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Civil Procedure-Trial Practice-Special Verdict Question That Can Be Decisive Only if Answered Negatively

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CIVIL PROCEDURE—TRIAL PRACTICE—SPECIAL VERDICT QUESTION THAT CAN BE DECISIVE ONLY IF ANSWERED NEGATIVELY—Plaintiff was severely burned by the explosion of a can of "liquid bug killer" allegedly sold to him by defendant. Four issues of fact were raised: whether defendant sold the can in question to plaintiff, the former's negligence, the latter's contributory negligence, and the amount of the damages. The trial judge submitted to the jury, over the objections of both parties, only the first issue, in the form of a single question of fact. The jury, having served

three days past the end of its term and one hour past the normal time for adjournment, was instructed that a finding for defendant on the single question submitted would exonerate defendant, while a finding for plaintiff would necessitate submission of further issues. The jury found for defendant on the issue submitted, and the trial judge entered judgment accordingly. The state intermediate appellate court affirmed. On certiorari to the Supreme Court of Tennessee, *held*, reversed, one judge dissenting. The right of trial by jury, as preserved by the Tennessee constitution, requires that the jury be informed as to its option to return a general verdict for either party, that the jury not be informed of the legal effect of its answers to special verdict questions, and that all issues raised by the pleadings be submitted to the jury. *Harbison v. Briggs Bros. Paint Mfg. Co.*, 209 Tenn. 534, 354 S.W.2d 464 (1962).

The special verdict originated in England with the Statute of Westminster II,[1] which, by granting the jury the right to render only a finding of facts, permitted it to refuse to return a general verdict. This reduced the ominous threat of an attaint[2] for a false verdict by leaving to the judge the duty of applying the law and rendering judgment.[3] The writ of attaint was abolished in 1825,[4] but by that time the option to render either a special or a general verdict was a well-established prerogative of the common-law trial jury.[5] Although the special verdict was a part of the common-law heritage of the states, most states codified the common law through enactment of special verdict statutes which often provided, in addition, for the submission of special interrogatories or questions of fact to be answered along with a general verdict.

The common-law special verdict, as developed in England prior to 1776 and subsequently modified by North Carolina prior to 1796, became a part of the common law of Tennessee[6] and, in question and answer form, has been used there several times.[7] Although there is some evidence of common-law precedent for the use of the special interrogatory in Ten-

1 13 Edw. 1, c. 30, § 2(4) (1285).

2 The attaint was used for several centuries as the sole remedy for a false verdict. A second and larger jury passed on the verdict of the first jury and, if the former found differently, the first jury was severely punished. See generally THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 140 (1898).

3 See generally 3 BLACKSTONE, COMMENTARIES 403 (Wendell ed. 1854); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 337 (7th ed. 1956); Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575 (1923).

4 6 Geo. IV, c. 50, § 60 (1825).

5 The jury could render a "narrative special verdict" by merely listing the facts, or a "question and answer special verdict" by responding to questions on the facts submitted by the court. These are to be distinguished from special interrogatories, which are fact questions put to the jury to be answered with or after a general verdict. See Morgan, *supra* note 3, at 575, 589-91.

6 Life & Cas. Ins. Co. v. Robertson, 6 Tenn. App. 43, 54 (1927); *cf.* Garner v. State, 13 Tenn. 132, 146-47 (1833).

7 *E.g.*, Life & Cas. Ins. Co. v. Robertson, *supra* note 6, at 51; Clark v. Keith, 76 Tenn. 703, 706-08 (1882); Burdett v. Norwood, 83 Tenn. 491, 495 (1885) (dictum); *cf.* Comment, 22 TENN. L. REV. 1039 (1953).

nessee, this has rarely been employed.[8] The principal case correctly construed Tennessee's sole legislative provision in this area[9] as providing only for special interrogatories, and not for special verdicts.[10]

Because the question submitted to the jury in the principal case did not accompany instructions for a general verdict, it cannot be deemed a special interrogatory. Yet, since it encompassed only one of several issues in dispute, it was not in the strict sense a common-law special verdict instruction, which would require a finding on all material facts in issue. The Tennessee Supreme Court found that this modification of a special verdict instruction was erroneous in three respects and thereby denied the right of trial by jury.[11] The first error, the failure to inform the jury of its common-law option to return a general verdict, is not regarded, in most jurisdictions, as denying a state constitutional right to a jury trial, contrary to the conclusion in the principal case. Although in the absence of statute it is considered error to fail to inform the jury of its option,[12] juries have been denied this privilege, in whole or in part, in nearly every jurisdiction which has enacted a special verdict statute.[13] These statutes, universally upheld,[14] establish that neither the jury nor the litigants have a constitutional right to the common-law option. The second error, the trial judge's instruction to the jury as to the legal effect of its answer, would probably not have been held to deny the right to trial by jury in most jurisdictions.[15] Most jurisdictions, however, do consider it error to

8 The commentators differ on whether cases discussing "special issues" or "special findings" refer to the special verdict or the special interrogatory. Wicker, *Trials and New Trials Under the New Federal Rules*, 15 TENN. L. REV. 570, 575 & n.11 (1939); Comment, *supra* note 7, at 1040. *But see* HIGGINS & CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES §§ 1515d-n (1937).

9 "Special Verdicts.—The trial judge . . . may direct and supervise the formulation of special issue or issues of fact for submission to and answer by the jury. The response or responses of the jury shall have the force of other verdicts at law." TENN. CODE ANN. § 20-1316 (1955).

10 There are differing opinions as to whether this statute authorizes special verdicts, special interrogatories, or both. See, *e.g.*, Braden, *Suggested Changes in Jury Trials*, 17 TENN. L. REV. 206, 208 (1942); Simmonds, *Reform in the Jury System*, 21 TENN. L. REV. 389, 393 (1950); *Symposium—The Movement for the Simplification of Legal Procedure*, 15 TENN. L. REV. 511, 620 (1939). See also materials in note 8 *supra*. State statutes have differed in terminology, as illustrated by the collection in CLEMENTSON, A MANUAL RELATING TO SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 297-320 (1905).

11 Tennessee's harmless error statute is not applicable where constitutional rights are involved. Dykes v. State, 201 Tenn. 65, 68-69, 296 S.W.2d 861, 863 (1956).

12 *E.g.*, Florida R.R. v. Lassiter, 58 Fla. 234, 50 So. 428 (1909); Fuller v. Insurance Co., 31 Me. 325 (1850); Baltimore & O.R.R. v. School Dist., 3 Pennypacker 518 (Pa. 1882); Life & Cas. Ins. Co. v. Robertson, 6 Tenn. App. 43, 53 (1927); Louisville & N.R.R. v. Frakes, 11 Tenn. App. 593, 621 (1928). *Cf.* Haase v. Morton, 138 Iowa 205, 115 N.W. 921 (1908) (a single "special interrogatory" on the crucial issue not permitted).

13 CLEMENTSON, *op. cit. supra* note 10, at 2-15, 175-85; Alton, *Special Verdicts in the State Courts*, 27 INS. COUNSEL J. 390, 391-92 (1960).

14 *E.g.*, Udell v. Citizens' St. Ry., 152 Ind. 507, 515, 52 N.E. 799, 803 (1899); Life & Cas. Ins. Co. v. Robertson, 6 Tenn. App. 43, 52 (1927) (dictum). See generally Donley, *Trial by Jury in Civil Cases—A Proposed Reform*, 34 W. VA. L.Q. 347 (1928); Sunderland, *Verdicts, General and Special*, 28 YALE L.J. 253, 258 (1920).

15 So far as can be determined, the question of a possible denial of trial by jury

inform the jury, expressly or impliedly, of the legal effects of its answers to special verdict questions.[16] Although to so inform the jury would frustrate the fundamental philosophy of the special verdict,[17] there is no denial of jury trial, for the jury would still have much less control over the final judgment than it does in rendering a general verdict, in which the jury not only knows the legal effect of its factual findings but also applies the law to these findings. The third finding of error was based on Tennessee's strict construction of the common-law rule that the jury must find every material fact at issue.[18] This rule, when strictly construed, has been the principal obstacle to the use of the special verdict, as developed at common law and under some statutes. Some courts have gone so far as to hold that trial by jury is denied whenever any material facts, even if not disputed or conceded at the trial, were not recited by the jury in its special verdict.[19] Others have stated flatly that a special verdict is defective unless it finds all facts put in issue by the pleadings.[20] Previous decisions based on a similar inflexible construction of this rule explain in part the infrequent usage of the special verdict in Tennessee, as well as the absence of special verdict legislation.[21]

The Anglo-American institution of trial by jury is the product of a steady and constant development from the Conquest to the present day.[22] While the federal government and most states have guaranteed the right to trial by jury through broad constitutional provisions,[23] only those

resulting from the court's informing the jury of the legal effect of its answers to special verdict questions has rarely, if ever, been considered at the appellate level. *Cf.* note 16 *infra.*

16 *E.g.*, Thompson v. Robbins, 157 Tex. 463, 304 S.W.2d 111 (1957); Gerrard v. La Crosse City Ry., 113 Wis. 258, 89 N.W. 125 (1902); Ward v. Chicago, M. & St. P.R.R., 102 Wis. 215, 78 N.W. 442 (1899) (special verdict submitted with general verdict); *cf.* Manufacturers Cas. Ins. Co. v. Roach, 25 F. Supp. 852 (D. Md. 1939) (not error where ordinary man would know legal result); Grieger v. Vega, 153 Tex. 498, 271 S.W.2d 85 (1954) (not error where obvious to juror of ordinary intelligence). See generally CLEMENTSON, *op. cit. supra* note 10, at 250-59; Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 YALE L.J. 296-303 (1926); 43 MINN. L. REV. 823 (1959).

17 See note 29 *infra.*

18 The principal case relied on Memphis St. Ry. v. Newman, 108 Tenn. 666, 669, 69 S.W. 269 (1902).

19 *E.g.*, Hodges v. Easton, 106 U.S. 408 (1882); United States Fid. & Guar. Co. v. Commercial Nat'l Bank, 55 F.2d 564, 567 (5th Cir. 1932); Standard Sewing Mach. Co. v. Royal Ins. Co., 201 Pa. 645, 51 Atl. 354 (1902). *Contra*, Life & Cas. Co. v. Robertson, 6 Tenn. App. 43, 55 (1927). See generally CLEMENTSON, *op. cit. supra* note 10, at 204.

20 *E.g.*, Housworth v. Bloomhuff, 54 Ind. 487, 497 (1876); Cole v. Crawford, 69 Tex. 124, 126, 5 S.W. 646, 647 (1887); Hart v. West Side R.R., 86 Wis. 483, 489, 57 N.W. 91, 92 (1893). See generally CLEMENTSON, *op. cit. supra* note 10, at 204.

21 See generally Green, *A New Development in Jury Trial*, 13 A.B.A.J. 715, 716 (1927).

22 See generally HOLDSWORTH, *op. cit. supra* note 3, at 312; MANSCHIZISKER, TRIAL BY JURY (1922); THAYER, *op. cit. supra* note 2, at 130.

23 U.S. CONST. amend. VII. State constitutions usually contain a general provision that "the right to trial by jury shall remain inviolate" or that "the right to trial by jury, as heretofore enjoyed, shall remain inviolate." *E.g.*, TENN. CONST. art. I, § 6. See a collection of the various constitutional provisions in 2 THOMPSON, TRIALS § 2226 (2d ed. 1912).

incidents which are regarded as fundamental and inherent in the jury trial system must remain inviolate and beyond reform. Courts and legislatures have thus devised numerous checks on the jury to make the system more effective; among them are the demurrer, special case and reserved point, directed verdict, compulsory nonsuit, and judgment notwithstanding the verdict. These improvements have been held constitutional as not impairing the fundamentals of trial by jury.[24]

It is doubtful that the requirement that all facts put in issue be recited by the special verdict can be justified as protecting the right to trial by jury. It is basic to the right to jury trial that the judge not decide any material fact. However, a judge does not decide a fact if it is immaterial to, and can have no effect upon, the eventual judgment. This conclusion is supported by decisions in many states holding that the failure of the jury to answer questions of fact made immaterial by the facts previously found does not deny the right to trial by jury.[25] Several jurisdictions have held that the failure of the jury to respond to material questions is to be regarded merely as a failure of one of the litigants to sustain the burden of proof.[26] These decisions, however, are distinguishable from those in which the judge has failed to submit special verdict questions covering all the facts in issue.

The federal government and several states have eliminated the controversy that often arose concerning the number and form of questions submitted by providing that absence of timely objection is to be construed as a waiver of trial by jury as to any issue not submitted.[27] However, in the absence of waiver provisions, the enigma of whether the failure to submit questions covering all the material facts denies trial by jury still resolves itself into the problem of whether the jury has found all the material facts. Therefore, the decisions upholding special verdicts where the jury had not answered questions of fact that were in issue but not material to the actual decision[28] must imply that facts that in no way affect the judgment need not be found by the jury, whether submitted to them or not. In many jurisdictions, then, there is no constitutional

24 See generally Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918). *Cf.* Walker v. Southern Pac. R.R., 165 U.S. 593, 596 (1897).

25 *E.g.*, White v. Bailey, 14 Conn. 270, 276 (1841); Bower v. Bower, 146 Ind. 393, 45 N.E. 495 (1896); Oregon Home Builders v. Montgomery Inv. Co., 94 Ore. 349, 184 Pac. 487 (1919) (dictum); *cf.* Hager v. Hager, 17 Tenn. App. 143, 66 S.W.2d 250 (1933).

26 CLEMENTSON, *op. cit. supra* note 10, at 91-108.

27 See, *e.g.*, FED. R. CIV. P. 49(a); WIS. STAT. § 270.28 (1957).

28 See note 25 *supra; cf.* Fox v. Masons' Fraternal Acc. Ass'n, 96 Wis. 390, 71 N.W. 363 (1897); Chopen v. Paper Co., 83 Wis. 192, 199, 53 N.W. 452, 454 (1892). In Hosie v. Chicago & N.W.R.R., 282 F.2d 639 (7th Cir. 1960), the Northern District of Illinois Civil Rule 21, which provides for separate trials of liability and damages, was upheld. See generally Weinstein, *Routine Bifurcation of Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961); 74 HARV. L. REV. 781 (1961); 49 ILL. B.J. 424 (1961); 46 IOWA L. REV. 815 (1961). This procedure is to be distinguished from that of the principal case where there was a full trial on all issues but only submission of one of the issues pertaining to liability.

restriction that would prohibit liberalizing the common-law rule requiring all material facts raised by the pleadings and evidence to be recited in the special verdict.

The constitutionality of a modification of the special verdict instruction resulting in the submission of special verdict questions that can produce a judgment only if decided one way necessarily hinges on each jurisdiction's interpretation of the rule requiring that all material facts in issue be found by the jury. It is probable that in many jurisdictions the questions submitted will be deemed sufficient if they result in a finding of all the facts material to the judgment rendered, even though other facts might have been material had the judgment favored the other party. Even if constitutionally valid, a special verdict practice involving the submission of less than all the material facts necessary for a judgment for either party would be of questionable value. One of the advantages of a special verdict is that an error in the application of the law by the trial court can be corrected on appeal without a complete new trial. This advantage is severely compromised where the judge is allowed, in applying the law in a given case, to select only those factual questions for submission to the jury that are material to a judgment favoring one of the litigants. The submission of less than all the material facts in issue would tend to defeat another advantage of the special verdict, due to the increased opportunity for the prejudice and sentiment of the jury to influence its findings of fact. The effect of the jury's prejudices would inevitably be increased by informing it that the reduced number of questions can only be decisive in favor of one party. Even in the absence of deliberate prejudice, the jury's impartiality would be affected by its awareness that certain answers would necessitate a second set of questions and instructions.[29] In addition, the time spent in preparation of special verdict questions could not be reduced, for all questions normally required for a complete special verdict would have to be prepared in advance to prevent delay in the event the jury's answer necessitated the submission of further issues. From the broader viewpoint of improved trial procedure, the effort devoted to this procedural reform might better be spent perfecting the conventional special verdict procedure applicable to all civil litigation. In a carefully planned special verdict practice the questions need not be numerous or confusing to the jury.[30] The sole advantage gained from this modified

29 On the merits of restricting the jury to consideration of the facts, see Skidmore v. Baltimore & O.R.R., 167 F.2d 54 (2d Cir. 1948). Others disagree, advancing the theory that the function of the jury is to mitigate the harshness of inflexible rules of law with common sense, applying justice according to the standards of the community. Sparf & Hanson v. United States, 156 U.S. 151 (1894) (dissenting opinion). See generally FRANK, COURTS ON TRIAL 129-32 (1949); Sunderland, *supra* note 14; 43 MINN. L. REV. 823 (1959); *cf.* Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958).

30 See generally McCormick, *Jury Verdicts Upon Special Questions in Civil Cases*, in 8 JUDICIAL ADMINISTRATION MONOGRAPHS 3 (1941); Dooley, *The Use of Special Issues Under the New State and Federal Rules*, 20 TEXAS L. REV. 32 (1941); Green, *supra* note 21; Sunderland, *supra* note 14, at 263.

procedure is that, in those circumstances where it could be applied, it might reduce the time spent in jury deliberation. This is too small a benefit to justify compromising the advantages realizable through the continued use of the conventional special verdict.

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