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SPECIAL FINDINGS OR SPECIAL VERDICTS

By

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With the promulgation of Civil Procedural Rule 2257, and a comment upon the use of such rule in *Brown v. Ambridge Yellow Cab Co.*,[1] the use of special findings and special verdicts comes up again to trouble the trial judge. The recent case of *Ratcliff v. Myers*,[2] suggests the use of the special findings might have been beneficial in that case.

Whether or not special findings, or a special verdict, have all of the benefits and desirabilities extolled in the appellate court decisions, remains to be seen.

Much of the difficulty in the past has arisen from the failure to distinguish between a special verdict, and special findings, as well as the circumstances wherein such use is desirable, or undesirable, and whether the issue can be readily defined, is comparatively simple, or is complex and interdependent upon other issues.

In a special verdict, the jury finds all the facts in the case, disputed as well as undisputed, and leaves the ultimate decision on those facts to the Court. Special findings accompany a general verdict, and serve as an aid in clarifying the facts and issues, which are disposed of by the general verdict.

Judge Keller, in *Fulforth v. Prud. Ins. Co.*,[3] says, on page 523 of his opinion, concerning a special verdict:

> "It is very similar to a case stated, except that the facts are found by the jury instead of agreed to and stated by the parties; and, like a case stated, the court in pronouncing judgment cannot go beyond the facts found in the special verdict and infer anything not there found. What is not found is presumed not to exist. If the facts found are not sufficient to support a judgment, the case must be tried again."

The full definition, as expressed in *Standard Sewing Machine Company v. Royal Insurance Co.*,[4] is as follows:

> "Nothing is better settled, on principle as well as authority, than that all the facts upon which the court is to pronounce judgment should be incorporated in the special verdict. It is the exclusive province of the jury, in the first place, to determine all disputed questions of fact, from the evidence before them; and then their special verdict is made up of those findings of fact, together with such undisputed facts as may be necessary to a just decision of the cause . . . . The court, in considering a special verdict and entering judgment thereon, is necessarily confined to the facts found and embodied in the verdict; the latter cannot be aided by intendment or extrinsic facts that may appear in the evidence."

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1 374 Pa. 208, 97 A. 2d 377 (1953).
2 382 Pa. 196, 113 A. 2d. 558 (1955).
3 147 Pa. Super. 516, 24 A. 2d 749 (1942).
4 201 Pa. 645, 51 Atl. 354 (1902).

Special findings are not defined to any length. They should accompany a general verdict at all times. They are more commonly used than the special verdict, but when used have been as defective in application as the special verdict. Both are excellent in theory, but exceedingly troublesome in practice.

The special verdict was apparently designed for those situations in which the jury found certain facts, after which the Court determined whether under the law, the plaintiff had a case, or the defendant had a defense. This was first summarized and defined in *Wallingford v. Dunlap,*[5] decided in 1850, as follows:

> "A special verdict is where the jury find the facts of the case, leaving the ultimate decision of the cause upon those facts, to the court, concluding conditionally, that if upon the whole matter thus found, the court should be of opinion that the plaintiff had a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant: 3 *Black* 378; *Boote on Suit at Law,* 158."

In *Pgh. Ft. Wayne & Chicago R. R. v. Evans,*[6] decided in 1867, the special verdict idea was applied, and is an excellent example of the difficulties created by such use, in a case of negligence and contributory negligence, with several facts dependent upon conflicting testimony. The Supreme Court through Justice Woodward, states on page 254:

> "Negligence is generally a mixed question of law and fact, and what renders special verdicts so proper in these railroad cases is, that if they ascertain all the material facts, the undisputed as well as the disputed, the question of negligence then becomes exclusively a question of law, and may be dealt with accordingly. This is a much better way of trying causes than to leave to the jury the application of the law to the facts, for out of this grows the practice of some judges of wholly committing the question of negligence to the jury. However, as the court undertook to instruct the jury upon the law of negligence in this case, and they decided that a sufficient head-light and a flagman were wanting, hereby showing that they meant to pass upon the subject of negligence, the instructions should have been more full, - - to this effect:"

Justice Woodward then poses a dozen or more questions which must be determined, and whether or not these constitute negligence or contributory negligence, as the answers thereto are found by the jury, and leaves to the trial court, the ultimate decision on negligence as an abstract proposition, a legal concept long since out of date. An attempt was made in *Kelchner v. Nanticoke Boro.,*[7] to pass upon a question of negligence, and experienced the same difficulty as in the *Evans* case. The question of the negligence of the defendant was not submitted to the jury, the same fault occurring in the *Evans* case.

So, in *Simpson v. Montgomery Ward,*[8] an action for damages for malicious prosecution, the Supreme Court, pointing out that in civil actions for malicious

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5 14 Pa. 31 (1850).
6 53 Pa. 250 (1867).
7 209 Pa. 412, 58 Atl. 851 (1904).
8 354 Pa. 87, 46 A. 2d 674 (1946).

prosecution the question of want of probable cause for the criminal prosecution which gave rise to the civil action, is a question, not for the jury, but for the court. Therefore, in such a case, where there is a conflict in testimony concerning the circumstances of the case, the trial court has two courses to follow, one, submit the testimony to a jury to find a special verdict, under proper and sufficient instructions and findings, within the requirements laid down in the *Wallingford* and *Fulforth* cases or (by inference) upon specific findings of fact, that is, special findings accompanying a general verdict. The case was then sent back for another trial, recommending to the trial judge the use of special findings, and suggesting certain questions or findings to be submitted to the jury.

Unfortunately, at the second trial (appearing after appeal, as *Simpson v. Montgomery Ward,*)[9] the trial judge submitted eight special findings, which did not reach the question of want of probable cause sufficiently to permit the court to determine whether or not want of probable cause existed. One of the questions, or findings, as submitted, as pointed out by the Superior Court, was not responsive, obviously confused the jury, and was also contradictory to another finding. The case then went back, was tried again, the special findings reduced to two in number, proper in form and purpose, and was finally affirmed.[10]

Theoretically, a special verdict, or special findings, seem to be an excellent vehicle by which a case, its issue, or issues, and the testimony pertinent thereto, can be clarified, simplified and presented to a jury to be passed upon with some degree of judgment and logic, on the part of the jurors.

However, when the trial judge finds, or thinks he finds, that one purely legal issue controls the case on trial, and with or without suggestion from counsel, he attempts to simplify matters by a special verdict, or to unravel complex facts, or mixed questions of law and fact, by a special verdict, or special findings, his trouble begins. He must decide if it is relevant to the issue, helpful, readily comprehensible and susceptible of a brief reply? With zealous counsel suggesting, or insisting upon the phrasing; which facts control the issue; what issue is involved; what the law is; which testimony proves what; and with said zealous counsel seeking every advantage, real or fancied (the fancied ones causing most of the trouble); it is no wonder he flounders around and produces nothing but reversible error.

The many disasters no doubt prompted former Chief Justice Robert Von Moschzisker's comment, on page 242 of his "Trial by Jury",

> . . ."but, I suppose, the difficulty with this suggestion is that many trial judges are not masters of the art of administering the law, and, in most cases, they would get but poor aid from the bar, few lawyers being skilled in court practice, hence the effort might end in confusion worse confounded."

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9 162 Pa. Super. 371, 57 A. 2d 571 (1948).
10 Simpson v. Montgomery Ward, 165 Pa. Super 408, 68 A. 2d 442 (1949).

One can only wonder if the Chief Justice ever experienced the difficulties the trial judge undergoes when he attempts the special verdict, or to unravel things by special findings.

Dare it be suggested that the Chief Justice was too limited in his reference to the judiciary? *Bertinelli v. Galoni*,[11] gives a right to special findings to a litigant, and refusal thereof as possible reversible error. In *Sebastianelli v. Prudential Ins. Co.*, [12] it is said if a special finding is irreconcilable with the general verdict, the special finding must prevail; but in *Brown v. Ambridge Taxicab Co.*,[13] just the opposite. In *Simpson v. Montgomery Ward*,[14] an excellent treatise on the law of civil actions for malicious prosecution, the special verdict is discussed in detail. Special findings are suggested, but no direction as to either, is given. It took two more trials by jury, and two more appeals to get out of the fog, and end the litigation.

A great many of the errors committed, resulted from attempts to use special verdicts, or special findings, in the wrong place, and frequently, without a clear distinction between the special verdict and special findings, as will be noted from the cases cited. The special verdict can be cumbersome and involved, except in the simplest sort of factual situation. In *Harrison v. Prudential Ins. Co.*[15] the only question to be resolved was the date of birth of the insured. With this date fixed, the court could readily calculate the amount to be paid the beneficiary. In the *Fulforth* case, counsel agreed upon the special findings to be submitted, upon which the court then entered judgment, or final verdict. These were both actions of assumpsit and, in the latter case, Judge Keller noted that special findings were agreed upon by counsel, although departing from observance of the rules of practice; but such a course had been sanctioned in *Union Trust Co. v. Gilpin*,[16] and *O'Boyle v. Kelly*.[17]

A final verdict by a jury is the most desirable; the whole case not only should be, but must be considered by the jury, and whether that finality is reached by a jury, or the court, it must be upon consideration of the whole case, all the testimony, and all the law involved. Special verdicts, or special findings, are too apt to break the case in its several parts, and attract consideration by piece-meal, rather than as a whole. It is only when the issue is but one, quite clear, and the testimony excluded to all except that issue, that these special mechanisms can be used without reversible error. Frequently, as in *Kelchner v. Nanticoke Boro.*,[18] where it was not clear whether the trial court was submitting the case on a special verdict, or

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11 331 Pa. 73, 200 Atl. 58 (1938).
12 337 Pa. 466, 12 A. 2d 113 (1940).
13 374 Pa. 208, 97 A. 2d 377 (1953).
14 354 Pa. 87, 86 A. 2d 674 (1946).
15 168 Pa. Super. 474, 79 A. 2d 115 (1951).
16 235 Pa. 524, 84 Atl. 448 (1912).
17 249 Pa. 13, 94 Atl. 448 (1915).
18 209 Pa. 412, 58 Atl. 851 (1904).

special findings, the finding upon one question submitted, by the jury, inevitably brought other questions for determination, requiring the jury's return to the jury room for further consideration; and in *Benzinger v. Prudential Ins. Co.*,[19] brought about the jury reaching their final verdict in open court. Aside from that, in both cases, the consideration of the jury upon the whole case was broken, and the jury considered only the selected portions of the evidence, or if all the testimony was considered, portion by portion.

Brown v. Ambridge Yellow Cab. Co.,[20] is the latest case in the books on special verdicts and findings, and an excellent guide is set forth on page 217:

> "Special findings have their use where the case involves a number of different parties, standing in different relation to the matter in issue, e. g., where there are an original defendant and additional defendant or defendants: see Rule 2257, Pennsylvania Rules of Civil Procedure. There can also be an element of helpfulness in special findings where the conflict on a material issue of fact is absolute and categorical, such as whether a thing is white or black, but once the issue slips into distinctions between the grays and the tints, between twilight and dusk or daybreak and dawn, shades of variance appear where requests for special findings will produce confusion rather than clarity, doubt rather than certainty, inconclusiveness rather than finality."

In this case, there were seventeen special findings, indicating some confusion at the trial, between a special verdict, or special findings. The questions, or findings, referred to in Justice Musmanno's opinion, are excellent examples of what not to say in a special finding, and how easily the trial judge can create confusions and contradictions. One can vision the struggle that must have taken place when these seventeen questions were being framed during the trial, under the influences mentioned earlier. When the time (often fatal) comes at which special findings are to be prepared, should the trial judge retire to chambers with respective counsel and thus in leisure and comfortably seated produce obfuscation, or should he compel counsel to stand on their feet, before the bench in the court room, and suggest? He had better leave it all alone, and give the case to the jury in the tried and true method. Always, the trial judge has the motion for non suit, binding instructions, judgment n. o. v. or new trial. Relying on these, he commits less error than using special findings, or special verdicts, as the reports will amply attest.

If the issue is, "is it black", or "is it white", and the testimony addressed to that, or counsel agree, well and good; otherwise, extraordinary care must be exercised if the attempt is essayed, and it will be better if it is not.

The *Brown* case suggests the use of Civil Procedural Rule 2257, in defining the various parties, their rights and liabilities, and their standing in the different

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19 317 Pa. 561, 176 Atl. 922 (1935).
20 374 Pa. 208, 97 A. 2d 377 (1953).

relations to the matters in issue. This rule might have been applied in the *Ratcliff* case, but again, great care would have had to be exercised. The pre-trial conference should be used, and if special findings, or special verdicts, are indicated, there will be ample time to fully consider the possibilities; then clear away most of the confusion by stipulation, and not use special findings.

All the cases, from the *Wallingforth* case to the *Brown* case, affirm and reaffirm the desirability of special findings, but all the cases, except the three or four mentioned, demonstrate that no matter how desirable, the results have been just the opposite.