion, accepts the defendant's consent to the increased verdict. However, there is no indication in the record that plaintiff made such a motion here.

[10] N.C. CONST. art. 1, § 19.

[11] Cohoon v. Cooper, 186 N.C. 26, 118 S.E. 834 (1923); Isley v. Bridge Co., 143 N.C. 51, 55 S.E. 416 (1906).

[12] Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69 (1889); Hughes v. Hearst Publications, Inc., 79 Cal. App. 2d 703, 180 P.2d 419 (1940); Sewell v. Sewell, 91 Fla. 982, 109 So. 98 (1926); Henderson v. Dreyfus, 26 N.M. 541, 191 Pac. 442 (1919); Weatherspoon v. Stackland, 127 Ore. 450, 271 Pac. 741 (1928).

cases, the court's answer is that the defendant has no right to complain because the reduction benefits him by requiring him to pay less than the amount awarded by the jury. By the same token, our court reasoned that the plaintiff had no right to complain about the use of additur since he was in fact benefited by its use.

It is argued that a trial by jury necessarily implies a trial by a properly functioning jury.[13] Thus, if the trial court must increase the jury award so that the damages will not be inadequate, it is obvious that the jury has not functioned properly. And, though the plaintiff has benefited by the use of the additur procedure, it is conceivable that a properly functioning jury at a new trial might award greater damages than those awarded with the use of the additur procedure.[14] It is also contended that a trial by jury includes a determination by the jury of both the existence of liability and the amount of damages to be awarded. When a court resorts to the use of additur, it cannot be said that the jury determined the final amount of damages awarded.[15] Has the plaintiff had his right to a jury trial when the final amount of damages awarded was found by the trial court and not by the jury?

In the principal case it was stated that the defendant waived his constitutional right to trial by jury by consenting to the use of the additur procedure. The consenting defendant pays a reasonable amount determined by the trial court; however, the non-consenting defendant is faced with a new trial, additional expenses, and the gamble as to what the new jury will award. Might it not be said that this is a legalized coercive type consent? Of course, if there were no coercion it is highly unlikely that defendants would consent.

The court in *Caudle* stated that if they held the trial court lacked the power to increase the verdict by $500, they "would be required to remand the case for a judgment upon the verdict in the sum of $6,192."[16] The implication of this language is that the court was of the opinion that the original jury verdict was adequate or, at least, not so inadequate as to warrant a new trial[17] for abuse of discretion. Since the trial court, by its use of additur, indicated that the verdict was inadequate, would it not have been more accurate for the Supreme Court to have

[13] Note, 21 VA. L. REV. 666 (1935).

[14] In Wisconsin, the defendant may prevent a new trial by consenting to an increased verdict which equals the maximum amount of damages which could be awarded as a matter of law. Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927); Note, 27 MARQ. L. REV. 86 (1943).

[15] Carlin, *Remittiturs and Additurs*, 49 W. VA. L. Q. 1 (1942).

[16] 248 N.C. at 261, 103 S.E.2d at 366.

[17] "While the judgment recites the trial court was of opinion that the amount of damages awarded was inadequate, he did not exercise the power of discretion vested in him to set the verdict aside on that ground, and, in our opinion, it cannot be said that his refusal was an abuse of his discretion." 248 N.C. at 256, 103 S.E.2d at 362.

said, instead, that if additur was improper they would remand the case to the trial court for exercise of its discretion, and not for "judgment on the verdict"?

As indicated above it appears that the additur procedure denies the plaintiff his right to trial by jury; however, in light of the remittitur precedent in North Carolina, our court's decision rests on logical ground.

NICK J. MILLER

Constitutional Law—Discretionary Power of the Secretary of State to Deny Passports

The power of the Secretary of State to deny passports for reasons other than those established by congressional legislation was rejected by the Supreme Court in the recent case of *Kent v. Dulles*.[1] To understand adequately the problem involved in that case it is necessary to review briefly the historical and legal background of the present passport laws.[2]

Originally, passports were issued by a multiplicity of federal, state, and local officers.[3] A statute[4] enacted in 1856 and, with minor amendments, codified in 1926 changed this practice. This statute remains the basis of the present passport laws. Its pertinent provision reads:

> "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

The Secretary assumed that under this statute and the executive order issued pursuant to it[5] he had the discretionary power to deny a passport. Until recently that power had never been questioned.[6]

[1] 357 U.S. 116 (1958).

[2] This Note will deal with the Secretary's power to deny passports and with the substantive grounds for such denial. It will consider only incidentally the related problem of procedural due process in the denial of passports.

[3] See 357 U.S. at 123.

[4] 11 STAT. 60 (1856) (later amended by 44 STAT. 887 (1926), 22 U.S.C. § 211a (1952)).

[5] Exec. Order No. 7856 (1938), 22 C.F.R. §§ 51.1-.77 (1958). This order outlined certain procedural rules and in § 51.77 authorized the Secretary to promulgate additional regulations not inconsistent therewith.

[6] The first case mentioning passports in the Supreme Court was Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692 (1835), where the Court, in a frequently quoted dictum, described the passport as a political document whose issuance was in the sole discretion of the Secretary. Briefly stated, the basis of the viewpoint thus expressed was that the inherent power of the Chief Executive to exercise sole discretion in conducting foreign affairs encompassed the issuance of passports, because the traveler's activities abroad might conflict with our foreign policy and because the government was in some measure obligated to protect citizens abroad. For a good exposition of this point of view, see Briehl v. Dulles, 248 F.2d 561,