

SPECIAL VERDICTS UNDER THE FEDERAL RULES

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I. INTRODUCTION

Eight hundred years of experience with the system of trial by jury have not served to develop the scientific fact-finding procedure to which the common law is entitled. Nor has this long experience served to resolve successfully the struggle between judge and jury for supremacy in the legal process. The problems of designating and of protecting the appropriate functions of these two companion agencies of justice still persist.¹ Of these problems, the most vital to the life of the jury system are those presented in the court's charge and the jury's verdict.

Traditionally the jury has functioned by rendering a general verdict in response to a general charge. In the general charge the trial judge hypothetically presents to the jury the law which is applicable to the factual issues as raised by the pleadings and the evidence. The charge divides the burden of proof between the litigants, and thus emphasis is placed upon the adversary nature of the procedure.² After the jury has received instructions on the law appropriate to the case, it must perform the three-fold task of understanding the law as thus presented in the general charge, of determining the true facts from the mass of conflicting testimony, and of correctly applying the law as presented to the facts as found. After performing this difficult, three-fold task, the jury renders a simple, single conclusion—the plaintiff or the defendant wins. Even aside from the unpredictable elements of bias and prejudice, the jury's task under the general charge is an unreasonable one. Professor Sunderland has ably characterized the task of the jury under the general charge thus:

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1. See: Bohlen, *Studies in the Law of Torts* (1926) 605; Morgan, *Function of Judge and Jury in the Determination of Preliminary Questions of Fact* (1929) 43 *Harv. L. Rev.* 165; 1 Wigmore, *Evidence* (2d ed. 1923) c. 16-26.

2. Professor Morgan has asserted: "Two elements conspire to prevent an ordinary lawsuit from being a rational proceeding for the ascertainment of truth—jury trial and the adversary theory of litigation." *Hearsay and Non-hearsay* (1935) 48 *Harv. L. Rev.* 1138.

The peculiarity of the general verdict is the merging into a single individual *residuum* of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial reagents exist for either a qualitative or a quantitative analysis * * *. 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 jury can tell what was put into it and the jurors will not be heard to say.³

He has also suggested that the general verdict is valued not for what it is but for what it does—for concealing the procedural errors of the jury and for giving us the assurance that we have attained the unattainable.

The first efforts to relieve the jury from the unreasonable requirements of the general verdict were made early in the development of the jury system. As a result of those efforts the first substitute for the general verdict was offered in the form of a special verdict.⁴ An inquiry into its origin is of interest. The jury of early English history was accorded a place of exalted importance in contrast to the place of minor importance held by the trial judge. Indeed, there seems to have been a tendency during its formative period to accord to the jury's verdict the same supernatural finality as had been previously accorded decisions by ordeal, by battle, and by wager of law. Not only did the jury have the power of determining the facts in controversy, but it also had the authority to determine and to apply the law as well.⁵ To the court room it brought both its information as to the facts and its understanding of the law. (Indeed, this pre-

3. Sunderland, *Verdicts, General and Special* (1920) 29 Yale L. J. 253, 258. In *Mounger v. Wells* (C. C. A. 5, 1929) 30 F. (2d) 521, 522, the court in criticizing the special verdict for its inconsistencies asserted: "It would have been simpler and more conclusive to have left the whole case to the jury for a general verdict."

4. Clementson, *Special Verdicts* (1903) c. 1; Morgan, *A Brief History of Special Verdicts and Special Interrogatories* (1923) 32 Yale L. J. 575, 588; Green, *A New Development in Jury Trial* (1927) 13 A. B. A. J. 715.

5. See: 1 Holdsworth, *History of English Law* (1922) 312 et seq.; Thayer, *The Jury and its Development* (1892) 5 Harv. L. Rev. 249; Thayer, *Preliminary Treatise on Evidence* (1898) c. 2-4; Morgan, *supra* note 3.

rogative of the jury to determine the appropriate law persisted long after the judge had gained the right to control the admissibility of all evidence.)⁶ The ancient jury, however, despite its broad powers and prerogatives in the trial process, was at an early date subjected to the peril of the attaint. If, upon an appeal to the grand jury, the trial jury's verdict was found to be false, whether in law or in fact, the jury was subjected to severe punishment.⁷ In order to relieve the jury from this constant peril the English Parliament provided by the Statute of Westminster II:

6. In *State of Georgia v. Brailsford* (U. S. 1794) 3 Dall. 1, 4, Chief Justice Jay, in charging the jury, stated:

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

One hundred years later the power of the jury to pass upon the law of the case was overruled by the United States Supreme Court in *Sparf and Handen v. United States* (1894) 156 U. S. 51, but Justice Gray, with whom concurred Justice Shiras, wrote a lengthy dissenting opinion concluding that the case should be reversed because, "* * * the defendants, by the instruction given by the court to the jury, have been deprived, both of their right to have the jury decide the law involved in the general issue, and also of their right to have the jury decide every matter of fact involved in that issue." 156 U. S. at 182. It should be observed that the learned jurist was dealing with a criminal case in which the issues are more political than they are in private litigation. See: *Sunderland*, supra note 3.

7. Sir William Blackstone gives us this interesting statement in regard to attaint juries: "The jury who are called to try this false verdict must be twenty-four, and are called the grand jury; for the law wills not that the oath of one jury of twelve should be attainted or set aside by an equal number, nor by less indeed than double the former * * *. And he that brings the attaint can give no other evidence to the grand jury, than what was originally given to the petit. For as their verdict is now trying, and the question is, whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter; because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their *liberam legem* and become forever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their

The justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseisin, or not, so that they do show the truth of the deed, and require aid of the justices. But if they of their own head would say that it is disseisin, their verdict shall be admitted at their own peril.⁸

The special verdict which developed under this statute consisted of lengthy recitals of the facts in contrast to the modern special verdict, which generally consists of brief or categorial answers to interrogatories propounded to the jury. Although the perils of the attaint have long since disappeared,⁹ the use of the special verdict has remained a part of English trial procedure. At times it has been variously used both in civil and in criminal cases,¹⁰ but under the new order in England the practice of receiving verdicts from the jury in response to specific interrogatories directed to it by the judge is well established.¹¹

Along with the development of the special verdict, there evolved in England the practice of quizzing the jury both in connection with its special verdicts and in connection with its general verdicts.¹² It appears, however, that the English jury has resisted such inquiries into the residuum of its verdict and that the English court in deference to the wishes of the jury has returned to the ancient practice of according to the jury the privilege of rendering at its own discretion and without quizzing thereon a special or a general verdict.¹³ In the United States, however, the practice of testing the jury, especially in cases in which the judge was surprised at its general verdict, was early developed in Massachusetts and in other New England States.¹⁴ As this practice has developed it is broadly different from the practice of the special verdict. Whereas the special

meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict." 3 Blackstone, *Commentaries* *404. See *infra*, note 9, for abolishment of the Writ of Attaint.

8. (1285) Statute of Westminster II, c. 30. This statute has been held to be declaratory of the common law. See *supra* note 3.

9. The Writ of Attaint was abolished by (1825) 6 Geo. IV, c. 50, sec. 60.

10. See: Morgan, *supra* note 4.

11. Millar, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 Harv. L. Rev. 1017; Millar, *The Old Regime and the New Civil Procedure* (1937) 14 N. Y. U. L. Q. Rev. 1, 214.

12. See: Wicher, *Special Interrogatories to Juries in Civil Cases* (1926) 35 Yale L. J. 296; Clementson, *op. cit. supra* note 4, c. 2 and 3.

13. See *supra*, note 12.

14. See *supra*, note 12.

verdict is in lieu of a general verdict and is designed to exhibit all the ultimate facts and to leave the drawing of legal conclusions to the judge, interrogatories accompanying the general verdict are designed merely to test it on one or more vital issues. The practice of using interrogatories met with such favor that it was soon extended so as to allow special interrogatories to be propounded to the jury along with the general charge, the answers to accompany the general verdict. A majority of the states have adopted substantially this practice.¹⁵

Although the practice of quizzing the jury upon its general verdict has the advantage of determining how well the jury has resolved its fact-finding and administrative functions, it does not eliminate from the trial the chief objectionable features of the general charge. At best it is only an improvement on the general charge and certainly is not a substitute for it. This method of submitting interrogatories to the jury along with a general charge has been incorporated in the new rules of Civil Procedure for the District Court of the United States as Rule 49(b).¹⁶ It should not be confused with the special verdict provision of Rule 49(a).¹⁷

15. See *supra*, note 12.

16. "Rule 49. SPECIAL VERDICTS AND INTERROGATORIES. (b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

17. "Rule 49. SPECIAL VERDICTS AND INTERROGATORIES. (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The

In the United States efforts to develop a worthy and scientific substitute for the general charge have evolved modified versions of the common law special verdict in several states.¹⁸ Of these states, North Carolina, Wisconsin, and Texas have made the most serious efforts to improve the jury trial. The North Carolina practice is unique. Although the North Carolina statute defines its modernized verdict as a "special verdict * * * by which the jury find the facts only,"¹⁹ its practice is far removed from the common law predecessor.²⁰ By statutory mandate only a few issues are submitted to the jury, and such issues are generally formulated by the attorneys or by the judge before the introduction of testimony.²¹ Dean Green has asserted that this practice has enabled a very small judiciary to care for the litigation of one of our larger states.²² The practice does have the distinct advantages of apparent simplicity and efficiency, yet it is very different from the conventional concept of a special verdict.

The Wisconsin practice as early as 1876 had made distinct

court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

18. Green, *supra* note 4. Donley, *Trial By Jury in Civil Cases* (1929) 13 J. of Am. Jud. Soc. 16; Staton, *The Special Verdict As An Aid to the Jury* (1929) 13 J. of Am. Jud. Soc. 176; Millar, *supra* note 11.

19. N. C. Code Ann. (1935) sec. 585.

20. "The statute does not contemplate or require that an issue shall be submitted as to every important material fact controverted by the pleadings, nor is it necessary, expedient, or proper to do so." *Patton v. Western N. C. R. R.* (1887) 96 N. C. 455, 464, 1 S. E. 863. It appears that it is not error to combine in one issue the question of whether a plaintiff has been injured and has sustained damages through the negligence of a defendant, even though contributory negligence is set up as a defense and there is evidence of contributory negligence in the record. *McAdoo v. Richmond & Danville R. R.* (1890) 105 N. C. 140, 11 S. E. 316. See also *Boyer v. Teague* (1890) 106 N. C. 576, 633, 11 S. E. 665; *Antietam Paper Co. v. Chronicle Pub. Co.* (1894) 115 N. C. 147, 20 S. E. 367; *Witsell v. West Ashville & S. S. Ry.* (1897) 120 N. C. 557, 27 S. E. 125; *Tuttle v. Tuttle* (1907) 146 N. C. 484, 59 S. E. 1008; *Shannonhouse v. White* (1915) 171 N. C. 16, 86 S. E. 168; *Wallace v. Bellamy* (1930) 199 N. C. 759, 155 S. E. 856; *Grier v. Weldon* (1934) 205 N. C. 575, 172 S. E. 200; *Etheridge v. Atlantic Coast Line R. R.* (1934) 206 N. C. 657, 175 S. E. 124.

21. N. C. Code Ann. (1935) sec. 584. *Beasley v. Surles* (1906) 140 N. C. 605, 53 S. E. 360.

22. See Green, *supra* note 4.

improvements in the common law special verdict,²³ and more recent improvements have materially advanced its usefulness.²⁴ The Texas practice, distinctively styled the "special issue practice," approaches theoretical perfection, but its theoretical niceties frequently lead to confusion and often tend to reduce the efficiency of the system.²⁵ Nevertheless, the modified Texas and Wisconsin special verdicts are worthy advancements in the procedure of trial by jury.²⁶ In 1897, Texas effected the most material improvement which has been embodied in the modern special verdict practice by providing that an omitted finding, in the absence of a request therefor, should be deemed to have been found by the court, provided that there was evidence in the record to sustain the judgment.²⁷ Ten years later Wisconsin adopted a similar provision.²⁸ In 1931, Michigan adopted a like provision;²⁹ and recently the improvement of 1897, as well as other statutory modifications, have found expression in the new Rules of Civil Procedure for the District Court of the United States, wherein both a modified special verdict and interrogatories accompanying the general verdict are provided for.³⁰ It may be interesting, therefore, to analyze the provisions of the new federal rule in the light of the decisions of the federal and states' courts, examining particularly the practices of the courts of Wisconsin and Texas.

II. JUDICIAL DISCRETION

The first provision of Rule 49(a) stipulates that "the court may require a jury to return only a special verdict in the form

23. *McNarra v. Chicago & N. W. Ry.* (1876) 41 Wis. 69; *Williams v. Porter* (1877) 41 Wis. 422; *Hutchinson v. Chicago & N. W. Ry.* (1877) 41 Wis. 541; *Ward v. Busack* (1879) 46 Wis. 407, 1 N. W. 107.

24. Wis. Laws of 1907, sec. 2858, now incorporated in Wis. Stats. (1937) sec. 270.27, 270.28.

25. Justice Lattimore asserted in *Texas Elec. Service Co. v. Anderson*. (Tex. Civ. App. 1932) 55 S. W. (2d) 142, 145: "The law authorizing special verdicts was enacted to obviate prejudice and emotional verdicts by requiring the jury to find the ultimate facts at issue. Its value was at once recognized so that now almost all jury verdicts in civil cases are on special issues. Of late, a trend appears in the appellate courts to multiply and increase the issues which a jury must pass on until it takes a Philadelphia lawyer on the jury to furnish a verdict that will answer the requirements."

26. See *supra*, note 18.

27. Texas Laws of 1897, Special Sess., c. 7, now incorporated in Tex. Vernon's Stats. (1936) secs. 2189, 2190.

28. See *supra*, note 24.

29. Mich. Court Rules 1931, 1933, Rule 37, sec. 7.

30. See *supra*, notes 16 and 17.

of a special written finding upon each issue of fact." Thus it appears that the privilege of calling for a special verdict is not a right to be demanded by the parties but is rather a matter to be determined by judicial discretion.³¹ This provision of the rule is opposed to the common law rule which, as previously observed, placed the control of this matter in the hands of the jury. It is also opposed to the practice in Rhode Island,³² Ohio,³³ Wisconsin³⁴ and Texas,³⁵ where special verdicts must be rendered if requested by either party or if directed by the judge. Prior to the enactment of the compulsory submission feature of the Texas statute, the number of cases tried under the special issue practice was negligible; but since its enactment in 1913, the special verdict is used in practically every trial. It should be observed that the statutory law of two states expressly provides that the special verdict shall be rendered at the option of the jury,³⁶ while the statutory provisions of seven states are silent on the point.³⁷ Six states provide for either a general or a special verdict at the option of the jury in cases for the recovery of money only or of

31. Hammon, Edward H., speaking before the Judicial Conference of the Fourth Circuit on June 11, 1937, asserted: "* * * the court can now order a special verdict in any case without the consent of the parties." This address was published: *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure (1937)* 23 A. B. A. J. 629, 633.

Prior to the new rule the special verdict was considered neither pleading nor procedure, and the federal courts were not required to follow the practice of the various states. *Indianapolis and St. Louis R. R. v. Horst* (1876) 93 U. S. 291; *United States Mutual Accident Ass'n v. Barry* (1889) 131 U. S. 100; *Grimes Dry Goods Co. v. Malcolm* (1896) 164 U. S. 483; *Spokane & Inland Empire R. R. v. Campbell* (1916) 241 U. S. 497.

32. R. I. Laws of 1938, c. 534, sec. 2.

33. Ohio Page's Gen. Code Ann. (1926) sec. 11460.

34. Wis. Stats. (1937) sec. 270.27.

35. Tex. Laws of 1913, art. 1984a, now Tex. Vernon's Stats. (1936) art. 2189. The statute provides: "* * * If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court."

No case has been found in which it is held that special issues could not be employed, but the courts apparently recognize that there may be such a situation. Comment (1939) 17 Tex. L. Rev. 521; *Texas & N. O. R. R. v. Crow* (Tex. Com. App. 1939) 123 S. W. (2d) 649; *Missouri, K. & T. Ry. v. Rockwall County Levee Improvement Dist.* (1927) 117 Tex. 34, 297 S. W. 206.

36. Ark. Dig. Stats. (1937) sec. 1528; *Johnson v. Missouri Pac. R. R.* (1921) 149 Ark. 418, 233 S. W. 699; Conn. Gen. Stats. (1930) sec. 5658.

37. See: *Ariz. Rev. Code* (1928) sec. 3828; *Iowa Code* (1935) c. 496, sec. 11512; *Me. Rev. Stats.* (1930) c. 96, sec. 106; *Mo. Stats. Ann.* (1932) sec. 968; *N. C. Code Ann.* (1935) sec. 585; *Okla. Stats. Ann.* (1936) tit. 12, sec. 587; *Vt. Public Laws* (1933) sec. 1688.

specific real property.³⁸ In other types of actions these six states are in accord with the federal rules. On the other hand, one state has expressly repealed the right of the jury to render any but a general verdict.³⁹ It is to be hoped that this limitation upon the use of the special verdict under Rule 49 (a) will not retard its use and development in the federal courts.

III. ISSUES OF FACT

The second provision of Rule 49 (a) calls for "a written finding for each issue of fact." This language is similar to the language used in the statutes of a number of states, particularly of Wisconsin⁴⁰ and of Texas,⁴¹ where its interpretation has occasioned considerable difficulty. Obviously, the simplest cases may involve many issues of fact; and, if an individual finding is required on each one, the special verdict becomes unwieldy. The courts have, therefore, sought to limit the fact issues submitted to "ultimate fact issues" in contradistinction to "evidentiary fact issues."⁴² The difference between the two types of issues is

38. See: Cal. Deering Civil Proc. and Probate Codes (1937) sec. 625; Idaho Code Ann. (1932) sec. 7-220; Neb. Rev. Code (1935) sec. 20-1121; Ore. Code Ann. (1930) vol. 1, sec. 2-403; S. C. Code (1932) vol. 1, c. 31, sec. 602; Wash. Remington's Rev. Stats. Ann. (1932) tit. 3, c. 3, sec. 364.

39. Ind. Burns Stats. Ann. (1933) sec. 2-2021. Ind. Laws of 1881, c. 38, sec. 388, provides for special verdicts but Ind. Laws of 1897, c. 85, sec. 1, p. 128, abolishes its use.

40. Wis. Stats. (1937) sec. 270.27 provides: "* * * Such verdict shall be prepared by the court in the form of written question, relating only to material issues of fact." This provision of the Wisconsin code is copied in the Michigan Court Rules. See Searl, Mich. Ct. Rules Ann. (1933) sec. 7.

41. Tex. Vernon's Stats. (1936) art. 2190, provides that the court shall "submit all the issues made by the pleading and evidence."

42. In *Baxter v. Chicago & N. W. Ry.* (1899) 104 Wis. 307, 312, 80 N. W. 644, Marshall, J., asserted: "A failure to distinguish between such facts (material issue of fact raised by the pleading) and the numerous evidentiary circumstances which may be the subjects of controversy on the evidence and are relied upon to establish the ultimate facts upon which the case turns, often leads to unjust criticism of a special verdict. * * * The object of a special verdict is solely to obtain a decision of issues of fact raised by the pleadings, not to decide disputes between witnesses as to minor facts, even if such minor facts are essential to and establish, by inference or otherwise, the main fact. * * * A strict compliance with this rule requires that the verdict be made up of sufficient questions to at least cover, singly, every fact in issue under the pleadings. If that could always be kept in view, the legitimate purpose of such a verdict in promoting the administration of justice would be uniformly accomplished, and the opinion entertained by some that its use is harmful would cease to exist."

In *Texas City Transp. Co. v. Winters* (Tex. Com. App. 1920) 222 S. W. 541, 542, McClendon, J., asserted: "By the expression 'issues of fact' is not meant the various controverted specific facts * * *, but only the independent ultimate facts which go to make up the plaintiff's cause of action and de-

clearly one of degree only, and the submission of an ultimate fact issue simply means that the interrogatories or form findings submitted to the jury shall not include special inquiry into, or statements of, all the numerous issuable matters in evidence. Necessarily, considerations of trial expediency forbid such a detailed inquiry. The detailed evidentiary facts will normally be grouped in the minds of the jury as the basis of its answers to the broader factual conclusions presented by the pleadings. The interrogatories, therefore, are framed on the theory that the jury will consider and answer in its own mind each evidentiary issue, including the credibility of each witness, and will group its detailed mental conclusions into a broad conclusion. This conclusion, standing alone, will present a controlling fact in the plaintiff's cause of action and the defendant's ground of defense. An evidentiary issue may be characterized as a subsidiary or a supplemental issue, which may be presumed to have been found by the jury in such a manner as to support its answer to the various interrogatories. It is of course true that occasionally one item of evidence presents a controlling issue. In such a case the evidentiary character of the issue is merged into the more significant character of an "ultimate fact issue," and as such it should be submitted. Experience has shown that the problem is not always as simple as it may appear.

Furthermore, in determining what is an issue of fact, we are confronted with the old and annoying problem of distinguishing law from fact, and although we have learned the futility of drawing our distinctions too nicely, distinctions must be made.⁴³ The

defendant's ground of defense." See: *Oregon Home Builders v. Montgomery Inv. Co.* (1919) 94 Ore. 349, 184 Pac. 487.

43. See Clark, *The Complaint in Code Pleading* (1926) 35 Yale L. J. 259, 260, for a discussion of law, facts, and evidence distinguished.

The ruling is repeatedly made that issues in a special verdict must be confined to matters of fact, without embodying questions of law. *Strahan v. Haynes* (1928) 33 Ariz. 128, 262 Pac. 995; *Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds* (1911) 16 Cal. App. 461, 118 Pac. 469; *Tomlin v. Hilyard* (1867) 43 Ill. 300, 92 Am. Dec. 118; *Tippecanoe Loan & Trust Co. v. Jester* (1913) 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E 721; *McGuire v. Chicago B. & Q. Ry.* (1908) 138 Iowa 664, 116 N. W. 801, aff'd (1910) 219 U. S. 549; *Martin v. Chanute* (1911) 86 Kan. 26, 119 Pac. 377; *Banner Tobacco Co. v. Jenison* (1882) 48 Mich. 459, 12 N. W. 655; *Socony Burner Corp. v. Gold* (1929) 227 App. Div. 369, 237 N. Y. S. 552; *Nygaard v. Northern Pac. Ry.* (1920) 46 N. D. 1, 178 N. W. 961; *Oklahoma City v. Page* (1931) 153 Okla. 285, 6 P. (2d) 1033; *Archambeau v. Edmunson* (1918) 87 Ore. 476, 171 Pac. 186; *Texas & N. O. Ry. v. Thompson* (Tex. Com. App. 1929) 12 S. W. (2d) 963; *Runyan v.*

precedents in the field of the special verdict, like similar precedents in the field of pleading, are neither consistent nor always sensible.⁴⁴ An issue of fact may be very simple, as the determination of the fact of death, or it may be very complex, as the determination of negligence, proximate cause, or nuisance, undue influence, waiver, *et cetera*. The more complex so-called facts are the composite of the application of a legal standard, rule, or concept to the simple, factual conclusions of conduct. If the process of determining such composite facts is not too difficult to be performed readily by the jury and does not involve the application of law which is too involved, it should be permitted. The determining of the reasonableness of the issue and of the jury's ability to resolve the issue should rest in the discretion of the court.⁴⁵

One Texas decision is worthy of consideration in this connection. In *Fox v. Dallas Hotel Co.*,⁴⁶ the wife of Fox brought a tort action based upon negligence for the death of her husband. The plaintiff sought to establish negligence in the failure of the defendant to keep an elevator in repair. The elevator had jammed while Fox was attempting to use it in his capacity as the night watchman. While Fox was endeavoring to discover the particu-

Kanawka Water & Light Co. (1911) 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430; Howard v. Beldenville Lumber Co. (1906) 129 Wis. 98, 108 N. W. 48; Wallace v. Skinner (1907) 15 Wyo. 233, 88 Pac. 221.

44. See: In *Watson v. Patrick* (Tex. Civ. App. 1915) 174 S. W. 632, 633, the court held the question: "Was the defendant *indebted* to plaintiff in the sum of \$875 when said attachment was sued out?" to be error involving a mixed question of law and fact. Whereas, in *Devine v. United States Mortgage Co.* (Tex. Civ. App. 1898) 48 S. W. 585, the court held that a finding that defendant was not a *principal* was not a conclusion of law. In *Westchester Fire Ins. Co. v. Dickey* (Tex. Civ. App. 1923) 246 S. W. 730, 731, 732, the court held that it was proper to refuse the following issue as including both law and fact: "Did the defendant * * * agree with the plaintiff * * * that it would *insure* his property" but proper to submit the question, "Was the policy sued on herein *procured* by direction of Ragsdale, or his clerk, Newsome, through *fraud or deceit*?" (Emphasis supplied)

45. Obviously, in the infinite variety of controversies incident to civil litigation many difficulties arise in determining (1) what are the ultimate fact issues, and (2) how best to frame them. The difficulties incident to these two problems inhere in the general charge as well as in the special issue method. The first problem lies at the very base of the litigation, and involves a proper legal analysis of the controversy. The second is obviously addressed largely to the discretion of the court, which should only be reviewed where prejudicial abuse is shown; the object being to so frame the issues as to direct the jury's attention, in as clear, simple, and direct a manner as possible, to the concrete fact questions they are called upon to decide. *Luling Oil & Gas Co. v. Edwards* (Tex. Civ. App. 1930) 32 S. W. (2d) 921. See also Comment (1932) 10 Tex. L. Rev. 217.

46. (1922) 111 Tex. 461, 475, 240 S. W. 517.

lar trouble with the elevator, it fell and caused his death. The defendant pleaded that the injuries to Fox were proximately caused by his contributory negligence in the following particulars:

1. That Fox in order to look under the elevator needlessly placed his body in a position where he would be injured if the elevator should descend;
2. That he failed to overcome the sticking by operating the elevator up and down;
3. That when the elevator stopped he failed to lock it in position;
4. That he went under the elevator without having locked it; and
5. That in working under the elevator he failed to get entirely in the pit. * * *

There was sufficient evidence in the record to raise the question of fact as to each of the distinct grounds of contributory negligence set out in the answer of the defendant in error. Over proper objection the trial judge refused to submit separate interrogatories covering each of the alleged grounds of contributory negligence but submitted rather the question whether Fox was "guilty of contributory negligence in his conduct in, around, or about the elevator, or the shaft either prior to or at the time he was injured." It was found that there was contributory negligence, and upon the jury's special verdict finding negligence, judgment was rendered against the defendant for \$9,000.00. Upon writ of error the Texas Supreme Court condemned the refusal of the trial judge to submit separately the various issues of contributory negligence, asserting as follows:

The statutes make it the duty of the court in trials by jury; first, to submit *all* the controverted fact issues made by the pleadings; second, to submit each issue distinctly and separately, avoiding all intermingling; * * *

In submitting either negligence or contributory negligence, special issues should be restricted to specific acts of negligence alleged or proven. It was no less improper to submit the general question of Fox's contributory negligence, over objection, without regard to the specific acts of negligence plead and supported by proof, than it would have been to have submitted the general question of defendant in error's negligence, without regard to the specific acts of negligence set out in plaintiff in error's petition.

Thus it appears that the Texas court has concluded that an ulti-

mate fact issue, within the meaning of its special issue statute, is a question of inquiry as to the existence or non-existence of a controlling fact which is essential to a single ground of defense. Under such a test anyone of the five alleged acts of contributory negligence might constitute a valid ground of defense, and the five acts might therefore constitute five ultimate fact issues.

Similarly, the Wisconsin court has held that it is error to ask omnibus question concerning the negligent cause of the plaintiff's injuries. In *Fontaine v. Fontaine*,⁴⁷ the Wisconsin court asserted:

The jury should have been called upon to answer whether each element of negligence constituted the cause of the plaintiff's injuries. The reason for this is apparent. Part of the jury might have thought that speed was the cause, others that the failure to maintain a lookout was the cause, and still others that control and management of the car was the cause. This form of verdict did not require ten jurors to agree that any species of negligence was the cause of the plaintiff's injuries.

On the other hand, the North Carolina practice appears to approve the intermingling of such issues as negligence and proximate cause.⁴⁸ Such a practice is probably too near to the general verdict to be entirely desirable.

The first federal decision involving factual issues under Rule 49(a) was presented in *Manufacturers Casualty Insurance Co. v. Roach*.⁴⁹ The plaintiff, an automobile liability insurance company, subsequent to an automobile accident involving the assured, sought to secure a declaratory judgment nullifying its insurance liability. The undisputed facts revealed that when the policy was issued the defendant breached three present and promissory warranties by misstating: "(1) the address of the insured; (2)

47. (1931) 205 Wis. 570, 575, 238 N. W. 410. In *Waters v. Markham* (1931) 204 Wis. 332, 342, 235 N. W. 797, Richards, J., said: "The court submitted but a single question relating to proximate cause and a single question relating to reasonable anticipation. Having submitted to the jury the first question, which contained three separate subdivisions respecting deceased's failure to exercise ordinary care * * *. The question relating to proximate cause should have had three subdivisions, and the same is true as to the question submitting reasonable anticipation."

48. *Turner v. Lipe* (1936) 210 N. C. 627, 188 S. E. 108, 109. On the issue of negligence and proximate cause the following issue was held proper: "1. Was the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint? Answer Yes."

49. (D. C. Md. 1939) 25 F. Supp. 852.

the place where the automobile would be principally garaged and (3) where it would be principally used." The only real controversy, therefore, was whether the insurance company by its conduct in investigating the accident and in negotiating with the defendant had waived the previous breaches of the warranties.

The trial judge, after instructing the jury "as a matter of law that there was a breach of the policy conditions which avoided the policy at the option of the insurer, unless the breach of the policy had been waived by the insurer after knowledge thereof," and after explaining the Maryland law of waiver, submitted two questions to the jury. They were:

(1) Q. Do you or not find as a matter of fact that the insurance company waived the breach of the policy? (Answer this in writing 'Yes' or 'No'.)

(2) Q. If your answer to the above is 'Yes' then answer the following question. (When that is on what date) do you find that the insurance company through its agents knew of the breach of the policy?

Both questions were answered favorably to the assured, and judgment was entered accordingly.

The insurance company's request for a third interrogatory requiring the jury "to find specifically when the insurer's agent first learned that the insured's automobile was principally garaged at Timonium" was denied. (It appeared to be uncontroverted that the car was not garaged at Timonium.) This question arises: Did the requested interrogatory call for a finding on an issue of fact or a finding on an evidentiary issue?

The court apparently treated the issue as an evidentiary one for it asserted that "the jury could not have failed to understand that they were not justified in answering 'yes' to the interrogatory as to the waiver if they found the insured agents did not know * * * of the breach of the policy * * * until on or about August 15th." Certainly it appears that the answer to the rejected question was vital to the broader issue of waiver and that its answer might have controlled the judgment. Furthermore, the issue submitted on waiver called for the applying of a rather complex legal concept to the facts of the case and the rendering of a rather broad legal conclusion thereon. Moreover, the answer to the question on waiver gave the court no concrete factual findings, and the court was forced to indulge in a presumption that facts had been found favorable to the conclusion rendered. It

might have been more consistent with the purpose of the special verdict to have framed several questions designed to have ascertained the simpler facts as to whether the insurance company had, with knowledge of the misstatements in policy, voluntarily and intentionally relinquished a known right or power to deny liability because of such misstatements.

On the other hand, it should be observed that the practice in Texas and in Wisconsin, despite its theoretical advantage of presenting separately each controlling factual issue, has occasionally resulted in the submission of so many issues that the practice has at times been burdensome. It might be desirable, therefore, as a sacrifice to an expedient trial to permit the grouping into one factual finding of all facts which arise from the same transactions and which constitute single elements of a cause of action such as negligence and proximate cause, or a single ground of defense such as contributory negligence or even waiver, as in the case above.

IV. QUESTIONS OF FORM

The third provision of Rule 49(a) stipulates that the court in the submission of an issue of fact

may submit to the jury written questions susceptible of categorical or other brief answers or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the return findings thereon as it deems most appropriate.

Thus two different forms for the submission of issues of fact are presented, and the court is left free to "use such other methods * * * as it deems most appropriate." The mere form of an issue has not been considered important except as a means of developing a technique for the discovery of the true facts.⁵⁰ The abolition of the judge's common law right to comment on the evidence⁵¹ has increased for the majority of the states the problem

50. See Green, *supra* note 4.

51. 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2551, gives us this interesting statement in criticism of the prevailing statutory prohibition against the judge's common law right to comment upon the evidence:

"The latter rule (which obtains by Constitution or statute in almost every State, but not in the Federal Courts) is an unforunate departure from the orthodox common-law rule. It has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice. Since it remains the law by grace of statute only, in most States, it can and should be readily abolished. A new birth of long life will then be open for the great beneficent institution of Trial by jury."

as to the form in which the issue may be presented to the jury. In Texas, a question which may be construed to be a comment on the evidence is objectionable.⁵² Since the federal courts have retained their common law privilege of commenting on the evidence, they are not confronted with the same problem in the same degree as are the courts in many of the states; but they are, of course, concerned with a fair presentation of the facts to the jury. Obviously, a question should not assume the existence of a material fact in controversy⁵³ nor the existence of a material fact for which there is no evidence in proof.⁵⁴ On the other hand, it is proper to assume the existence of a fact when the evidence is so conclusive that reasonable men could reach but one conclusion.⁵⁵ Likewise, it is proper to assume the existence of any matter clearly within the doctrine of judicial notice.⁵⁶ It is, of course, the proper function of the court to determine when there is sufficient evidence to justify the submission of an issue to the jury.

It is especially imperative in the submission of special issues that each question be independent of the others, i. e., it should be so framed as to avoid the assumption of any particular answers to the other issues. This result is frequently accomplished by the use of qualifying phraseology which clearly negatives the assumption of the existence of a fact as proof of any particular answer to other issues.⁵⁷

In order that the judge's charge to the jury may be equally fair to all litigants, the Texas courts have insisted that each party to the litigation shall be given the right to demand an affirmative presentation of his theory of the case to the jury. This rule is well settled and pertains equally to the general

52. *Davidson v. Wallingford* (1895) 88 Tex. 619, 32 S. W. 1030; *Southland Greyhound Lines v. Richards* (Tex. Civ. App. 1934) 77 S. W. (2d) 272; *Schaff v. Scoggin* (Tex. Civ. App. 1918) 202 S. W. 758.

53. *Johnson v. Hyltin* (Tex. Civ. App. 1910) 133 S. W. 293; *Martin, Wise & Fitzhugh v. Texas & Pac. Ry.* (1894) 87 Tex. 117, 26 S. W. 1052; *International & G. N. R. R. v. Brice* (1906) 100 Tex. 203, 97 S. W. 461.

54. *Payne v. Harris* (Tex. Com. App. 1922) 241 S. W. 1008; *Lyles v. Myer* (Tex. Civ. App. 1927) 293 S. W. 295.

55. *Manufacturers Casualty Ins. Co. v. Roach* (D. C. Md. 1939) 25 F. Supp. 852.

56. 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2565 et seq.

57. For example: "If you have answered special issue number one in the affirmative, do you find etc." or some similar qualification negating the existence of any evidentiary hypothesis. *Stayton, Methods of Practice in Texas Courts* (1935) 270.

charge and to the special verdict.⁵⁸ In many cases the issue which presents affirmatively the plaintiff's theory of his cause of action may negate the defendant's theory of defense. Likewise, the defendant's affirmative theory of defense may negate the possibility of an affirmative answer to those issues presenting the plaintiff's affirmative viewpoint. Obviously, this practice of asking inconsistent questions may result in inconsistent answers and in a verdict which cannot be sustained. On the other hand, the practice causes the conflicting viewpoints of the contestants to be equally and fairly called to the attention of the jury. The practice, therefore, serves as a searching inquiry into the controversial issues of a case.

A serious problem has, however, arisen in the Texas practice when the defendant has sought to have the issues presenting his theory of defense submitted when such issues have not been affirmatively alleged in his pleadings. Under the plea of a general denial, the defendant may of course introduce any evidence in rebuttal which is an inferential "no" to the plaintiff's allegations. Also, an affirmative defense to be relied on must be pleaded. The Texas courts have held, however, that the defendant, upon request, is entitled under the rebuttal theory of the general denial to affirmative interrogatories presenting his view of defense.⁵⁹ The most outstanding illustration of this practice is that of presenting an affirmative issue on the basis of evidence which indicates an unavoidable accident, such defense not having been affirmatively pleaded.⁶⁰ This same theory has been applied in order to justify the submission of the affirmative of other purely rebuttal issues in other types of cases.⁶¹

58. See *supra* note 45.

59. *McElroy v. Dobbs* (Tex. Civ. App. 1921) 229 S. W. 674, 676, holding: "Appellee combats the assignment of error under the view that there was no pleading upon which to invoke the submission of such special charge. This view is not correct. Appellee alleged that he made a certain contract with appellant to procure a purchaser and thereby earned his fee. Appellant answered by general denial. This answer was sufficient to put in issue every fact necessary to sustain or defeat the cause of action. There was nothing in the petition calling for any special pleading by defendant, and the general denial met every feature of the case alleged." Comment (1930) 8 Tex. L. Rev. 294.

60. *Galveston, H. & S. A. Ry. v. Washington* (1901) 94 Tex. 510, 63 S. W. 534; *National Cash Register Co. v. Rider* (Tex. Com. App. 1930) 24 S. W. (2d) 28; *Dallas Ry. & Terminal Co. v. Garrison* (Tex. Com. App. 1932) 45 S. W. (2d) 183.

61. *Galveston, H. & S. A. Ry. v. Washington* (1901) 94 Tex. 510, 63 S. W. 534 (unavoidable accident); *Ford v. Couch* (Tex. Civ. App. 1929) 16

The affirmative presentation of such a negative defense has been criticized on the theory that any evidence presented under the general denial was only negative in nature, tending merely to say "no" to the plaintiff's allegations and that therefore such issues were evidentiary only and should not be submitted in an affirmative form as an issue to the jury.⁶² Certainly, if the particular defense has not been affirmatively pleaded, it does not merit an affirmative presentation as a question or as an issue. Complete justice may be accomplished by one affirmative issue presenting the affirmative issue pleaded. Obviously, there cannot be an affirmative finding on an issue of negligence if the injury resulted from an unavoidable accident or from an act of God. Despite the fact that this practice multiplies the issues, it has become well established in Texas.⁶³

In an effort to guard the theory of special verdict practice and to keep the jury as a purely fact-finding body whose function is to determine facts without regard to the results to the litigants, state courts have held it error for an interrogatory or for the instruction to suggest to the jury the legal effect which would result from the jury's answer.⁶⁴ In the first written opinion

S. W. (2d) 869 (congenital condition existing from birth rather than negligence of physician); *Horton & Horton v. House* (Tex. Com. App. 1930) 29 S. W. (2d) 984 (negligence of third person is proximate cause of injury); *Federal Surety Co. v. Jetton* (Tex. Com. App. 1930) 29 S. W. (2d) 534 (injury due to disease rather than accident); *Texas Employers' Ins. Ass'n v. Galloway* (Tex. Com. App. 1931) 40 S. W. (2d) 973 (plaintiff only partially incapacitated instead of totally incapacitated).

62. See C. J. Gallagher's criticism of the rule in *Texas & P. Ry. v. Perkins* (Tex. Civ. App. 1926) 234 S. W. 683, 686, wherein he asserted: "Doubtless any testimony tending to show that plaintiff's injuries might have resulted from some other cause was admissible to aid the jury in determining such issue (referring to the issue presenting plaintiff's affirmative viewpoint) * * * Such testimony in this case, if any, did not, in the absence of pleading, raise an issue within the meaning of that term in the authority cited, but was evidentiary only."

63. *Toney v. Herman Hale Lumber Co.* (Tex. Civ. App. 1931) 36 S. W. (2d) 234; *South Plains Coaches v. Behringer* (Tex. Civ. App. 1930) 32 S. W. (2d) 959; *Texas & N. O. Ry. v. Martin* (Tex. Civ. App. 1930) 32 S. W. (2d) 363. Speer, *Special Issues* (1932) sec. 150.

64. In *Anderson v. Seelow* (1937) 224 Wis. 230, 271 N. W. 844, 846, Fowler, J., said: "The sole purpose of a special verdict is to get the jury to answer each question according to the evidence, regardless of the effect or supposed effect of the answer upon the rights of the parties as to recovery. To inform them of the effect of their answer in this respect is to frustrate this purpose." See: *Beach v. Gehl* (1931) 204 Wis. 367, 371, 235 N. W. 778, 780, and *Banderob v. Wisconsin Central Ry.* (1907) 133 Wis. 249, 287, 113 N. W. 738, approving the above rule. See also *Humble Oil & Refining Co. v. McLean* (Tex. Com. App. 1926) 280 S. W. 557; *Wichita Valley Ry. v.*

under Rule 49(a), the federal district court apparently was not concerned over this matter.⁶⁵ Of course if an ordinary man would know the legal result of any particular finding, it is not error for either the court or the counsel so to inform the jury.⁶⁶

Professor Sunderland has suggested that, since the facts which the jury is expected to find are the ultimate facts of the case and the facts which the parties are expected to plead are the ultimate facts of the case," * * * it would be perfectly easy to draw the pleadings in such a form as to make them serve as the special verdict itself."⁶⁷ Although carefully drawn pleadings would materially simplify the process of drawing the issues to be submitted to the jury, and pre-trial procedure may be looked to as an aid in this process, it appears that as long as pleadings are used as a touchstone for litigation, issues must be framed after the evidence is all in. The price for laxity must be paid at some point in the procedure; if the pleadings are loosely drawn, the trial judge and the attorney must work the harder to present simple and precise issues to the jury.⁶⁸

V. EXPLANATION AND INSTRUCTION

The fourth provision of Rule 49(a) stipulates that "the court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." A similar provision is found in the Texas statute,⁶⁹ but the statute of Wisconsin and

Southern Casualty Co. (Tex. Com. App. 1926) 284 S. W. 940; *McFaddin v. Hebert* (Tex. Comm. App. 1929) 118 Tex. 314, 15 S. W. (2d) 213; *Cannon Ball Motor Freight Lines v. Grasso* (Tex. Civ. App. 1933) 59 S. W. (2d) 337. When a party complains of this error of the charge suggesting the legal effect of the answer, he must present more evidence than the mere fact that the finding of the jury was against him. *Guffey Petroleum Co. v. Dinwiddie* (Tex. Civ. App. 1916) 182 S. W. 444.

65. *Manufacturers Casualty Ins. Co. v. Roach* (D. C. Md. 1939) 25 F. Supp. 852.

66. *McFaddin v. Hebert* (Tex. Civ. App. 1929) 118 Tex. 314, 15 S. W. (2d) 213; *Galveston, H. & S. A. Ry. v. Harling* (Tex. Com. App. 1924) 260 S. W. 1016.

67. See Sunderland, *supra* note 3, at 263.

68. Rule 16, Rules of Civil Procedure for the District Courts of the United States, provides: "In any action, the court may in its discretion direct the attorney for the parties to appear before it for a conference to consider (1) the simplification of the issues; * * * (6) such other matters as may aid in the disposition of the action."

69. Tex. Vernon's Stats. (1936) art. 2189 provides: "* * * such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues."

the rule of Michigan are silent on this point.⁷⁰ During the early stage of the special verdict practice in Wisconsin, it was permissible to present a general charge along with special questions. This loose practice was, however, condemned by the Wisconsin Supreme Court as a "bad practice,"⁷¹ and now the Wisconsin trial court, in the giving of instructions on special verdicts, is limited to presentations of the "general rules of law appropriate to the particular question of the special verdict."⁷² Since one of the principal purposes of the special verdict practice is to relieve the jury of the difficult task of understanding and applying the law, the submission of a general charge along with special questions or with a form verdict is truly a "bad practice."

The chief problem in the Texas practice has been to determine how far the court may go in giving "such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issue."⁷³ Obviously, the only legitimate purpose of any instruction or explanation is to aid the jury in its ultimate function of properly deciding the issues.⁷⁴ In view of the difficulty of determining when it is necessary to give instructions, the Texas courts have held that, in order to take advantage of an error in this particular, a timely objection must be preserved.⁷⁵ Similarly, a duty rests on the counsel who desires a particular instruction

70. Wis. Stats. (1937) sec. 270.27.

71. *Byington v. Merrill* (1901) 112 Wis. 211, 88 N. W. 26.

72. *Banderob v. Wisconsin Cent. Ry.* (1907) 133 Wis. 249, 113 N. W. 738.

73. See *supra*, note 69.

74. "In the nature of things, the statute has not attempted to declare what 'legal terms' shall be explained or defined further than 'shall be necessary to enable the jury to properly pass on and render a verdict on such issues.' * * * Ordinary words of simple meaning, of course, need not be defined. But those terms which in law have a distinct fixed meaning which an ordinary person would not readily understand should, upon proper request, be defined." *Robertson & Mueller v. Holden* (Tex. Com. App. 1928) 1 S. W. (2d) 570; *Tidal Western Oil Corp. v. Blair* (Tex. Civ. App. 1931) 39 S. W. (2d) 1103; *Texas Pipe Line Co. v. Bridges* (Tex. Civ. App. 1931) 39 S. W. (2d) 1109; *David v. Starnes* (Tex. Civ. App. 1933) 61 S. W. (2d) 548; *Houthens v. State* (Tex. Com. App. 1933) 63 S. W. (2d) 1011; *Texas Indemnity Ins. Co. v. Smith* (Tex. Civ. App. 1934) 73 S. W. (2d) 578.

75. *Robertson & Mueller v. Holden* (Tex. Com. App. 1928) 1 S. W. (2d) 570, (Commission of Appeals approved by Texas Supreme Court) wherein is said: "It is thus the rule that, whether the defect in the court's charge be an affirmative error or mere omission, a proper objection pointing out the defect is a sufficient predicate for reversal." *Gulf C. & S. F. Ry. v. Conely* (1924) 113 Tex. 472, 260 S. W. 561; *Osceola Oil Co. v. Stewart Drilling Co.* (Tex. Com. App. 1924) 258 S. W. 806; *Yellow Cab & Baggage Co. v. Smith* (Tex. Civ. App. 1930) 30 S. W. (2d) 697; *Kansas City, M. & O. Ry. v. Foster* (Tex. Civ. App. 1932) 54 S. W. (2d) 270; *Richards v. Westminsterland* (Tex. Civ. App. 1933) 63 S. W. (2d) 715.

to request its submission.⁷⁶ The tendency of the Texas practice has been for the court to give instructions whenever in doubt, and consequently more and more instructions have been given.⁷⁷

The necessity of giving instruction on legal standards has sometimes been avoided by incorporating the standard in the question asked. For example, instead of defining negligence, the standard may be presented to the jury thus: "Do you find from the preponderance of the evidence that John Doe, on the occasion (describing it) exercised such care and caution, if any, as an ordinary prudent person would have exercised under the same or similar circumstances?"⁷⁸ By this method the process of defining negligence is simplified, and the jury answers the interrogatory without the necessity of referring to instruction on a legal standard.

In addition to the necessary advisory explanations and definitions of legal terms which have been sanctioned in Texas, the Texas courts have frequently considered it advisable to give certain precautionary instructions, warning the jury against the commission of certain common errors and acts of misconduct.⁷⁹ In a particular case it may be advisable to admonish the jury not to consider the legal effect of its answer,⁸⁰ or not to visit the scene of the accident,⁸¹ or not to indulge in a quotient verdict,⁸² or not to discuss the case with witnesses, or not to consider the court costs or the amount of the attorney's fees.⁸³

76. See *supra*, note 75.

77. *Speer*, *op. cit. supra* note 63, sec. 51: "The safe rule is, when in doubt, define."

78. *Bailey v. Woodrum Truck Lines* (Tex. Civ. App. 1930) 36 S. W. (2d) 1090; *Western Union Tel. Co. v. Taylor* (Tex. Civ. App. 1923) 253 S. W. 549; *Booth v. Crosby* (Tex. Civ. App. 1923) 248 S. W. 417; *San Antonio, U. & G. Ry. v. Dawson* (Tex. Civ. App. 1918) 201 S. W. 247. *Speer*, *op. cit. supra* note 63, sec. 55: "Clearly when an issue submits the essentials of a cause of action or defense in terms of its legal meaning rather than terminology, the necessity for explanations and definitions is avoided."

79. *Reed v. Bates* (Tex. Civ. App. 1930) 32 S. W. (2d) 216, 218: "It has been said many times by our courts that an admonitory charge is not error, but that such charges are 'salutary in effect.'" *St. Louis, S. F. & T. Ry. v. Allen* (Tex. Civ. App. 1927) 296 S. W. 950; *Houston Belt and T. Ry. v. Davis* (Tex. Civ. App. 1929) 19 S. W. (2d) 77; *Speer*, *op. cit. supra* note 63, secs. 143 and 145.

80. *Simmonds v. St. Louis, B. & M. Ry.* (Tex. Com. App. 1930) 29 S. W. (2d) 989; *Speer*, *op. cit. supra* note 63, sec. 145.

81. *Southern Traction Co. v. Wilson* (Tex. Com. App. 1923) 254 S. W. 1104.

82. See *supra*, note 75.

83. *Northern Texas Traction Co. v. Woodall* (Tex. Civ. App. 1927) 294 S. W. 873, *rev'd on other grounds in* (Tex. Com. App. 1927) 299 S. W. 220.

In submitting a case to the jury under a general charge, it is necessary to allocate the burden of proof between the litigants.⁸⁴ Under the special verdict practice, however, such an allocation of the burden of proof is not necessary. The primary purposes of the special verdict are to emphasize facts, not law, issues, or litigants, and to remove as much as possible the effect of the personal elements of influence, bias, or prejudice. For the sake of these objectives, the charge should not place the burden of persuasion upon the plaintiff "to prove by a preponderance of the evidence the affirmative of special issues No. 1 to 18" and the burden on the "defendant to prove * * * the affirmative of special issues * * * No. 19 to 33."⁸⁵ Although this form of instruction is clearly objectionable it has been allowed with criticism. The Texas Supreme Court has insisted, however, that "the proper practice is to point out to the jury where, and not upon whom the burden of establishing a preponderance of the evidence lies."⁸⁶ Thus it has been suggested that the issue be formed by asking the question, "Do you find from the preponderance of the evidence that (following with the question to be determined), so framing the question, upon each issue, as to place the burden of proof where it properly belongs?"⁸⁷ The first two decisions under Rule 49(a) throw no light on this phase of the special issue practice.⁸⁸

VI. WAIVER OF JURY TRIAL ON OMITTED ISSUES

Probably the most outstanding contribution which has been made to the efficient and expeditious use of the special verdict is found in Rule 49(a), which provides that if in submitting the issues to the jury

the court omits any issue of fact raised by the pleadings or

84. See 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2485.

85. See *Reed v. Bates* (Tex. Civ. App. 1927) 296 S. W. 950.

86. *Boswell v. Pannell* (1915) 107 Tex. 433, 130 S. W. 593; *Duron v. Beaumont Iron Works* (Tex. Com. App. 1928) 9 S. W. (2d) 1104; *Reed v. Bates* (Tex. Civ. App. 1927) 296 S. W. 950, *supra*, holding: "Though this charge does not constitute reversible error, we think, where the court charges on the burden of proof in a special issue case, the suggestion made by the Austin Court of Civil Appeals in *Wootton v. Jones* (Tex. Civ. App. 1926) 286 S. W. 680, 688, should be followed: 'In charging on the burden of proof in a special issue case, we think the proper practice is to point out to the jury where, and not upon whom, the burden of establishing a preponderance of the evidence lies'."

87. *Sharp, J.*, in *Federal Surety Co. v. Smith* (Tex. Com. App. 1931) 41 S. W. (2d) 210, 214.

88. See cases cited *supra*, note 49 and *infra*, note 101.

by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment of the special verdict.

Prior to the enactment of the present rules, the federal courts, in line with the common law precedent, persistently held that, in order to support a judgment, a special verdict must contain a finding upon every material issue or fact essential to a judgment.⁸⁹ The Supreme Court went so far in *Hodges v. Easton*⁹⁰ as to hold that even when the facts omitted from the special verdict were "conceded or not disputed at the trial" the court could not "consistent with the constitutional right of trial by jury * * * presume that a jury trial on the omitted findings had been waived." The Court asserted that "every reasonable presumption should be indulged against its waiver."

The strict rule pronounced in *Hodges v. Easton*⁹¹ represented the prevailing rule throughout the United States until 1897. In that year Chief Justice Gaines of the Supreme Court of Texas, in applying the rule of *Hodges v. Easton*, asserted as follows:

We take occasion to say that we do not approve the rule. Logically it is correct; * * *. But the rules of procedure in the courts should be so framed as to secure substantial justice, and any oversight of the court or of the counsel, which, within certain limitations, is not calculated to operate to the prejudice of the parties and has not so operated, should be disregarded. * * * Under our system of procedure in many, if not in most cases, numerous issues arise, and in such the facts can be best determined by a jury upon a

89. In *United States Fidelity & Guaranty Co. v. Commercial Nat'l Bank* (C. C. A. 5, 1932) 55 F. (2d) 564, 567, Mr. Justice Hutcheson asserted: "In the absence of an applicable statute such as Texas has, specifically authorizing such practice, a judgment may not in a case tried without waiver to a jury be entered in part upon a special verdict which is not complete, and in part upon findings of the court."

See also: *Hodges v. Easton* (1883) 106 U. S. 408. In *Graham v. Bayne* (U. S. 1855) 18 How. 60, 63, Mr. Justice Grier asserted: "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*." *Ward v. Cochran* (1893) 150 U. S. 597; *Mounger v. Wells* (C. C. A. 5, 1929) 30 F. (2d) 521; *United States Fidelity & G. Co. v. Commercial Nat'l Bank* (C. C. A. 5, 1932) 55 F. (2d) 564.

90. *Hodges v. Easton* (1883) 106 U. S. 408.

91. *Ibid.*

submission of special issues; but our reports show that under the existing rule it is a dangerous practice. The fact about which there is no controversy is apt to be omitted in the submission, and verdict, otherwise correct must be set aside. Probably the Legislature could pass no measure better calculated to promote a prompt and proper disposition of causes than to provide that, *when a case is submitted upon special issues, the submission of all issues not requested by a party to the suit shall, upon appeal, be deemed to have been waived, and such issue shall be presumed to have been determined in such manner as to support the judgment of the court.*⁹²

In response to this worthy dictum, the Texas legislature, which was then in special session, enacted, in almost the exact form suggested by Chief Justice Gaines, the following statutory provision:

Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or Writ of Error, an issue not submitted and not requested is deemed as found by the Court in such manner as to support the judgment if there is evidence to sustain such finding * * *.⁹³

Ten years later the substance of the Texas statute was enacted in Wisconsin in a form superior to that of the Texas statute, in that the Wisconsin statute expressly stipulates that the omitted fact may be a fact "essential to sustain the judgment."⁹⁴ In 1931, the substance of the Wisconsin statute was in turn incorporated in the Court Rules of Michigan.⁹⁵

It should here be observed that judicial interpretation of the Texas statute has not served to preserve for Texas the efficient procedural device conceived by Chief Justice Gaines. In *Moore v. Pierson*,⁹⁶ the first authoritative interpretation of the Texas statute, the Texas Supreme Court held that an omitted issue as to the existence of negligence, an independent ground of defense in that case, might be presumed to have been found by the court

92. *Silliman v. Gano* (1897) 90 Tex. 637, 39 S. W. 559, reh'g denied (1897) 40 S. W. 391 (Italics supplied).

93. Tex. Laws of 1897, Special Sess., c. 7, now incorporated in Tex. Vernon's Stats. (1936) art. 2190.

94. Wis. Laws of 1907, sec. 2858m, now incorporated in Wis. Stats. (1937) sec. 270.28.

95. Mich. Court Rules 1931, 1933, Rule 7, sec. 7.

96. (1906) 100 Tex. 113, 94 S. W. 1132.

as a finding of no negligence—a finding in such a manner as to sustain the judgment. In the subsequent decision of *Ormsby v. Ratcliffe*,⁹⁷ the Texas Supreme Court narrowed its concept of the issue which might be presumed as having been found by the court in support of the judgment, to an issue which in connection with other issues might be considered as supporting a cause of action or a ground of defense. The court thus repudiated the previous broad interpretation in *Moore v. Pierson*⁹⁸ that a “separate and independent finding of facts establishing a cause of action or a defense” might be presumed. Later decisions have still further narrowed the operative effect of the Texas statute until it appears now that the Texas courts will not presume a finding on an ultimate fact issue even though the particular issue is auxiliary to other issues actually submitted and found.⁹⁹ Thus, through a series of judicial somersaults the Texas practice has been carried back to the condition lamented by Chief Justice Gaines in *Silliman v. Gano* in 1897. As the result of efforts to eliminate the confusion which has thus developed in the Texas practice and as a result of the impetus created by the new federal rules, Texas should have established an effective rule by September, 1941.¹⁰⁰

Hinshaw v. New England Mutual Life Insurance Co.,¹⁰¹ the

97. (1928) 117 Tex. 242, 1 S. W. (2d) 1084.

98. (1906) 100 Tex. 113, 94 S. W. 1132.

99. *Dallas Hotel Co. v. Davison* (1930) 23 S. W. (2d) 708. The suit was by a guest of the defendant hotel company for negligent loss of valuables taken from the guest's room. Special issues were submitted and the jury found: (1) that certain conditions existed; (2) that such conditions and acts were the proximate cause of the loss; (3) that no contributory negligence existed; and (4) that the value of the lost articles was of a certain amount. The case was reversed because there was no special issue finding upon negligence although there was ample evidence of negligence and the trial court had thought negligence was apparent as a matter of law. The decision spoke of negligence as an independent ground of recovery although negligence had previously been classified as only a part of a cause of action. The next decision narrowing the Texas concept of what might be presumed under art. 2190 is *Federal Surety Co. v. Smith* (Tex. Com. App. 1931) 41 S. W. (2d) 210. In the next important decision, *International-Great Northern Ry. v. Casey* (1932) 46 S. W. (2d) 669, the appellate court refused to presume that the issue of proximate cause had been found by the trial court. The court emphasized its decision, the duty of the plaintiff to see that the essential elements of his cause of action were submitted, asserting that unless they were submitted they were waived.

100. By statutory authorization, H. B. No. 103, October, 1939, the Texas Supreme Court is authorized to adopt new rules of Civil Procedure on September 1, 1941.

101. (C. C. A. 8, 1939) 104 F. (2d) 45. The first federal decision on Rule 49(a) was presented in *Manufacturers Casualty Ins. Co. v. Roach* (D. C. Md. 1939) 25 F. Supp. 852.

first federal appellate decision to review the waiver provision of Rule 49(a), construed the rule as giving the appellate court the right to presume that an issue which was not submitted or requested had been found by the court in such a manner as to sustain the judgment for the life insurance company. Had this issue been presented to the jury a different judgment might have followed. The decision, despite the brevity of its discussion, demonstrates the practical usefulness of the new rule. The facts of the case are simple. The plaintiffs, the insurance company named and another company, brought an action in the district court for a declaratory judgment against Johanna H. Hinshaw as administratrix de bonis non with the will annexed of the estate of Mary E. Voss, deceased, to determine the rights of the parties under certain annuity contracts. The defendant filed a cross action alleging wrongful and fraudulent acts in the procuring of the contracts. The cases of the two insurance companies were consolidated and submitted to the jury for a special verdict. Fifteen issues were submitted, and fourteen were found in favor of a judgment for the plaintiff. The fifteenth question and answer read: "Did W. F. Gentry tell Mary E. Voss that the premium and reserve on the annuities mentioned in evidence were based on the annuity table adopted by the insurance companies in their contract? Answer: Yes." There was evidence indicating that the premiums and reserve on the annuities were not based on the annuity table as represented by W. F. Gentry, the agent who procured the contracts of insurance for the companies, and that his statement was, therefore, false. A sixteenth question might have been propounded to determine whether or not Mary E. Voss relied upon the representation which, according to the answer to the fifteenth question, was made by Gentry, but such a question was not requested. The answer to the fifteenth question appears to have been immaterial without a sixteenth one covering the issue of reliance. Since no sixteenth issue was requested, the trial court upon the basis of the answers to the first fourteen questions entered judgment for the plaintiffs and dismissed the defendant's cross-petition.

The defendant sought reversal on appeal because, among other things, he contended that Miss Voss, the insured, was "presumed to have relied upon the representation of fact made to her by Gentry." As previously stated, none of the findings except find-

ing fifteen showed any fraudulent conduct on the part of Gentry; and if there was to be a finding on fraud, an additional finding was necessary. The circuit court of appeals, without passing on the question of whether a preliminary false statement which induces an insurance contract may legally constitute fraud, asserted that since there was "no request to submit any further questions to the jury" the defendant waived "a trial by jury of the issue so omitted."

Although the court made no specific finding on the issue of possible fraud as presented in the answer to question fifteen, it held, in accord with the presumption of Rule 49(a), that the omitted issue was "deemed to have been made by the court in accord with the judgment." The judgment was accordingly affirmed. The interpretation of the rule seems to be in line with its legal purpose.

In view of the strict interpretation of the constitutional right to a trial by jury presented in *Hodges v. Easton*¹⁰² and later in *Slocum v. New York Life Insurance Co.*,¹⁰³ the constitutionality of the present rule might be questioned were it not for the fact that the Supreme Court would scarcely promulgate an unconstitutional rule. Rule 49(a) in effect imposes a forfeit of the right to a jury trial on an issue in a case when the proponent fails to demand its submission. Such provision appears, however, to be only a reasonable limitation on the right to a jury trial, and, as such, the soundness of the rule is above question.¹⁰⁴ The further stipulation, providing that if the court fails to make a finding on an omitted issue "it shall be deemed to have made a finding in accord with the judgment on the special verdict," is a rule of procedural convenience consistent with practical justice to all parties concerned.

102. (1882) 106 U. S. 408.

103. (1913) 228 U. S. 364, restricted the courts power under the restrictions of the Seventh Amendment to grant a judgment *non obstante verdicto*; but the later decision in *Baltimore & Carolina Line, Inc. v. Redman* (1935) 295 U. S. 654, limited the effect of the *Slocum* decision, and Rule 50(a) and (b) provides for a reservation of the courts ruling on a motion for a directed verdict and permits the trial judge under the theory of a reserved ruling to enter a judgment *non obstante verdicto*.

104. *Coughran v. Bigelow* (1896) 164 U. S. 301; *Prince Line v. American Paper Exporters* (C. C. A. 2, 1932) 55 F. (2d) 1053; *Lehigh & N. E. Ry. v. Finnerty* (C. C. A. 3, 1932) 61 F. (2d) 289; *In re Baker* (C. C. A. 9, 1926) 13 F. (2d) 119; *Fenno v. Primrose* (C. C. A. 1, 1903) 119 F. 801.

VII. FORM OF THE VERDICT—ANSWER TO INTERROGATORIES

As the method by which issues of fact are presented to the jury may vary, so the form of the special verdict under Rule 49(a) may vary. The special verdict may consist of "categorical or other brief answer" to each issue, or it may consist of "written forms of the several special findings," or it may consist of written findings in the form deemed "most appropriate" by the court. The prevailing and probably the most expedient practice is to have a verdict consisting of brief answers which are responsive to brief questions propounded to the jury.

As has often been stated by both the state and federal courts, "a special verdict should not be accompanied by a general verdict."¹⁰⁵ Obviously, a verdict "must be either general or special. It cannot be both."¹⁰⁶ To require a general verdict along with a special verdict is to mar, if not to defeat, the aims and purposes of the special verdict practice. The provision for quizzing the jury along with the general charge, as set forth in Rule 49(b), is designed to satisfy the demand of those who wish to blend the two systems of verdicts.¹⁰⁷

Obviously the general practice demands that the essential findings of the jury, required by the court as the basis of its judgment, shall not conflict with each other.¹⁰⁸ If the essential controlling findings are in conflict, the jury has failed utterly to perform its function of determining the facts, and its verdict is a nullity. In order to sustain a verdict, a practical rule in Texas directs that all of the findings be given effect if possible.¹⁰⁹ If, within the spirit of this rule, the issues are found to be conflicting, the trial judge should refuse to render a judgment and should declare a mistrial. The judge may, however, before declaring a mistrial, direct the jury to reconsider its verdict. It should be observed that the mere presence of inconsistency in the findings is not necessarily fatal to the verdict, if, as a matter of law, the

105. *Francis v. Earle* (C. C. D. Conn. 1896) 77 Fed. 712; *British Queen Mining Co. v. Baker Silver Mining Co.* (1891) 139 U. S. 222.

106. *British Queen Mining Co. v. Baker Silver Mining Co.* (1891) 139 U. S. 222.

107. See *supra*, note 30.

108. *Mounger v. Wells* (C. C. A. 5, 1929) 30 F. (2d) 521; *Waller v. Liles* (1902) 96 Tex. 21, 70 S. W. 17; *Stevens v. Novice State Bank* (Tex. Com. App. 1928) 2 S. W. (2d) 419.

109. *Texas & Pacific Ry. v. Foster* (Tex. Civ. App. 1933) 58 S. W. (2d) 557; *Southwest Bitulithic Co. v. Dickey* (Tex. Civ. App. 1930) 28 S. W. (2d) 264.

findings in their entirety compel a certain judgment, and if different findings to those creating the inconsistency could not, under any contingency, justify a different result.¹¹⁰

VIII. CONCLUSION

The modified special verdict under Rule 49(a) should not be confused with its common law antecedent nor with the practice of procuring a general verdict accompanied by answers to interrogatories as provided by Rule 49(b). Rule 49(a) is a new rule based upon a very old idea. Its potential advantages in a trial by jury are many. By its use the trial judge is relieved from the difficult task of charging the jury on the law of the case, and thus the danger of errors incident to a lengthy charge is eliminated. At the same time the jury's task is simplified. Instead of attempting to understand the court's charge the jury may devote its entire efforts to the task of answering definite questions of fact. The fact that the jury is relieved from the task of resolving the controversy for one party or the other, eliminates as far as possible the ever present dangers of a verdict prompted by sympathy, bias, or prejudice. Under the necessity of answering definite questions concerning the facts in issue, the jury is constrained to answer each question in accordance with the preponderance of the evidence. The individual jurymen would be embarrassed to do otherwise. The very nature of the procedure, the method of allocating the burden of proof, the placing of emphasis on facts rather than on parties, all tend toward the development of a scientific and sensible procedure for the jury trial.

By the use of the special verdict both sides of a controversy may be more efficiently presented to the jury than under the

110. In *Perez v. Houston & T. C. Ry.* (Tex. Civ. App. 1928) 5 S. W. (2d) 782, a tort action was brought by a railway section hand. The jury in response to interrogatories found as follows: (1) that the plaintiff employee was guilty of contributory negligence, (2) that the employer was guilty of negligence which was not the cause of the injury, (3) that the injury was the result of a legal accident. The appellant in the case contended that these findings were in conflict. It is quite apparent that if the injury was the result of contributory negligence on the part of the plaintiff it could not have been caused by a legal accident. If the inconsistency between the finding of contributory negligence and the finding of a legal accident were harmonized by changing the answer to either issue, the general result must be a verdict for the defendant because the defendant's negligence was found not to be the cause of the injury. The appellate court consequently held that the inconsistency between the findings was immaterial and affirmed the judgment of the lower court.

method of presenting alternates in the general charge. Furthermore, if the trial judge misapplies the law to the special verdict he may correct his error without the necessity of a new trial. And of outstanding importance is the fact that the definite factual findings furnish a practical, concrete basis for the appellate court's evaluation of the case on review. If the only error involves a point of law or a misapplication of law to the facts by the trial judge, the necessity for a new trial should be eliminated. Obviously, the procedure incident to the use of a special verdict calls for a thorough analysis of a case and exposes the steps in the legal process to close scrutiny. The errors which may thus be exposed do not condemn the special verdict—rather they present mistakes which unless discovered might result in injustice.

In the final analysis, it is believed that the fact-finding procedure of Rule 49(a) provides the nearest approach to a scientific method of trial by jury yet evolved. Nevertheless, experience with a similar verdict in the courts of Wisconsin and of Texas shows that the rule is not perfect, that too strict an application of legal niceties can defeat the efficiency of the rule, and that its successful operation is dependent upon a close cooperation between bench and bar. A knowledge of the problems which the rule involves and a scientific technique for its application will come not by divination nor unverified assumptions but through the detailed, intensified analysis of actual experiences with its workings in different jurisdictions. In the hands of the federal judiciary the modified special verdict of Rule 49(a) should give new life to the jury system.