Wis. 148, 196 N. W. 451. It would seem that the courts should abandon the sham to which they have resorted and expressly make aesthetics a ground for the exercise of the police power. Cf. Freund *Police Power* (1904) sec. 182, "It is conceded that the police power is adequate to restrain offensive noises and odors. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further applications."

A. J. G. '36.

CONSTITUTIONAL LAW—TRIAL BY JURY—ADDITUR—Plaintiff brought a personal injuries suit in a United States District Court; the jury returned a verdict in his favor for $500; the court ruled in favor of a new trial for inadequacy of damages unless defendant should consent to an increase to the sum of $1500. Defendant's consent resulted in an automatic denial of plaintiff's motion for a new trial. Plaintiff appealed to the Circuit Court of Appeals, whence certiorari to the Supreme Court. *Held* The action of the trial court was unconstitutional as a violation of Amendment VII of the United States Constitution providing that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and 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." *Dimick v. Schiedt* (1935) 55 S. Ct. 296, 79 L. Ed. 256.

The court premised its decision on the accepted interpretation of Amendment VII as embodying the common law as it existed at the time of the adoption of the constitutional provision. *United States v. Wonson* (1812) 28 Fed. Cas. 745, at 750; *Thompson v. Utah* (1898) 170 U. S. 343; *Capital Traction Co. v. Hof* (1899) 174 U. S. 1 at 8; *Patton v. United States* (1930) 281 U. S. 276. As far back as the Year Books English judges increased inadequate verdicts in cases of mayhem. 2 Bacon's Abridgment 611 (7th. ed.) The practice continued well into the eighteenth century. *Burton v. Baynes* (1733) Barnes notes 153, 94 Eng. Rep. 852; and see *Brown v. Seymour* (1742) 1 Wils. 5, 95 Eng. Rep. 461; *Beardmore v. Carrington* (1764) 2 Wils. 244, 95 Eng. Rep. 790. The court in the instant decision declared it could find no more recent case than *Burton v. Baynes*, supra, in which this power was actually exercised; it decided that by the end of the eighteenth century the judicial power thus to increase damages had become atrophied. Apparently the court's attention was not directed to *Armytage v. Haley* (1843) 4 Q. B. 917 in which the plaintiff brought an action on the case for negligence, recovered a nominal verdict and obtained a rule to show cause why a new trial should not be granted unless defendant would consent to an increase in damages. In any event, persistent dicta gave the practice of additur at least an umbrageous existence in the English courts until the beginning of the twentieth century. Judicial addition as well as remission from verdicts was finally outlawed by the leading case of *Watt v. Watt* (1905) A. C. 115.

The court was obliged to distinguish the present case from well established decisions upholding the power of the federal trial judge to deny a

motion for a new trial for excessive damages upon condition that the plaintiff consent to a remittitur. *Blunt v. Little* (C. C. D. Mass. 1822) Fed. Cas. No. 1578; *Arkansas Valley Co. v. Mann* (1888) 130 U. S. 69; *Gila Valley R. Co. v. Hall* (1914) 232 U. S. 94. It did so on the somewhat startling ground that where a remittitur is allowed to decrease the verdict the jury have nevertheless awarded the sum finally assessed, whereas in the case of additur no jury has passed on the increased amount.

A strong dissent attacks the majority reasoning on all sides. The trial judge's sound discretion in granting or refusing a new trial for inadequate damages is not reviewable. *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454; *Fitzgerald & Mallory Co. v. Fitzgerald* (1890) 137 U. S. 98. He might unconditionally have denied a new trial to the plaintiff. A fortiori no right of the plaintiff suffers infringement if the court deny the new trial on condition that the defendant increase his damages. See *Arkansas Valley Co. v. Mann* supra. This reasoning might be attacked on the basis that by the very act of granting an additur the trial court has made a fact finding of inadequacy of damages and thus no longer has the power to refuse a new trial. The superior court can then order an unconditional new trial without in any way interfering with the lower court's discretion, which has already been exercised in the finding of inadequate damages. A sounder rationale is contained in the statement that the practice of additur cannot validly be distinguished from that of remittitur: "For in neither does the jury return a verdict for the amount actually recovered, and in both the amount of recovery was fixed, not by the verdict but by the consent of the party resisting the motion for a new trial" *Dimick v. Schiedt* supra. More fundamental than this, however, is the consideration that Amendment VII was intended to preserve the essentials rather than the "minutiae" of trial by jury. *Parsons v. Bedford* (1830) 3 Peters 433. Thus the constitutionality of granting new trials as to damages alone, although unknown to the older common law, has been upheld on the ground that "the Seventh Amendment does not exact the retention of old forms of procedure." *Garoline Products Co. v. Champlin Refining Co.* (1931) 283 U. S. 494, at 498. The common law adopted by the Constitution was something more than a "miscellaneous collection of precedents"; it was a system containing a vital principle of growth and adaptibility; precedents are in a sense but evidences of the past and guides for the future dynamic progress of the common law. *Hurtado v. California* (1883) 110 U. S. 516, at 530; *Funk v. United States* (1933) 290 U. S. 371. Indeed, the efficacy and continued existence of the trial by jury in the past were made possible only by a process of increasing and shifting impositions of judicial control. Holdsworth "A History of English Law" (3rd. ed. 1922) Vol. I, p. 321.

The desirability of the dissenting view is enhanced by considerations of expediency as well as logic. Time and expense obviously are saved by obviating the necessity of a new trial. Several state courts utilize the additur. *Campbell v. Sutliff* (1927) 193 Wis. 370, 214 N. W. 374; *Gaffney v. Illingsworth* (1917) 90 N. J. Law 490, 101 Atl. 243; see note (1934) 44 Yale Law Journal 318.

C. B. P. '35.