Special Verdicts

History of the Special Verdict

After the Normans introduced the battle and inquest into England it was perceived that while the results determined by ordeal, battle, or wager of law were dictated by the supernatural and therefore conclusive, yet the inquest was the work of man and was subject to error. The attaint was used as a means of remedying a false verdict. It was based upon the assumption that the jury had wilfully given a false verdict; and, consequently, the original parties plus the first jury were subsequently tried by a larger jury made up of more influential persons. If the larger jury found contrary to the first, the first judgment was reversed and the first jury was convicted of perjury and was heavily punished.[1]

Besides direct answers to questions submitted, there were at least five forms of verdict during the twelfth and thirteenth centuries, *viz*: (1) Direct answers followed by a statement of the facts as reasons for the answers; (2) a statement of the facts followed by direct answers to the questions as conclusions from the statement; (3) a statement of facts followed by the conclusion that they [jurors] cannot answer the question put; (4) a statement of facts without any reference to a direct answer to the question submitted; and (5) a statement of facts with the request that the judges draw therefrom the conclusions which should constitute answers to the questions put.[2]

If the jury used any one of the latter three forms it was comparatively safe from being subjected to attaint if it truthfully related the facts. When the jurors found only the correct facts, the entire responsibility for a proper judgment was placed upon the justices. However, if one of the first two forms were used it was quite feasible that the jury might draw the wrong legal conclusion from a correct finding of the facts. If such wrong conclusions were drawn it was the duty of the justices, subject to the penalty of amercement, to give such judgment as the facts required. Therefore, the juries early recognized that by returning a special verdict they were freeing themselves from determining questions of law and consequently lessening their chances for "perjury". The special verdict was extended to criminal actions. The court had no

1 Thayer, Preliminary Treatise on Evidence 136 *et seq.* (1898); Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 Yale L. J. 575 (1903); Von Moschzisker, *Final Development of Jury System*, Trial By Jury 41 (Bisel 2d ed. 1930).

2 Morgan, *supra* note 1, at 577 *et seq.*

right to compel a general verdict, but as to whether the court could coerce the jury to return a special verdict the evidence is meager and nebulous.[3]

The attaint had grown unworkable as oftentimes the second jurors were unwilling to find the former jury guilty. In time, the method of granting new trials was adopted when the verdict was unreasonable and the jurors were not punished. Also, instead of the assumption that the jury had an independent, original knowledge of the facts, a converse situation evolved. Now, if the juror knows of anything relating to the case, he must state it in court; and the assumption is that, in general, nothing is known to the jury except what is publicly stated in court.[4]

Validity of the General Verdict

In 1794 the United States Supreme Court tried its first jury case.[5] Following the trial, Chief Justice Jay, after stating that the facts were all agreed upon, pointed out that the jury need only determine the law of the land arising from those facts. He gave the court's opinion and then continued as follows:

> It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect which is due to the opinion of the court: for as, on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still, both objects are lawfully within your power of decision.[6]

This case stood both unquestioned and unfollowed, in the court which decided it, until 1894 when the court declared (three judges dissenting) that there was no basis for the jury to have any such right and further, that even in criminal cases the court had the exclusive right to determine and declare the law.[7]

As there was no common law requirement that juries should determine matters of law, it would appear that the jury might restrict itself to the finding of facts. However, such is not the case. The normal attainment of a jury is the returning of a general verdict. Prior to the determination of the cause the judge

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[3] *Id.* at 589.

[4] Thayer, *op. cit. supra* note 1, at 139.

[5] Georgia v. Brailsford, 3 Dall. 1 (U. S. 1794).

[6] Georgia v. Grailsford, *supra* at 4.

[7] Sparf and Hansen v. United States, 156 U.S. 51 (1894); See Sunderland, *Verdicts, General and Special*, 29 Yale L. J. 253 (1920).

makes his charge to the jury. This charge is to instruct the jury with respect to the principles of law applicable to the issue to be decided. It should be easily comprehensible. Not too infrequently the charge is a long and/or involved set of instructions which few, if any, can comprehend.[8] Regardless of how precise the judge intends to make his charge, if there is error in his statements it will in all probability be grounds for reversal even though the jury did not comprehend him in the first instance. Even though we unhesitatingly accept the presumption that twelve reasonable men comprehend the charge, is it conclusive that the jury's general verdict will be the correct application of that charge? Prof. Sunderland would indubitably answer this in the negative. He states the situation:[9]

> The peculiarity of the general verdict is the merger into a single indivisible *residuum* of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial reagents exist for either a qualitative or a quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. There are therefore three unknown elements which enter into the general verdict: (a) the facts; (b) the law; (c) the application of the law to the facts. And it is clear that the verdict is liable to three sources of error, corresponding to these three elements. It is also clear that if error does occur in any of these matters it cannot be discovered, for the constituents of the compound cannot be ascertained. No one but the jurors can tell what was put into it and the jurors will not be heard to say.

However, Prof. Sunderland by no means stands alone in his conception of the general verdict. Circuit Judge Frank,[10] while generally condemning the general verdict method, points out that: "The general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of the jurors, and usually converts into a futile ritual the use of stock phrases about dispassionateness almost always included in judges' charges."

It is conceded that the general verdict, in effect, gives flexibility to the law and may in that manner manifest the mores and beliefs of the community. But how different is this from the

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[8] An example of a charge to a jury in a murder case in one instance was: "If they found that the defendant did, with malice aforethought, project, propel, and/or otherwise with force and violence insinuate the aforesaid bullet in, on, against, and within the body of the corpus delicti, then they must bring in a verdict of guilty." S. F. Brewster, *Twelve Men In A Box* 110 (Callaghan ed. 1934).

[9] Sunderland, *op. cit. supra* note 7 at 258.

[10] Skidmore v. Baltimore & O. R. Co., 167 F. 2d 54, 61 (2d Cir. 1948).

defunct method of "waging of law"?[11] The presumption should be that over such a long period of time, since the wager of law days, there be a more feasible means of attaining justice. Does the general verdict rebut that presumption?

SPECIAL VERDICTS AND SPECIAL INTERROGATORIES

Special verdicts must be differentiated from special interrogatories, or, as the latter are commonly called, special findings. In the broad sense the finding of facts by the jury in either case is a "special" verdict. However, a special verdict in the narrow sense is in lieu of a general verdict and is the sole basis of judgment. Special interrogatories are questions submitted to the jury for the determination of the facts and are returned to the court with the general verdict. The general verdict shows only the ultimate result of the jury's processes, whereas the specific findings of fact show the method of ascertaining the result. A majority of the states provide by statute for special interrogatories.[12]

Some states define a special verdict as ". . . that by which the jury finds facts only," yet they further state that ". . . in all cases the jury shall render a general verdict."[13] At first it might appear that the special verdicts were to be in lieu of a general verdict, but indubitably the meaning of special verdict is in the broader sense. Several states have made clearer distinctions in the statutes,[14] but the Federal Rules of Civil Procedure spell out most adequately the difference between the special verdict and the special interrogatory.[15] Whenever the special interrogatory is

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[11] Green, *A New Development In Jury Trial*, 13 A.B.A.J. 715 (1927), states that: "As a scientific method of settling disputes the general verdict rates little higher than the ordeal, compurgation or trial by battle."

[12] Wicker, *Special Interrogatories In Civil Cases*, 35 YALE L. J. 296 (1925).

[13] KANS. GEN. STAT. § 60-2918 (Supp. 1947); MICH. STAT. ANN. § 27.1019 (Supp. 1949); OKLA. STAT. tit. 12 § 587, § 588 (Supp. 1949); RHODE ISLAND GEN. LAWS c. 534 § 2 (1938).

[14] OHIO GEN. CODE ANN. § 11420-12 to § 11420-18 (Supp. 1949); S. CAROLINA CODE OF LAWS §§ 601, 602, 603 (Supp. 1946); WYOMING COMP. STAT. § 3-2418 (Supp. 1949).

[15] FED. R. CIV. P. 49 (a) and (b). Rule 49 (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted

used, and there is found a material inconsistency between the facts and the general verdict, the former will control.

Special Verdicts

This discussion will consist of the special verdict in the narrow sense, *i.e.*, where the jury does not return a general verdict. Under the common law the jury could return either a special or a general verdict. Now, it is usually determined by statute. Some states provide that in an action for money only or specific real property, the jury has the discretion to render a general or special verdict and in all other cases the court may direct the jury to find a special verdict upon all or any issue.[16] While some states leave the choice to the discretion of the jury[17], other states leave it to the discretion of the court.[18] In Ohio and Wisconsin if one of the parties requests special verdicts, it is mandatory upon the court to grant the request.[19]

There should be a sufficient number of questions to cover every material fact in issue under the pleadings which is in dis-

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without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. Rule 49 (b) General Verdict accompanied by answer to interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

16 Calif. CCP § 625; Idaho Code § 10-220 (Supp. 1949); Minn. Stat. § 9304 (Mason, Supp. 1946); Mo. Rev. Stat. Ann. § 1120, § 1121 (Supp. 1949); Nebr. Rev. Stat. § 25-1121 (Supp. 1949); Nev. Comp. Laws § 8778 (Hillyer, Supp. 1949); N. Carolina Gen. Stat. § 1-203 (Supp. 1949); S. Carolina Code of Laws § 602 (Supp. 1946); Wash. Rev. Stat. Ann. § 364 (Remington, Supp. 1940); Wyoming Comp. Stat. § 3-2419 (Supp. 1949).

17 Ark. Stat. Ann. § 27-1740 (Supp. 1949); Conn. Gen. Stat. § 7973 (Supp. 1949); La. Code of Practice P521 (Dart, Supp. 1949); New Jersey Stat. Ann. tit. 2 § 27-237 (Supp. 1949); Vermont Stat. § 1730 (Rev. of 1947).

18 Arizona Code Ann. § 21-1007 (Supp. 1949); Delaware Rev. Code 4671. § 29 (1935); Iowa Code R.C.P. No. 205 (1946); Maine Rev. Stat. § 107 (1944); Mont. Rev. Code Ann. § 93-5202 (Supp. 1950); N. Dak. Rev. Code § 28-1502 (Supp. 1949); Penn Stat. Ann. tit. 12 § 781 (Purdon, Supp. 1949); Tex. Rules Civ. Proc. 277 (1941); Utah Code Ann. § 104-25-2 (Supp. 1949); Va. Code § 8-217 (1950).

19 Ohio Gen. Code Ann. § 11420-16 (Supp. 1949); Wisc. Stat. § 270.27 (1949).

pute on the evidence. Each question should be worded as to be easily comprehensible and so stated that the answer will necessarily be positive, direct, and intelligible.[20] It is always better if the question is so worded that it is susceptible of an affirmative or negative answer.

Where a special verdict is to be given, the charges made should be shorter and less complicated than when a general verdict is to be returned. The only instructions should be those that are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling testimony, the burden of proof, and whatever else may be necessary for the jury to understand clearly their duties concerning such special verdict and the facts to be found therein.[21] The jury should not be instructed as to the effect of any or of all of their answers.

If all the material issues are found consistently by the jury, the judge will apply the law to the facts found. If the issues are found inconsistently, the verdict must be set aside and a new trial granted unless some of the material issues are found in the defendant's favor. If a material issue was not submitted, and consequently not decided, the aggrieved party can not complain unless he had requested that the issues be submitted. In North Carolina the issues submitted must support the judgment whereas in Wisconsin and Texas any omitted issue will be assumed to have been found by the judge so as to support the judgment.[22] The judge may make an express finding on such omitted issues as the failure to request the submission of the issue is considered as a waiver of jury determination. If issues not raised by the pleadings are submitted and decided upon without objection, the verdict is accepted as it is presumed that the parties consented to the submission. If there is an agreed material fact which is inconsistent with the other material facts found by the jury, the agreed fact must be considered by the judge as if it had been found by the jury.[23]

Conclusion

Theoretically the use of the special verdict appears feasible; the jury finds the material facts and the judge determines and applies the law to those facts. However, the courts have been hesitant in using the special verdict. Most courts have hundreds of cases pending, and it is pointed out that much litigation is removed

[20] P. W. Viesselman, Abbot's Civil Jury Trials 950 *et seq.* (5th ed. 1935).

[21] See Green, *A New Development In Jury Trial* 13 A.B.A.J. 715, 719, as to the type of general instructions given in Texas, Wisconsin, and North Carolina.

[22] Green, *op. cit. supra* note 21 at 718.

[23] Green, *Id.* at 719.

from the courts to administrative boards because of the delay and expense under the current general verdict system.[24] The special verdict might be used more frequently to expedite justice by lessening the chances for reversals.

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[24] L. M. Hyde, *Fact Finding By Special Verdict*, 24 J. Am. Jud. Soc'y 144 (Feb. 1941).