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A CONSIDERATION OF THE MORE EXTENDED USE OF THE SPECIAL VERDICT

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LAST MARCH I chanced to read Circuit Judge Jerome N. Frank's article in the *Journal of the American Judicature Society,* entitled "The Case for the Special Verdict." It was based upon Judge Frank's opinion in *Skidmore v. Baltimore & Ohio Railroad Co.*[1] In that case, a car repairman sued the railroad company for personal injuries under the Federal Employers' Liability Act. At the trial, the court refused to submit to the jury a special verdict, requested by the defendant, and a general verdict was returned in favor of the plaintiff. The defendant appealed and the court of appeals affirmed. The choice of the kind of verdict to be returned by the jury was regarded as a matter within the discretion of the trial court. Judge Frank, however, in outspoken and persuasive *dicta,* pointed out the many shortcomings of the general verdict and the marked advantages of the special verdict. His opinion was an undisguised exhortation to trial judges to make more extensive use of the special verdict as provided in Rule 49(a) of the Rules of Civil Procedure. Judge Frank's article and opinion intrigued me and aroused my curiosity. They caused me to speculate as to whether the trial courts were neglecting Rule 49(a) and, if so, whether there was any sound reason for their doing so other than the natural inertia which tends to hold courts and judges in the procedural grooves to which they are accustomed.

This discussion will cover only subdivision (a) of Rule 49, but I feel that I should briefly distinguish it from subdivision (b), the other subdivision of the rule, since the cases reveal a surprising amount of confusion regarding them. Subdivision (a) provides that the court may require the jury to return only a special verdict in the form of special findings on each issue of fact formulated by the pleadings and the evidence. The special verdict may be in the form of either written findings or written questions, susceptible of categorical or other brief answer, covering the factual issues. In any case, it is purely a fact verdict. The jury finds the basic facts and the court then arrives at appropriate conclusions of law and enters judgment accordingly. No general verdict is submitted to the jury with a special verdict.

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[1] 167 F.(2d) 54 (C.C.A. 2d 1948).

Subdivision (b) of Rule 49 provides for submission to the jury, together with a general verdict, of written interrogatories on one or more issues of fact, the decision of which is necessary to a verdict. Under subdivision (b) the general verdict is always employed. The fact interrogatories do not dispense with the general verdict, but merely serve to test and explain it.

It is interesting to note the confusion in one of the concurring opinions in *Skidmore v. Baltimore & Ohio Railroad Co.*[2] with reference to the function of the special verdict. Mention is therein made of taking "a special verdict along with a general verdict" and of the possibility that the special verdict may "expose the general verdict to defeat" by showing up its deficiencies. As I have just pointed out, a general verdict is never submitted with a special verdict under Rule 49(a).

How extensively is the special verdict being used by the federal trial courts? So far as I have been able to discover, no direct statistics are available, but there are what appear to me to be plain indications that, in most jurisdictions, its use has been very limited. The fact that the Second Circuit Court of Appeals considered it necessary, in its opinion in the *Skidmore* case, to make such an urgent and forceful appeal for greater use of the special verdict is, in itself, significant, and much the same thing has been done in other circuits. In the Ninth Circuit, in *Pacific Greyhound Lines v. Zane,*[3] Judge Bone has pointed out that the general or lump verdict makes it impossible for an appellate court to determine what facts the jury found and that the difficulty can be avoided by the use of special jury fact findings under Rule 49. The Court of Appeals of the Third[4] and Fifth[5] Circuits in reversing and remanding for further proceedings have recommended that the special verdict be used upon retrial of the case.

There are other indications that Rule 49(a) has not generally been adopted as standard practice. In the fore part of each volume of the Federal Rules Decisions, there is a table showing the cases in which the rules have been cited. I have scrutinized all of the tables in bound volumes 1 to 7, inclusive, and in the advance issues through May, 1949, Volume 9, No. 1, and I have examined every case in which Rule 49 has been cited, according to the tables. For the ten-year period, 1939

[2] *Id.* at 70.
[3] 160 F.(2d) 731, 737 (C.C.A. 9th 1947).
[4] *See* Van Sant v. American Express Co., 169 F.(2d) 355, 369 (C.C.A. 3rd 1948). "It would make for a just verdict in this case if the trial judge would submit to the jury questions for special findings as to said basic facts."
[5] *See* Phillips Petroleum Co. v. Bynum, 155 F.(2d) 196, 199 (C.C.A. 5th 1946).

to 1949, I found only four published district court opinions involving the use of special verdicts. Two of the four cases were in district courts of Texas, where the special verdict was in common use in the state courts, as it was in Wisconsin and North Carolina also, prior to the adoption of the Federal Rules of Civil Procedure. During that same ten-year period, I found only eight cases in courts of appeals involving a question in connection with the submission to the jury of a special verdict by the district court. Three of such cases were appeals from District Courts of Texas and another was from a District Court of Wisconsin. I also found that during the same period, there were six cases in which appeal was taken because of the refusal of the district court to submit a requested special verdict.

I was, at first, puzzled to discover that in one of the Texas cases, District Judge Kennerly of the southern district submitted a special verdict under Rule 49 in an action by the United States to acquire a tract of land by condemnation under the power of eminent domain. Rule 81 expressly provides that the Rules of Civil Procedure are not applicable in condemnation proceedings except as to appeals. Judge Kennerly's court made them applicable by the simple expedient of adopting them as a part of the local district court rules under the provisions of Rule 83.[6]

I am aware, of course, that special verdicts have been returned in many cases where no opinion was written by the trial court and no appeal was taken, but, nevertheless, it seems obvious that if Rule 49(a) were in common use, there would be more cases citing it in the books. The fact that over a ten-year period, the cases in the courts of appeals, in which it appears to have been involved, average less than one to the circuit indicates that, aside from those states which had the practice before the adoption of Rule 49, the special verdict has been given scant consideration.

If the reluctance of the trial courts to utilize the special verdict is due to actual opposition rather than sheer inertia, it appears to be an inarticulate opposition. While my research on the subject has been far from exhaustive, I have not found a single opinion, law journal article, or other writing advocating abandonment of Rule 49(a). On the other hand, there is a wealth of written material denouncing the general

[6] U.S. v. 2,877.33 Acres of Land, 52 F. Supp. 696, 698, 702 (S. D. Tex. 1943). *See also* U.S. v. 16,572 Acres of Land, 49 F. Supp. 555, 558 (S. D. Tex. 1943).

verdict and advocating that it be replaced by the fact-finding special verdict.[7]

With unusual unanimity of opinion, lawyers, judges, and legal writers have joined in condemning the general verdict. A statement of its peculiarities and shortcomings, so clear and logical that it has often been quoted, is that of Professor Sunderland.[8] In part, it is as follows:

> The peculiarity of the general verdict is the merger into a single indivisible residuum of all matters, however numerous, whether of law or fact. . . . 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. . . .
>
> As to the second element in the general verdict, the *law,* it is a matter on which the jury is necessarily ignorant. The jurors are taken from the body of the county, and it is safe to say that the last man who could be called or allowed to sit would be a lawyer. They are second-hand dealers in law, and must get it from the judge. They can supply nothing themselves; they are a mere conduit pipe through which the court supplies the law that goes into the general verdict. But while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour. . . . The instructions upon the law given by the court to the jury are an effort to give, in the space of a few minutes, a legal education to twelve laymen upon the branch of the law involved in the case. Law cannot be taught in any such way. As to this element, accordingly, the general verdict is almost necessarily a failure.
>
> As to the third element in the general verdict—*the application of the law to the facts,* we find the same difficulty as in the case of the first element—a merging of the law into the verdict in such a way that it is impossible to tell how or whether the jury applied the law. . . . Whether the jurors deliberately and openly threw the law into the discard, and rendered a verdict out of their own heads, or whether they applied the law correctly as instructed by the court, or whether they tried to apply it properly but failed for lack of understanding—these are the questions respecting which the verdict discloses nothing. So far, therefore, as the third element goes, the

[7] See *e.g.,* Sunderland, *Verdicts General and Special,* 29 YALE L. J. 253 (1920); Green, *A New Development of Jury Law,* 13 A. B. A. J. 715 (1927); Morgan, *A Brief History of Special Verdicts and Special Interrogatories,* 32 YALE L. J. 588 (1923); McCormick, *Jury Verdicts Upon Special Questions,* 2 F. R. D. 176 (1943); Rossman, *The Judge-Jury Relationship in the State Courts,* 3 F. R. D. 98 (1944).

[8] See note *7 supra.*

general verdict is an unknown and unknowable mystery, with the balance of probability against it. . . . We come, then, to this position, that the general verdict . . . confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations.

As a trial judge, I have made a special effort to formulate instructions for juries in such a way that they will be comprehensible to laymen, but I have found that in all but the simplest cases, it is impossible to do so if the instructions are complete and technically accurate. When the issues are complex and legal principles must be explained and fine distinctions accurately drawn, lay jurors are incapable of understanding and correctly applying the court's instructions as to the law. In giving such instructions, I find it difficult to escape the feeling that I am merely following a meaningless, childish ritual.

The special verdict offers what appears to be a satisfactory solution to many of the problems of the general verdict. It eliminates two of Professor Sunderland's three unknown elements, inherent in the general verdict, namely, the law and the application of the law to the facts, and leaves to the jury the single task of finding the facts. It requires of the jury a detailed consideration of the factual issues. Since, in most cases, it is not readily apparent to the jury which side their findings favor, the influence of prejudice and sympathy on their verdict is minimized. The special verdict also discloses to the parties, the trial court, and the appellate court, in the event of appeal, precisely what answer the jury made to each fact question presented for determination. And it relieves the trial court of the burden of giving detailed, comprehensive instructions on the principles of law involved. Only such instructions need be given as are necessary to enable the jury to understand and intelligently answer the fact findings, or fact questions, presented.

As Judge Frank remarked in his opinion in the *Skidmore* case, "the special verdict is no newfangled idea." It was used by early common law juries as a device to escape the punishment of attaint that could be imposed upon them by the judges if their general verdicts were considered erroneous.[9] It was not, however, generally accepted, as it logically should have been, for the reason that it was hedged about by impractical, hampering restrictions. There was a rigid requirement that the jury must find all the material facts in issue. If any such facts

[9] See Morgan, *supra* note 7, at 588.

were omitted, a new trial must be had. The requirements as to the form of the verdict were too exacting also. The jury must find ultimate facts, not evidentiary facts, and not mere conclusions of law.[10] It is apparent from the language of the opinion in *Graham v. Bayne*,[11] decided by the Supreme Court in 1855, why trial judges justifiably were reluctant to employ the common law special verdict:

> If a special verdict be ambiguous, or imperfect—if it find but the evidence of facts, and not the facts themselves, or finds but part of the facts in issue, and is silent as to others—it is a mistrial, and the court of error must order a *venire de novo*.

Rule 49 was designed to eliminate, so far as possible, the hampering restrictions on the common law special verdict. The rule provides that if the court omits any issue of fact, each party waives his right to trial by jury thereon unless he demands its submission before the jury retires. The rule further specifies that the court shall make a finding as to any omitted issue, or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment entered on the special verdict. The rule has thus eliminated the danger of invalidating a jury trial by the inadvertent omission of some material issue of fact from the special verdict submitted.

There still remains the difficulty of framing the special verdict in such a way as to elicit findings of ultimate facts rather than evidentiary facts or conclusions of law, but there is no indication that appellate courts are inclined to be exacting in that respect. My research has disclosed no case, during the ten years of operation of Rule 49(a), in which a district court has been reversed because of having submitted to a jury a special verdict defective or inadequate as to form. In *Mourikas v. Vardianos*,[12] objection was made to the form of the fact interrogatories comprising the special verdict, but the Fourth Circuit Court of Appeals held that the form of the interrogatories was in the sound discretion of the trial court and affirmed the judgment.

My conclusion is that the special verdict under Rule 49(a) has many advantages over the general verdict and should be much more extensively employed than it has been in the past. It is peculiarly adaptable for use in connection with the pre-trial conference. If, by pre-trial, the factual issues have been narrowed to embrace only the real meat of the controversy and have been clearly and sharply defined,

[10] See Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 287 (1939).
[11] 18 How. 60, 63 (U.S. 1855).
[12] 169 F.(2d) 53 (C. C. A. 4th 1948).

it should not be difficult to formulate a special verdict for the jury. The special verdict is not a cure-all and, with more extensive use, may very well develop imperfections of its own, but it seems to me that, everything considered, it is much to be preferred to the crude, unfair, and childishly unrealistic general verdict.