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OPERATION OF THE MODIFIED SPECIAL VERDICT IN CIVIL ACTIONS IN NORTH CAROLINA

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The Constitution of the United States[1] and the Constitution of North Carolina[2] both guarantee trial by jury, the latter according to the "ancient mode". It is a "trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law, and to advise them on the facts".[3] The Constitution of North Carolina[4] has guaranteed "the ancient mode of trial by jury" since 1776.[5] In 1796 there arose a great feud between influential lawyers and the Bench over the attitude of the judges in cases involving confiscation of the lands of Tories, and the lawyers being in the legislature, the judges out, the former procured the passage of an act[6] providing that "no judge in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and deliver and explain the law arising thereon". The first clause of this statute is of doubtful constitutionality, since in a jury trial according to "the ancient mode" the judge was not forbidden to express an advisory opinion on the facts in the case.[7] The second clause of the statute is declaratory of the common law with respect to the duty

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[1] Capital Traction Co. v. Hof, 174 U. S. 1 (1899).

[2] North Carolina Const. (1868) Art. 1, Sec. 19. Smith v. Kappas, 219 N. C. 850, 854, 12 S. E. (2d) 693 (1941).

[3] See *supra*, notes 1 and 2.

[4] North Carolina Const. (1868) Art. 1, Sec. 19.

[5] North Carolina Const. (1776) Declaration of Rights, Sec. 14.

[6] Now N. C. Con. Stat. (1919) Sec. 564.

[7] See *supra*, notes 1 and 2; Thomas, *Use and Abuse of the Jury System*, 24 N. C. Bar Assoc. Reports 58. But in 145 years the question has not been presented to the Supreme Court of North Carolina. See also: Thompson v. Utah, 170 U. S. 343 (1898).

of the judge. Although at common law the judge's charge was given to instruct the jury in returning a general verdict, statutes curtailing the common law privilege of the jury, to render either a general or a special verdict, and empowering the court to require a special verdict, are constitutional and do not impair the right of trial by jury.[8] Under the North Carolina Constitution of 1868, abolishing the distinctions between actions at law and suits in equity and providing for one form of action, denominated a civil action, and that "the facts at issue (shall be) tried by order of court, before a jury",[9] and that the General Assembly shall "regulate by law, when necessary, the methods of proceeding, in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this constitution",[10] the General Assembly of 1868, adopted the "Code of Civil Procedure",[11] which retained the statute of 1796 relating to the judge's charge,[12] but simplified the judge's task by empowering him to require of the jury a modified form of special verdict in lieu of the common law general verdict.[13] This is termed a "general verdict" in North Carolina,[14] as distinguished from the common law special verdict, which is still permitted,[15] though rarely used in civil cases, but it is not the common law general verdict.[16]

Instructions on Law

One of the arguments used by some law writers in favor of special verdicts is that their use obviates the necessity of the jury's considering the law at all. It is sometimes said that if the issues are properly framed, there is no need of instructions on the law.[17] North Carolina

[8] Udell v. Citizens St. Ry., 152 Ind. 507, 515, 52 N. E. 799 (1899).
[9] North Carolina Const. (1868) Art. 4, Sec. 1.
[10] North Carolina Const. (1868) Art. 4, Sec. 12.
[11] This is substantially the Field Code.
[12] See *supra*, n. 6.
[13] N. C. Con. Stat. (1919) Secs. 584, 585, 587.
[14] Porter v. Western N. C. R. Co., 97 N. C. 66, 2 S. E. 580 (1887).
[15] N. C. Con. Stat. (1919) Secs. 585, 587.
[16] Green, *A New Development in Jury Trial* (1927) 13 A. B. A. Journal 715, 719.
[17] *Ibid.*

adopted a modified form of special verdict, not for the purpose of getting away from instructions to the jury by the court, but for the purpose of making the duty of the jury an easier one to perform, and the charge of the court a simpler one for the jury to understand. In North Carolina a proper charge from the court is deemed absolutely essential to make the trial a jury trial, as guaranteed by the constitution, as distinguished from a submission of the case to a board of twelve arbitrators. In the most recent expression of the North Carolina Supreme Court on this subject, Associate Justice Barnhill writes:[18]

> "The duty of guidance perforce devolves upon the judge,—a duty incident to the high office which he holds and made imperative with us by statute, . . . The feature of the statute here invoked is declaratory of this constitutional right. To emasculate the one is to impinge upon the other . . . To declare and explain the law arising upon the evidence in a case means to declare and explain it as it relates to the various aspects of the testimony offered. While no general formula is or should be prescribed, something substantially more than a general definition or an abstract discussion is required. The judge should at least give a resume of the facts upon which plaintiff relies, and as to which she has offered evidence, and instruct them as to the law arising thereon. He should do likewise as to evidence offered by the defendant. That is, *it is the duty of the judge to instruct the jury as to the circumstances under which the issue should be answered in the affirmative and under which it should be answered in the negative.* When the law is thus explained and applied, it can be followed with intelligent understanding. On the other hand a general definition or an abstract discussion of the law, and nothing more, leaves the jurors to grope in the dark for a fair and righteous answer to the issue. It is for this reason that the court has been somewhat meticulous in insisting upon a substantial compliance with its requirements. Without it there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented."

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[18] See *supra*, n. 2.

As will be hereinafter seen, most issues comprising a modified special verdict, as used in North Carolina, present mixed questions of law and fact. Typical issues are those of negligence, or contributory negligence. The special verdict is favored over a general verdict by professor Edson R. Sunderland, not because it gets away from the necessity of instructions altogether, but because it requires a concrete form of instruction which is of some real aid to the jury. He says:[19]

> "It must be admitted that as long as the line of demarcation between law and fact is incapable of being drawn sharply, in accordance with well defined qualitative differences, there will always be a class of matters called mixed questions of law and fact with which juries will have to deal. These will necessitate instructions to the jury in matters of law. . . . But the inherent intricacy of general instructions on the whole case is so great compared with the relatively simple instructions commonly requisite to put the jury in a position to render an intelligent special verdict, that the change from general to special verdict would carry us a very long way toward the goal we are seeking. . . . It is therefore no reflection on the soundness of a principle of procedure that it operates only within limits. This rather demonstrates its merit as something free from the visionary claims of a Utopian panacea."

As issues are framed in North Carolina, the actual finding of the jury, the real meaning of the verdict, is often found only by a reference to the charge of the court.[20]

The form of instructions required in North Carolina[21] was the subject of favorable comment by Judge Morris A. Soper, of the Fourth United States Circuit Court of Appeals, at the Fourth Circuit Judicial Conference in Asheville, North Carolina, on June 21, 1940,[22] and is advocated by the Special Committee on Improving the Administra-

[19] Sunderland, *Verdicts, General and Special* (1920) 29 Yale L. J. 253, 266.

[20] State v. Murphy, 157 N. C. 614, 72 S. E. 1075 (1911); Groves v. Baker, 174 N. C. 745, 94 S. E. 528 (1917).

[21] Except the prohibition against intimating any opinion on facts.

[22] (1941) 24 Jour. Amer. Judicature Society 111.

tion of Justice, of the American Bar Association, in a monograph prepared for that committee in 1941, by Judge W. Calvin Chesnut, of the United States District Court for Maryland.[23] Like Judge Soper, Judge Chesnut also takes exception to that part of the North Carolina statute which probably has been unconstitutional since its enactment.

The practice in North Carolina as to instructions to the jury is substantially the same as that which may be expected in Maryland under Rule 6 (a) and (b) for the trial of actions at law, of the General Rules of Practice and Procedure, effective September 1, 1941. The Maryland rule (Rule 6 (c) and (d)) seems to be superior to the North Carolina practice with respect to objections to the charge and exceptions on appeal. Under the Maryland rule and in the United States District Court, objections to any portion of the instructions must be made before the jury retires (but out of the hearing of the jury), to preserve an exception for an appeal. In North Carolina any error in the charge on the law is deemed excepted to without the filing of any formal objections at the time.[24] This requires the judge to be more alert than counsel and makes the case "open season" for him with respect to the charge required by statute. The number of appeals on the ground of error in the charge would be more numerous even than they are, but for the rule that counsel must object in open court to the misstatement of factual contentions of the parties or a failure to state such a contention.[25] A statement of the factual contentions of the parties is not required by the statute, but is habitually made;[26] and a

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[23] Copies of this monograph may be secured from the office of the Executive Secretary of the American Bar Association, 1140 N. Dearborn St., Chicago, Illinois.

[24] N. C. Con. Stat. (1919) Sec. 590 (2).

[25] Hood v. Cobb, 207 N. C. 128, 176 S. E. 288 (1934).

[26] Rocky Mount Sav. and Trust Co. v. Aetna Life Ins. Co., 204 N. C. 282, 167 S. E. 854 (1933). A skillful and astute judge can go far toward short-circuiting the prohibition against intimating any opinion on the facts by the manner in which he gives the non-statutory part of the charge, the statement of the "contentions of the parties." The attitude of the Supreme Court toward such use of the charge is set forth in the case here cited: "The statement of the contentions has steadily grown into an accepted and helpful body of practice in trial courts. While counsel have sometimes insisted, in rare instances, that such statements were partial and bore the

failure to object promptly on this phase of the charge waives the objection. It is believed that appeals based on errors in the charge would be very rare indeed if the rule adopted in Maryland and in the United States District Court on this subject were in force in North Carolina. The number of such appeals has been the subject of recent criticism in North Carolina.[27]

The statutory provisions in North Carolina above referred to, regulating the form of verdicts, have substantially the same effect as Rule 49 of the Rules of Civil Procedure for the District Courts of the United States, and Rule 7 of the new Maryland rules, except that in North Carolina there is no reservation to the court of the right to make any finding upon any controverted issue which is omitted. If a material issue is not submitted, the party aggrieved cannot complain, unless he requested that the issue be submitted,[28] but the answered issues remaining must be sufficient to support the judgment, as nothing will be presumed in its support.[29] The Federal and the Maryland rules permitting the judge to supply omitted findings are a distinct improvement over the North Carolina practice, and if effective in North Carolina would further reduce the small number of appeals based on the omission of issues.

Special Question Practice

The easing of the burden upon both court and jury, through the use of the modified special verdict, may be made to appear by describing what happens in the trial of a civil action in North Carolina. The reader may contrast the proceedings with a law case in a jurisdiction where general instructions are required of the judge, and a general verdict is required of the jury. Although there is but one form of civil action in North Carolina for the trial of

tang of the 'stump'; nevertheless, the practice springs from a worthy and intelligent effort to designate and clarify to the jury the determinative issues of fact. They tend to clear the battlefield of smoke and noise . . . *No error.*" (204 N. C. 282, 285, 167 S. E. 854, 855).

[27] Dissenting opinions in Ryals v. Carolina Contracting Co., 219 N. C. 749, 485, 14 S. E. (2d) 531, 535 (1941).

[28] Maxwell v. McIver, 113 N. C. 288, 18 S. E. 320 (1893).

[29] Tucker v. Satterthwaite, 120 N. C. 118, 27 S. E. 45 (1897).

issues of fact at law and vital questions of fact in equity, and although all disputed ultimate facts both at law and in equity must be determined by the jury, nevertheless the fundamental distinction between legal and equitable pleas and principles is preserved in North Carolina.[30] Since this paper is concerned as nearly as possible only with actions at law, such actions will be dealt with (but equitable defenses are permitted in actions at law). In actions at law the issues are usually few in number and framed to determine the ultimate facts upon which liability depends, and in some classes of cases have become standardized. In equity cases or cases involving equitable defenses, the issues are more numerous and have a tendency to become evidentiary in form.

When a case is called for trial and both sides announce themselves ready, the judge directs the plaintiff to proceed with the selection of the jury. When the plaintiff is satisfied, he directs the defendant to satisfy himself with the jury. The examination on the voir dire is conducted by counsel after preliminary statements, first by plaintiff's counsel, and then by defendant's counsel, of the nature of the claim and the nature of the defense, before the pleadings are read. When the twelve are empaneled, the court directs counsel for the plaintiff to read the complaint, and counsel for defendant to read the answer, to court and jury. The reading of the pleadings further enlightens the jury and serves in lieu of any opening statements by counsel as to what they intend to prove. When the pleadings have been read the issues appear. Frequently the judge immediately calls for issues from both sides. An issue of fact arises upon any material allegation in the complaint or new matter in the answer, or new matter in the reply, which is controverted.[31] "Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues."[32] In the run-of-the-mine case, such as a negligence

[30] MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES, 60.
[31] N. C. Con. Stat. (1919) Sec. 582.
[32] N. C. Con. Stat. (1919) Sec. 584.

case, or a suit upon a promissory note, what the issues will be is so well understood by counsel that the court does not call for issues upon the reading of the pleadings, but immediately calls for the evidence. If issues are tendered before the evidence is received they usually have to be revised in some respect after the evidence is all in. An issue, e. g., contributory negligence, may arise upon the pleadings, but if there is not sufficient evidence to warrant a verdict in favor of the pleader on such an issue, it will not be submitted. As soon as the evidence is completed, the character of the essential questions in dispute appears more clearly than upon the reading of the pleadings alone. Although the exact wording of the issues may not have been agreed upon, the lines of battle are now so clearly drawn that motions attacking the legal sufficiency of the evidence to support a verdict either on the whole case or on any material issue may now be finally determined. Likewise, motions for a directed verdict may now be determined. If issues have been tendered, without evidence in support thereof, they are now eliminated. If the case is to go to the jury, the judge in a simple case dictates to the court reporter the final form of the issues. Sometimes he directs one of the counsel to dictate the issues, in the presence of his opponent. Counsel usually agree on the issues between themselves. In the event of disagreement they gather around the judge's bench, or retire to his chambers, and thresh out the points of difference there. If the conference does not produce agreement, the judge fixes the form of the issues. Any party aggrieved notes exceptions to any or all of the issues finally submitted, and to the refusal of any or all of the issues tendered by him. Appeals follow as of course when issues are submitted without evidence in support, or are refused when there is evidence in support, or are ineffective to decide the legally material matters in dispute, but the majority of such appeals would be taken any way on other grounds, e. g., refusal of motion to nonsuit or for directed verdict. Appeals based solely on the issues submitted are extremely rare. Appeals based on mere technical contentions as to the

wording of the issue are so uniformly unsuccessful that they have practically disappeared. If lawyers understand the essential points of difference in the case, there is little difficulty in formulating questions to the jury to be answered categorically, yes, or no, which will settle the facts of the case.

NEGLIGENCE CASES

In a case which was tried in June, 1941, the plaintiff administrator, c. t. a., sought recovery for the wrongful death of his testator, in an automobile accident which occurred while he was driving defendant's car. The grounds of liability alleged were that the defendant had supplied the car to the plaintiff's testator, when the rear tires were dangerously slick, and the defendant had failed to warn the driver of this condition, although he had no reason to believe that the driver was aware of it. The defense was a general denial, a specific allegation that the plaintiff's testator was aware of the condition, and a plea of contributory negligence based on the plaintiff's testator's knowledge, as well as on the allegation that the driver negligently used the brakes while the car was skidding on a wet pavement. Motion for nonsuit was overruled and the case went to the jury on the following issues, agreed upon by counsel:

> 1. Was the death of plaintiff's testator caused by the negligence of the defendant, as alleged in the complaint?
>
> Answer: Yes.
>
> 2. Did the plaintiff's testator contribute to the injury which caused his death by his own negligence, as alleged in the answer?
>
> Answer: Yes.
>
> 3. What damages is plaintiff entitled to recover of the defendant?
>
> Answer: $.....

Upon the coming in of the verdict the defendant tendered judgment in accordance therewith. The plaintiff moved that the verdict on the second issue be set aside and for a new trial on that issue; and in the alternative that the entire verdict be set aside, and a new trial awarded. The court declined the defendant's motion and allowed the plaintiff's motion, setting aside the entire verdict and ordering a new trial. The defendant appealed, and the appeal is now pending.[33] One of the appellant's contentions will be that the court acted outside the bounds of his judicial discretion in setting aside the verdict on the second issue, because upon all the evidence construed in the light most favorable to the plaintiff, there being no evidence except that introduced by the plaintiff, the court should have allowed the motion for nonsuit on the ground of contributory negligence, and should have directed a verdict for the defendant on that issue; that where the verdict went in the same direction the law would have sent it, the trial court could not set it aside. The defendant appellant will contend that this is so because the evidence showed without contradiction and beyond dispute that the plaintiff's testator did have full knowledge concerning the condition of the rear tires on the car. But the plaintiff appellee will almost certainly contend that the jury may have found the issue of contributory negligence against the plaintiff on the ground that the plaintiff's testator negligently put on brakes while the car was skidding, rather than on the ground of his knowledge, and that the evidence of plaintiff's testator's negligence in this respect, in the emergency in which he found himself, does not clearly appear from the evidence, that stronger inferences might be drawn that in putting on the brakes he acted as a prudent man would have done, and that the judge in this situation had the discretion which he could and did exercise in ordering a new trial. The issue as framed does not

[33] Nash, Admr., v. Philips, to be argued at the 1941 Fall Term, Supreme Court of North Carolina. It is a risky business for one of counsel for defendant appellant to be writing about a pending case, but it so perfectly illustrates the inter-relation of the charge and the verdict that the risk is assumed.

disclose exactly what the jury decided, but in connection with the charge of the court, the exact meaning of the verdict becomes plain.

The charge of the court in that case is typical. After the issues were settled, and counsel had completed their arguments to the jury, the judge had the last word with his charge, which he delivered orally, with the use of notes. He first explained briefly the nature of the claim, and the nature of the defense. He then explained to the jury how the three issues submitted would determine the entire lawsuit. He then took up each issue seriatim. On the first issue, as to negligence, he summarized the evidence, explained where the burden of proof lay, read from his notebook definitions of negligence and proximate cause, (which the jury probably did not understand), and then stated the contentions made by the plaintiff and by the defendant with respect to the application of the law to the evidence. The judge listened to the arguments of counsel and made notes, either mentally or otherwise, and was able succinctly to outline the contentions of the parties. (Any error or omission in this part of the charge would be waived by failure to object at the time). Finally he charged the jury directly, specifically, and concretely, how they should answer this issue, as follows:

> I charge you this is the law: If you find from the evidence and by its greater weight that on the occasion in question, that is the night that Mr. Nash was killed, the automobile in which plaintiff's testator was riding belonged to the defendant, which fact is admitted, and that the two rear tires with which said car was equipped were old and worn and slick, and that the treads of both the said tires were entirely worn away, and that this condition was such as to constitute a defect or a dangerous condition of a nature and degree that a person in the exercise of due and ordinary care and prudence would realize and know that the use of such automobile in that condition would present an unusual and extraordinary peril and hazard, and if you further find from the evidence and by its greater weight that the defendant knew such condition at the time he permitted plaintiff's testator to ride in and

> drive said automobile, as alleged in the complaint, and that knowing such condition, the defendant failed to communicate such knowledge and information to the plaintiff's testator, and that he failed to warn him of the unusual and extraordinary peril and hazard, and if you further find from the evidence and by its greater weight that the condition of the rear tires, as before set out, was a proximate cause of the injuries and death of plaintiff's testator, you will answer the first issue "Yes."

He then took up the second issue, as to contributory negligence, and treated it similarly, as separate and distinct from the first issue. He concluded the charge on the second issue by the following definite instruction:

> I charge you this, if you find from the evidence and by its greater weight that plaintiff's testator knew or in the exercise of due and ordinary care and prudence should have known the condition of the defendant's tires, then and in that even you will answer the second issue "Yes".

The two quoted paragraphs constitute the heart of the charge. They apply the law to the facts of the case, but leave the jury to determine the facts. From the charge it appears that the jury found plaintiff's testator was guilty of contributory negligence, not on the ground that he improvidently used the brakes, but solely on the ground that he had full knowledge of the alleged dangerous condition of the tires. In this case the modified special verdict performed every function which could have been performed by a common law special verdict. But the jury, although fully capable of rendering a modified special verdict, with the assistance of the judge, tendered through instructions, would in all probability have been unable to intelligently and comprehensively write out for their special verdict, in the common law form, all the essential facts. Juries do not have secretaries. If a common law general verdict had been rendered in this case—"We the jurors, find for the defendant"—there would have been no possible way to ascertain the ground upon which they

decided the case. Furthermore, the defendant would have been deprived of any opportunity to present for review the action of the judge in setting the verdict aside. A description of this case illustrates not only the formulation of the issues, but the function of the judge's charge.

In another negligence case,[34] one for personal injuries, the defense was a general denial, contributory negligence, and joint enterprise. The issues were substantially the same, although in not exactly the same words, as in *Nash v. Philips,* described above, with an additional issue:

> "Were the plaintiff and defendant engaged in a joint enterprise, so as to bar the plaintiff's action, as alleged in the answer?"

In negligence cases the issues are pretty well standardized into three: negligence, contributory negligence, and damages, with the addition of other issues covering various defenses, such as the fellow servant rule, release, assumption of risk, contribution between joint tort feasors, indemnity against the primary tort feasor, etc. The issue as to the insulation of the negligence of one person by the intervening negligence of another is usually covered by the primary issue as to negligence. This involves the definition of proximate cause. The judge instructs the jury that if they find the defendant was guilty of negligence, but that the negligence of another intervened and was the proximate cause of the plaintiff's injuries, they should answer the first issue "No". It is permissible and would seem to be the better practice to submit a separate issue as to insulation. Otherwise, it can never be known whether the jury decided that neither of the parties accused was guilty of negligence causing the injury, or, if just one of them, which one. Consequently neither the trial judge, nor the appellate court, could review the sufficiency of the evidence to support the exact finding of the jury.

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[34] Jernigan v. Jernigan, 207 N. C. 831, 178 S. E. 587 (1935).

INSURANCE CASES

In an insurance case[35] begun in the State Court of North Carolina but removed to United States District Court, tried under the new Federal Rules, substantially the same as the North Carolina rules, the plaintiff sought to recover upon a policy of accident insurance for the death of her husband. The defendant answered that the insured did not die of accidental means, within the meaning of the policy, that he died as the result of suicide, (specifically excluded from coverage), that the plaintiff failed to give notice or furnish proof of loss or give the defendant the right and opportunity to have an autopsy, and that plaintiff failed to bring her suit within two years, as required by the policy. The plaintiff made oral reply, written reply being waived, that the defendant had waived compliance with policy conditions as to notice, proof of loss and autopsy; that although the present action was not brought within two years from the death of the insured, another action was so brought and was nonsuited, and the present action was instituted within one year after said nonsuit.[36]

Upon the reading of the pleadings, the District Judge called for issues from both sides, which were tendered. The plaintiff tendered the following issues:

> (1) Was plaintiff at time of death of Dr. Gorham totally incapacitated mentally to give the notice and offer to make proof of loss as required by said policy?
>
> Answer:
>
> (2) Did plaintiff, through her attorney, give said notice and offer to make said proof of loss as soon thereafter as was reasonably possible?
>
> Answer:
>
> (3) Was defendant informed of the death of Dr. Gorham within 90 days of its occurrence and of the circumstances surrounding it upon which it relies for defense?
>
> Answer:

[35] Gorham v. Mutual Benefit Health and Accident Association of Omaha, 114 F. (2d) 97 (C. C. A. 4th, 1940), cert. denied 85 L. Ed. 494 (U. S. 1941).
[36] N. C. Con. Stat. (1919) Sec. 415.

(4) Did defendant fail to make timely demand for opportunity to perform an autopsy upon the body of Dr. Gorham?

Answer:

(5) Was defendant fully informed of the result of plaintiff's autopsy before trial of this action?

Answer:

(6) Did defendant, upon receipt of notice of claim by plaintiff, deny or disclaim liability under said policy?

Answer:

(7) Was the death of Dr. Louis R. Gorham the result of bodily injuries sustained through purely accidental means other than suicide, sane or insane?

Answer:

The defendant tendered the following issues:

(1) Did the plaintiff give to the defendant immediate notice of alleged accidental death of Louis R. Gorham as required by standard provision No. 4 in the policy referred to in the pleadings?

Answer:

(2) If not, did she give such notice as soon as reasonably possible?

Answer:

(3) Did the plaintiff furnish affirmative proof of loss to the defendant company at its office as required by said policy?

Answer:

(4) Did plaintiff give defendant the right and opportunity to have an autopsy or its equivalent as required by Standard Provision No. 8 in said policy?

Answer:

(5) Was the death of Louis R. Gorham on or about March 8, 1933, the result of suicide committed by him, whether sane or insane?

Answer:

(6) Was this action brought within two years from the expiration of the time within which proof of loss was required by the policy, as required by Standard provision No. 14 in said policy?

Answer:

(7) If not, was another action brought within said two years and nonsuited, and this action brought on the same policy within six months after the entry of said nonsuit?[37]

Answer:

(8) Did Louis R. Gorham die as a result, directly and independently of all other causes, from bodily injuries sustained while said policy was in force, through purely accidental means?

Answer:

The judge took the issues tendered under consideration, and heard the evidence. At the conclusion thereof the defendant moved for a directed verdict, on the ground that upon all the evidence, construed in the light most favorable to the plaintiff, there was not sufficient evidence to go to the jury on waiver of compliance with the policy conditions, that therefore the issues tendered by the plaintiff should be rejected, and that upon all the evidence construed in the light most favorable to the plaintiff, all the issues tendered by the defendant should be answered in its favor. The motion was granted, judgment signed, and affirmed on appeal.[38]

This case illustrates how a complicated case can be reduced to a small number of simple, easily understood questions. If the case had gone to the jury, the District Judge could have made plain to the jurors their duty with respect to each question put to them. If they had been permitted to render a general verdict either for the plaintiff or for the defendant, it would have been impossible to ascertain the real meaning of their verdict, what facts they found, what they understood the law to be, or how

[37] Defendant contended that N. C. Con. Stat. (1919) Sec. 6290 applied, rather than Sec. 415.

[38] See *supra*, n. 35.

they applied the law to the facts; the jurors might have found that the insured died by accidental means, but that the plaintiff had breached policy conditions, either as to notice, proof of loss, or autopsy; but no one would ever have known. The sufficiency of the verdict could only have been tested as a whole, and not with reference to the specific finding which determined the case.

EJECTMENT

In a common law ejectment action,[39] plaintiffs sought to recover a valuable tract of land as executory devisees under the will of one Wells Draughn, dated Feb. 17, 1870, probated Sept. 24, 1872. The first taker, Thomas Sears, who owned as devisee in fee, defeasible upon his death without leaving issue him surviving, had died, without leaving issue, in April, 1926, thus making effective the devise over to the plaintiffs. The complaint alleged that the defendants were in wrongful possession of the land, claiming title under deed to Richard H. Jones, from the executor of Wells Draughn, who had no title or authority to convey, and that said deed was void. The action was begun in 1927. The answer did not controvert these facts, but the defense was that in his lifetime Wells Draughn had entered into a contract in writing, binding upon his heirs, to convey the land in question to Richard H. Jones; that said Richard H. Jones contemporaneously executed and delivered purchase money notes; that Richard H. Jones, under whom defendants claimed, went into possession of the land as purchaser in 1872; that the contract to convey was lost, and had been for fifty years; that Richard H. Jones paid the purchase money notes either to the executor of Wells Draughn, or to the legal holder of said notes; that defendants, and those under whom they claimed, particularly Richard H. Jones, had been in quiet and undisturbed possession of the land since 1872, under said contract; that the plaintiffs held under the will only a naked legal title, as trustees for the defendants; and that the defendants were entitled to specific performance of the

[39] Sears v. Braswell, 197 N. C. 515, 149 S. E. 846 (1929).

written contract made in 1870. The plaintiffs replied, pleading the statute of limitations against the equitable counterclaim of the defendants.

In this case the essential allegations of the complaint were not controverted, and the defendants relied entirely upon their affirmative equitable defense. Therefore, no issues were submitted on the allegations contained in the complaint. Counsel had no difficulty in agreeing upon issues directed solely at the affirmative defense. The following issues were submitted to the jury by agreement, the first four being answered by the jury, the last two by the court, as follows:

(1) Did Wells Draughn enter into a contract in writing binding himself, his heirs and assigns to convey the land in question to said Richard H. Jones, as alleged in the answer?

Answer: Yes.

(2) Did Richard H. Jones contemporaneously with the execution of said contract execute and deliver to Wells Draughn purchase money notes for the purchase price of said land, as alleged in answer?

Answer: Yes.

(3) Did Richard H. Jones subsequently pay said purchase money notes to the legal holder thereof?

Answer: Yes.

(4) Have defendants and those under whom they claim, been in quiet and undisturbed possession of said land since 1872, under said contract?

Answer: Yes.

(5) Is defendants' counterclaim to remove plaintiffs' claim as a cloud upon their title, barred by the Statute of Limitations?

Answer: No. Answered by Court—Small, Judge.

(6) Are the plaintiffs the owners and entitled to possession of lands described in the complaint?

Answer: No. Answered by Court—Small, Judge.

Judgment was thereupon rendered which was affrmed in the Supreme Court, that the defendants were the owners of the land, and that the plaintiffs were required to execute and deliver a conveyance to the defendants of all their right, title and claim in and to said real estate; and the judgment further provided that it should be recorded as a deed, and upon such registration would take effect as such conveyance.[40]

If the verdict had been in favor of the plaintiffs on the defendants' affirmative defense, the plaintiffs would have been entitled to judgment on the pleadings and the verdict, since the essential allegations of the complaint were not controverted by the defendants. Thus the six questions submitted to the jury, simple in form, requiring simple answers, determined the entire controversy, under definite instructions from the judge as to the circumstances which would control the answers to such issues.

The essential issues in the case were the first three, as to the making of the contract in writing back in 1870, and the payment of the purchase price. The contract could not be found, and the only evidence of it was the void deed from Wells Draughn's executor, to Richard H. Jones, dated in 1872, which recited the execution and delivery of such a contract, and its substance. The defendants relied upon this ancient deed upon the principle that recitals in an ancient document are admissible as an exception to the hearsay rule. In his charge to the jury the judge instructed them that:

> "The court charges you that before the defendants can recover on this issue and on their counterclaim, they must show that the alleged contract was entered into by Wells Draughn; that the contract was in writing, and that it contained a sufficient memorandum and agreement of the description of the land, and that it was made for a valuable consideration. . . . The defendants do not rely upon the deed, but rely upon the recitals in the instrument that the executor signed, purporting to be a deed, as evidence to prove clearly, cogently and convincingly, that there was a contract

[40] N. C. Con. Stat. (1919) Secs. 607 and 608.

> to convey the land in question, and that the contract was executed and delivered, and that afterward, the purchase price was paid by Jones in the form of notes, and that afterward the notes were paid. Plaintiffs contend that it not being lawful for an executor to make a deed for lands of the testator, this executor not being clothed with that authority, that the recitals in the deed, it being a void deed, should not be accepted as evidence, etc."

The attention of the jury was called to all the arguments on both sides, with respect to the credibility of the recitals in the deed, and their attention was clearly directed to the fact that the first three issues were the determinative issues in the case. This case should be reassuring to the Maryland lawyer who is apprehensive of difficulties in framing issues for a modified special verdict. Frequently the Chancellor submits to the jury for its advisory opinion such questions in equity. The practice of formulating issues which separately present all essential matters of fact in dispute should, therefore, already be a familiar one.

Construction Contract

One more illustration should suffice. In actions by a number of material suppliers, against a building contractor (R. L. Blalock) and the owner of the construction project (A. C. L. R. R. Co.) and the surety on the contractor's compliance bond (American Surety Co.), consolidated for trial, the plaintiffs alleged that they had furnished materials which were used on the project, that the work had been completed in substantial compliance with the contract, that notice of claims had been given to the owner, that the chief engineer of the owner had arbitrarily and in bad faith refused his certificate of approval required by the contract, that the owner had retained a large amount of money, some $30,000.00, of the contract price; that the compliance bond guaranteed the faithful performance of the contract, one of the obligations secured being that all material men must be paid; that the plaintiffs had not been paid, and

had notified the owner and the surety company of the amount of their respective claims. The owner answered, denying the essential allegations of the complaint, and alleging that the work had not been done in a workmanlike manner, or in substantial compliance with the specifications and drawings embraced in the contract; that its chief engineer had so notified the contractor, and requested compliance; that the chief engineer had withheld his certificate of approval, reasonably and in good faith; that it was not liable either to the contractor or to the material men until its chief engineer had certified his approval of the work. The surety company answered in agreement with the allegations of the complaint, except that it alleged that its bond was only an indemnity bond, and that it was not liable to the material men until after remedies against the contractor and the owner had been exhausted. Issues were agreed upon by counsel. The first issue involved the amounts due the respective plaintiffs as material men, and was answered in detail by stipulation. This issue also, by consent, settled the question of liability of the surety company to the plaintiffs. (There was a private stipulation between the plaintiffs and the surety company, which later gave rise to a dispute involving alleged conditions of liability, depending upon the outcome of the case between the contractor and the owner.) The other issues submitted were as follows:

> 2. Did the defendant Blalock construct the Kentucky Rock asphalt floors in the coach and paint shop of the railroad company in the most substantial and workmanlike manner, and in strict accordance with the specifications and drawings referred to in the contract?
>
> Answer: No.
>
> 3. Did the chief engineer of the Railroad Company on or about March 31st, 1925, condemn said floors as not having been constructed in the most substantial and workmanlike manner and in strict accordance with the specifications and drawings referred to in the contract, and so notify the contractor, Blalock, and

request the said contractor to put said floors in a satisfactory condition?

Answer: Yes.

4. What would be the reasonable cost to the Railroad Company of reconstructing said floors in the most substantial and workmanlike manner and in accordance with the terms of the contract?

Answer: .....

5. Was the withholding or refusal to issue a formal final certificate by the chief engineer of the railroad company unreasonable, arbitrary, wrongful, without just cause or excuse, and not in good faith as alleged in the complaint?

Answer: No.

6. Did each plaintiff give the defendant Railroad Company notice of its claim within statutory time required by the lien laws of North Carolina?

Answer: Yes.

7. In what amount, if any, is defendant Railroad Company indebted to R. L. Blalock?

Answer: .....

The judge took the owner's view of its liability under the contract, and instructed the jury that if they answered the second issue, no, and the third issue, yes, and the fifth issue, no, they need not answer the fourth and seventh issues. He held that the finding on the third issue relieved the owner entirely, unless and until the contractor, under whom the plaintiffs and the surety claimed, complied with the owner's demand. The surety company settled with the plaintiffs and took subrogation receipts and prosecuted an appeal to the Supreme Court of North Carolina,[41] its principal ground of appeal being the instruction of the court above explained. It took the position that upon the breach of the contract, as shown by the answers to the second and third issues, the owner was obliged

[41] Southern Engineering Co., et al., v. Blalock, et al., Fall Term, 1926, not reported.

to complete the work, and that it could not hold the entire $30,000.00 withheld from the contractor, but only so much thereof as was required to correct the deficiencies in the work; it contended that the fourth and seventh issues should have been answered by the jury. The case was settled by compromise in the Supreme Court, before argument, between the surety company and the owner. This verdict is a perfect illustration of the utility of the modified special verdict in segregating and isolating the vital points to be decided upon an appeal. The sole remaining question of law was clearly defined. If error had been found in the instructions of the lower court, that the fourth and seventh issues need not be answered, a new trial would have been ordered only as to those two issues. The original trial consumed two weeks. The new trial could have been completed in a day.

CONCLUSION

As said by Prof. Leon Green,[42] "The jury is a means,—a rough and ready means,—a crude piece of machinery at best,—and if it is to be used rationally, these fine spun hypotheses of the legal expert [the general charge] will not have to be taken too seriously"; and again: "The shorter the question the more likely will it be understood and less likely will it be misleading. So long as it covers a single issue, the more comprehensive the term, if understood by laymen, the better. . . . Provision is made expressly for short and comprehensive questions by requiring the trial judges to give explanation of such terms as are thought to need it. There ought to be no more trouble about this matter than any other matter where the use of language is necessary." Any substantial change in procedure is likely to produce some confusion at first in giving effect to it. Such was the history of the new code system introduced in North Carolina in 1868.[43] But a lawsuit is merely for the purpose of doing justice, and lawyers

[42] See *supra*, n. 16.

[43] Crump v. Mimms, 64 N. C. 767 (1870); Parsley v. Nicholson, 65 N. C. 207 (1870); Moore v. Edmiston, 70 N. C. 510 (1873).

trained under any system of pleading, having long been used to analyzing cases and arguing them, with reference to their vital points, should have little difficulty in transferring their analysis in any case from their briefs to the jury issues.

The sole object of any attempt at improvement of court procedure is to sharpen the tools with which judge, jury and counsel have to work, to the end that a better job may be done in less time and with less expense. Business men have been short-circuiting the courts because of expense and delay. One of the principal causes of excessive expense and delay is that more than one trial is required in too many cases to achieve what should have been done the first time. Each new trial takes more time and costs more money. The use of the modified special verdict is better adapted to achieve a correct result than the common law general verdict, and its adoption has a tendency to reduce the number of new trials and consequently the time and expense required in any case.[44]

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[44] Hyde, *Fact Finding by Special Verdict* (1941) 24 Jour. Amer. Judicature Soc. 144. In North Carolina there are still too many new trials, but they are not due to the use of the modified special verdict; most of them could be avoided by improvements in the rules in other respects, two of which, to conform with the new Maryland and Federal rules, are suggested in this paper, *supra, circa* notes 24 to 30. Four trials, instead of one, were required in Batson v. City Laundry Co., 202 N. C. 560, 163 S. E. 600 (1932); 205 N. C. 93, 170 S. E. 136 (1933); 206 N. C. 371, 174 S. E. 90 (1934); and 209 N. C. 223, 183 S. E. 413 (1936) because North Carolina has not amended its rules to permit reservation of decision on motion to nonsuit until after verdict, a procedure which has proved its efficacy elsewhere.