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TRIAL BY THE COURT WITHOUT A JURY

LEO CARLIN∗

It is elementary, of course, that, in an action at law, normally, the court tries the law and the jury tries the facts; and, in one respect, there can be no departure from this division of labor. For obvious reasons, no other functionary can assume the task of the court. But there are various procedural devices, some under the common law and some under statutes, by which the jury may be entirely eliminated as a trial factor. Its services may be dispensed with in the course of the trial, after it has developed that they are no longer needed, as by a demurrer to the evidence or a motion to direct a verdict; and even after verdict, under modern statutes, the court, substituting its own evaluation of the evidence for that of the jury, may render a judgment contrary to the verdict. In addition to these devices, which are called into operation after the trial has begun, on the theory that, due to a lack of evidence or to a great preponderance of the evidence, the facts, as a matter of law, could properly and legally be decided only one way, and therefore there is no function which a jury could legally perform, there are still other devices by which a jury may be dispensed with before the trial begins. These will constitute the theme of this discussion, with emphasis on the West Virginia law.

A brief consideration of possibilities is sufficient to suggest two circumstances under which participation of a jury in a common law trial may be dispensed with: (1) when no facts are to be tried; and (2) when some other functionary may be substituted for the jury as trier of the facts. The first circumstance will occur when the parties agree to the truth of all the essential facts involved in the controversy and only matters of law are in dispute. Such an

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agreement results in what is usually called an "agreed case."¹ The second circumstance will ordinarily occur when the court is substituted for a jury as trier of the facts.² The resulting procedure is ordinarily described as "trial by the court in lieu of a jury."

**The Agreed Case**

It sometimes happens that the facts of a controversy are not in dispute and that the parties disagree only as to the legal effect to be given to the facts. In other words, only questions of law are involved. Since the controversy in such a case requires only a decision of matters of law, a function which the court and not the jury performs, nothing is involved which comes within the purview of a jury. Consequently, if the facts can be presented to the court as undisputed facts, a jury may be dispensed with. In practice, this is accomplished by submitting to the court, in writing, an agreed statement of the facts, upon the basis of which the court, applying what it conceives to be the proper legal principles, finds for the plaintiff or for the defendant. The judicial process involved is essentially the same as that involved in the decision of a demurrer to a pleading. As will be emphasized later, the facts as agreed must be of the same nature (ultimate facts) as those alleged in a pleading. When a demurrer is interposed to a pleading, the demurrer, for purposes of argument and decision, admits the truth of the facts alleged. When a case is submitted to the court as an agreed case, the agreement supplies the admission. In either case, only questions of law are involved — whether, under the admitted facts, the plaintiff has a cause of action or the defendant has a valid defense, as the case may be.

At the common law, an agreed case can be submitted only in a pending action.³ Although, as will be noted later, the agreement may dispense with and serve as a substitute for pleadings, it cannot, at the common law, dispense with a writ or some other device employed for the purpose of instituting an action. In many jurisdictions, however, statutes have eliminated this common law

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¹ Also variously known as a "case agreed," "special case," "case agreed, to be argued in lieu of a special verdict," or "a general verdict, subject to a special case." See Sawyer v. Corse, 17 Gratt. 230, 94 Am. Dec. 445 (Va. 1867); 4 MINOR, INSTITUTES 753 (1878); 2 AM. JUR. 364 (1936). "Special case is the term generally used in the English practice.

² Under a West Virginia statute, arbitrators may by agreement of the parties be substituted for a jury. See W. VA. CODE c. 55, art. 10, § 1 (1931).

requirement and submission of the agreed statement dispenses with both writ and pleadings. In fact, it is sometimes said that a proceeding instituted by an agreed statement under these statutes is not an action at all, but a substitute for an action. On the other hand, at the common law, the agreement is not a substitute for an action, but rather is an aid to an action by way of dispensing with a jury and proof. Whether a case is one submitted under the common law or under a statute, the procedure after the agreement is submitted is somewhat the same; but the dissimilarities are sufficient to make it advisable to know the nature of the case in this respect before undertaking to evaluate it as a precedent in any particular jurisdiction; particularly, before accepting it as a common law authority.

There is no statute in West Virginia regulating the submission of an agreed case. Consequently, the common law procedure prevails and in this state a case can be submitted as agreed only after an action has been started.

The extent to which the pleadings, if any have been filed, may moderate the effect of the agreed facts depends upon whether the case has been submitted under the common law or under a statute. Statutes regulating the submission of an agreed case usually dispense with pleadings, permitting the case to rest solely on the agreed facts. Consequently, any pleadings that may have been filed before the case was agreed are superseded and eliminated by the agreement, unless the pleadings or the facts therein are integrated, by reference or otherwise, with the facts in the agreement. Likewise under the common law, an agreed case may be submitted wholly without pleadings; and, in the absence of plead-

4 See 2 Am. Jur. 364-8 (1936). The Iowa statutes may serve as examples. "Parties to a question in difference, which might be the subject of a civil action, may, without action, present an agreed statement of facts to any court having jurisdiction of the subject matter." Iowa Code § 12686 (1939). "The court shall hear and determine the case and render judgment as if an action were pending." Id. at § 12688.


6 It is often difficult to determine whether a case has been submitted under the common law or under a statute. Frequently common law and statutory cases are cited indiscriminately in encyclopedias and other texts for the same proposition.

7 Burks, Pleading & Practice 508; 1 M.J., Agreed Case 364 (1948).

ings, the court will give to each party the benefit of any facts in the agreed statement to the same extent as if they had been alleged in an appropriate pleading. However, if pleadings have been filed, they will be taken, as far as they go, as defining the scope of the controversy and will not be ignored.

"... A case may be submitted to the court on a case agreed without either declaration or plea. The defect of pleadings without a plea as well as with one, and it is sometimes done is cured by the agreement. When there is a declaration and no plea, as in the present case, the plaintiff's cause of action, as set forth in the declaration, is submitted to the court without reference to any particular form of defence, and the defendant is entitled to judgment, if the facts stated afford a defence of which he might have availed himself under any form of pleading. When the case is submitted after an issue is made up, the decision of the court is restricted to that issue."\(^{10}\)

For purposes of determining the nature of the facts which must be stated in an agreed case and the manner in which they may be treated by the court, continual reference is made in the cases and in the texts to a special verdict. The agreed case is described as the equivalent of a special verdict.\(^{11}\) Sometimes it is said to be a substitute for a special verdict.\(^{12}\) The special verdict is universally accepted as a standard by which to measure the content, potentialities and limitations of the agreed case. Consequently, before proceeding further, it will be helpful to pause for a brief consideration of the essential features of a special verdict.

The special verdict is a substitute for a general verdict. In the process of reaching a general verdict, which is simply a finding for the plaintiff or for the defendant, the jury is supposed to deal with both the law and the facts of the case. It finds the essential facts from the evidence, and then, in order to find a verdict, is supposed to apply to those facts the law stated to it by the court through the medium of instructions. Thus, although the jury does not determine the law, it is supposed to apply it, and the general verdict is properly a compound of law and facts.\(^{13}\) On the

\(^{10}\) *Id.* at 237.


\(^{13}\) "A general verdict embraces both the law and the facts. It states the result of the whole controversy. It determines the ultimate rights of the parties. It combines the decisions of the court with the opinions of the jury. True, the jury receives the law in the instructions of the court, but they apply the
other hand, when the jury finds a special verdict, it does not deal with the law of the case, nor does it make a finding for either party. It simply finds the facts which it considers established by the evidence and leaves to the court the task of applying the law to the facts. The principal virtue of the special verdict is supposed to be that it frees the jury from the task which it is most poorly equipped to perform — application of the law to the facts.

It is a cardinal principle applying to special verdicts that the court must accept the facts found by the jury as the final result and end of the fact-finding process. It must simply apply the law to the facts as found and cannot, by way of inference, derive from them any further facts as a basis for its judgment. As it is usually expressed, the court cannot draw conclusions of fact from the facts found by the jury, although, of course, it can draw conclusions of law, which it necessarily does when it finds for the plaintiff or for the defendant on the basis of the facts.

law to the facts, and, having combined the two, declare the result. So that under such a verdict they really perform two functions, that of finding the facts, and then that of applying the law to those facts." First National Bank of Sturgis v. Peck, 8 Kan. 660, 666 (1881).

"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 the 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." Wallingford v. Dunlap, 14 Pa. St. 31 (1850). See also 4 Minor, Institutes 751 (1878); Andrews, Stephens' Pleading 224 (1901).

"There did exist another species of special verdict, as where the jury returned a general verdict for the plaintiff, subject, nevertheless, to the opinion of the court, on a special case, stated by counsel, on both sides, on a matter of law: 3 Black, 378. But this proceeding has gone out of use. . . ." Wallingford v. Dunlap, 14 Pa. St. 31 (1850). See also Hall v. Ratliff, 93 Va. 327, 24 S.E. 1011 (1896).

The special verdict should not be confused with special findings by a jury in response to interrogatories submitted under statutes such as W. Va. Code c. 56, art. 6, § 5. Unfortunately, in the cases and in the texts, such findings are often called special verdicts. Interrogatories may, independently of statute, be used to assist and guide the jury, so that it may find all the facts necessary to constitute a special verdict. See Standard Sewing Machine Co. v. Royal Ins. Co., 201 Pa. 645, 51 Atl. 354 (1902). And when so found, the facts, collectively, will constitute a special verdict. But this is not a function of answers to interrogatories submitted in pursuance of the statute. A special verdict is a substitute for a general verdict. If the jury finds a special verdict, it finds no general verdict. On the other hand, a general verdict always accompanies answers to interrogatories under the statute. The answers serve as checks on the general verdict and may supersede its effect, but they do not, singly or collectively, constitute a true special verdict. See Hall v. Ratliff, 93 Va. 327, 24 S.E. 1011 (1896), for an abortive attempt to use interrogatories for the purpose of producing a special verdict.


From the principle last stated, it is easy to determine the nature of the facts which must be found in a special verdict. They are usually described as *ultimate* facts, as opposed to mere evidentiary or probative facts. The word "ultimate" (meaning "final," "farthest," etc.) would seem to be particularly apt, as indicating facts which are not antecedent or subsidiary to any other facts. If only evidentiary or probative facts were found, obviously it would be necessary to draw conclusions of fact from them in order to arrive at the ultimate, controlling facts of the case. If the jury reported only such facts to the court, it would fail in the performance of one of its functions — to evaluate the probative effect of the evidence — and shift that function to the court. Of course, to be sufficient, a special verdict should find all the facts necessary to dispose of the case.

The statement of an agreed case, like a special verdict, must contain all the facts necessary for a decision of the case. This generally means all the facts which a jury would be expected to find in order to report a special verdict. However since the agreed case is amenable to agreement, it is within the discretion of the parties to submit the case, by agreement, upon a less number of facts than would be necessary for a special verdict, with a

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17 Henderson v. Allens, 1 Hen. & Munf. 235 (Va. 1807); Blank's Adm'r v. Foushee, 4 Munf. 61 (Va. 1812); Sawyer v. Corse, 17 Gratt. 280, 94 Am. Dec. 445 (Va. 1867); 4 MINOR, INSTITUTES 752 (1878).

18 It is a finding upon all the material issues of fact raised by the pleadings. A failure to distinguish between such facts 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 issue turns, often leads to unjust criticism of a special verdict.” Baxter v. Chicago & Northwestern Ry., 104 Wis. 307, 80 N.W. 644 (1899).

19 The special verdict was defective in stating the evidence of the fact, instead of the fact itself.” Barnes v. Williams, 11 Wheat. 415 (U.S. 1826).

20 Wallingford v. Dunlap, 14 Pa. St. 31 (1850); Standard Sewing Machine Co. v. Royal Ins. Co., 201 Pa. St. 645, 51 Atl. 354 (1902); 4 MINOR, INSTITUTES 751 (1878). "... it is the very essence of such a verdict that it state all the material facts within the issues of the case, and no omission of a fact therein can be supplied by intendment.” Wabash R.R. v. Ray, 152 Ind. 892, 51 N.E. 920 (1899).
stipulation to the effect that the whole case may be decided by the court by application of legal principles to the limited facts stated.

"It is true that in a case agreed the parties need not agree upon all the facts in the case, but may state such facts as are pertinent to a particular question of law, and agree that the judgment be entered for the plaintiff or for the defendant according as the opinion may be in favor of the one or the other party upon the facts stated. When the parties thus rest their case upon the decision of a particular point of law, the enquiry of the court will be narrowed accordingly so as to exclude all other matters, and the court in such case will enter up its judgment in favor of the plaintiff or of the defendant according to its opinion on this point of law submitted."\(^2\)

However, the agreed statement must contain all the facts necessary for a decision of the case as submitted. If an essential fact has been omitted, at the common law no judgment can be rendered on the merits, but the agreed case must be set aside and further proceedings ordered.\(^2\)

Although the parties may submit a case upon a limited number of agreed facts, as noted above, it is not within their discretion to limit the effect of a judgment which may be rendered upon the facts. The case must be submitted unconditionally and they cannot stipulate for a tentative judgment that may or may not, depending upon conditions, finally dispose of the case. For instance, it is not competent for the parties to stipulate that the court's finding shall be conclusive if in favor of a designated party on a designated issue, but not conclusive if in favor of the other party.\(^2\)

\(^{20}\) Stockton v. Copeland, 23 W. Va. 696 (1884). See also Royal v. Eppes, 2 Munf. 479 (Va. 1811).


\(^{22}\) Stockton v. Copeland, 23 W. Va. 696 (1884). The action was ejectment. The defendants pleaded not guilty. They "claimed that by the record of a former action of ejectment for the same tract of land the plaintiffs were forever barred from setting up against them any claim to this tract of land. If this should be the judgment of the circuit court, there was an understanding, that it should render a judgment for the defendants, which might be brought before this Court on a writ of error, and if it was affirmed, that should terminate the controversy; but if the circuit court should be of opinion, that the plaintiffs were not barred for setting up claim to this tract by the record of the former action of ejectment, then on the circuit court expressing such opinion, it should not render a judgment for the plaintiffs for this tract of land, though on the facts but for this agreement set out therein it would be bound to do so; but that a jury should then be empaneled to try the case on the facts that might be proven before the jury, and that in such event the facts agreed were not to be used by either party against the other."
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Since the facts in an agreed case are to be treated by the court as if they were facts found by a jury in a special verdict, it results that, unless otherwise agreed or provided by statute, the court, for purposes of deciding the case, can draw no conclusions of fact from the facts stated, but only conclusions of law. As a corollary to this proposition, it necessarily results that the facts stated as agreed must be ultimate facts and not probative or evidentiary facts. If, in lieu of ultimate facts, only probative or evidentiary facts are stated, a judgment on the merits cannot be rendered and the agreed case must be set aside for further proceedings. The results of an attempt to rely upon a statement of probative or evidentiary facts are nicely exemplified in the leading Virginia case of Sawyer v. Corse, last cited.
Sawyer, the defendant, was a contractor with the United States Government for carrying mail between Alexandria and Washington. He employed Fleming to do the carrying. Fleming, on a trip between Alexandria and Washington, lost a bag containing mail and it was never recovered. In this bag was a letter deposited by Corse containing bank notes. Corse sought to hold Sawyer liable on the ground that the letter was lost through the negligence of Fleming as Sawyer’s agent. The major controversy between the parties was one of law, whether, considering the nature of the employment, Sawyer was responsible for the negligent acts of Fleming on the principle of respondeat superior. All the facts essential for submitting the case as an agreed case were agreed except the fact of Fleming’s negligence. Facts were agreed from which Fleming’s negligence could have been inferred, and it was surmised that the parties probably intended that the trial court should be at liberty to indulge in such an inference; but, since there was no agreement to that effect, no conclusion could be drawn. Consequently, since the question of Fleming’s negligence was the very gist of the fact controversy, the agreed case had to be set aside.

TRIAL BY THE COURT IN LIEU OF A JURY

The procedure in this type of trial is radically different from the procedure in an agreed case. No facts are necessarily agreed. The court is simply substituted for the jury as trier of the facts.28 The same evidence is introduced before the court, and normally in the same manner,29 as if a jury were trying the facts. In other words, probative or evidentiary facts, and not ultimate facts, are submitted to the court, and, of course, the court is entitled to draw the same conclusions from the facts that a jury would draw if it were trying the case.30

At the common law, the court, as a court, could not be substituted for the jury as trier of the facts. The parties by agreement

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28 Western Maryland Ry. v. Cross, 92 W. Va. 9, 114 S.E. 438 (1922).
29 Due to the fact that no jury, which might be confused or prejudiced, is a participant in the trial, certain formalities may be dispensed with in the introduction of evidence before the court. It is not error for the court to hear illegal testimony. Nutter v. Sydenstricker, 11 W. Va. 535 (1877). The order in which the evidence is introduced is immaterial. Wright v. Rambo, 21 Gratt. 158 (Va. 1871). It is not necessary that all the evidence be heard at a single term of court. Ewart v. New River Fuel Co., 68 W. Va. 10, 69 S.E. 300.
might permit the judge, in lieu of a jury, to hear the evidence and
decide the facts; but if so, he did not act judicially, but rather in the
role of an arbitrator. Consequently, his decision had no judicial
status and was not subject to appellate review.

"The finding of issues of fact by the court upon the evi-
dence is altogether unknown to a common-law court, and can-
not be recognized as a judicial act. Such questions are ex-
clusively within the province of the jury; and if, by agreement
of parties, the questions of fact in dispute are submitted for
decision to the judge upon the evidence, he does not exercise
judicial authority in deciding, but rather acts in the character
of an arbitrator. And this court, therefore, cannot regard
the facts so found as judicially determined in the court below,
nor examine the questions of law, as if those facts had been
considerably determined by a jury or settled by the admission
of the parties. Nor can any exception be taken to an opinion
of the court upon the admission or rejection of testimony,
or upon any other question of law which may grow out of the
evidence, unless a jury was actually impanelled, and the exception
reserved while they were still at the bar. The statute
which gives the exception in a trial at common law gives it only
in such cases. And as this court cannot regard the facts found
by the judge as having been judicially determined in the
court below, there are no facts before us upon which questions
of law may legally and judicially have arisen in the inferior
court, and no questions, therefore, open to our revision as an
appellate tribunal. Consequently, as the Circuit Court had
jurisdiction of the subject-matter and the parties, and there is
no question of law or fact open to our re-examination, its
judgment must be presumed to be right, and on that ground
only affirmed."  

In order to remove this common law limitation upon power
of the court to act as a full substitute for the jury, and to invest
the court with judicial functions in this respect, statutes have
been enacted in various states regulating trials by the court in lieu
of a jury. The primary object of these statutes is to open the way
for appellate review, a consideration which has had much to do
with dictating the terms of the statutory provisions.

In most jurisdictions, by virtue of these statutes, the aspects
of a trial before the court display a rather close (if somewhat dis-
guised) analogy to the features of a trial before a jury. Under
some of the statutes, the court may make a general finding, which

is analogous to a general verdict of a jury. In many jurisdictions, by statutes or rules of court, either the court must make, or a party may require the court to make, specific findings of facts as a basis for its judgment. The facts so found must be ultimate facts and not probative or evidentiary facts. Hence such findings are analogous and equivalent to a special verdict found by a jury.

"If the finding of the judge was an authorized proceeding, it was in the nature of a special verdict, which must find facts, and not the mere evidence of facts. It must not leave part of the facts to be presumed, but must find all that are deemed material, so that the court will have nothing to do but to declare the law."

The analogy to a jury trial is not limited to the manner of dealing with the evidence and reporting the findings of facts. In many jurisdictions, statutes or rules of court provide for specification of principles of law controlling the legal effect of the facts.


33 53 Am. Jur. 787-8 (1945); 64 C.J. 1228 (1933).

34 "Our statute provides that upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly." Bal. Code § 5029; 2 Hill's Code, § 379. This provision of the code is in form mandatory, and this court has several times held, in effect, that in actions at law tried by the court without a jury, findings of fact and conclusions of law are necessary to support the judgment." Wilson v. Aberdeen, 25 Wash. 614, 66 Pac. 95 (1901), as quoted in Slayton v. Felt, 40 Wash. 1, 3, 82 Pac. 173, 174 (1905).

35 In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Fed. R. Civ. P. 52(a). See annotations to this rule in Dobie & Ladd, CASES ON FEDERAL JURISDICTION & PROCEDURE (1940), listing states and citing statutes in which findings of facts are required and those in which the procedure is assimilated to the equity practice.

36 The Nebraska statute may serve as an example. "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law." Neb. Rev. Stats. c. 25, art. 11, § 1127 (1943).

For a similar statute, see City of Owensboro v. Weir, 95 Ky. 158, 24 S.E. 115 (1893).


and dictating the nature of the judgment to be rendered, which are analogous to instructions to a jury. In other words, a party may submit to the court, as instructions to a jury would be submitted, propositions of law, to be approved or rejected by the court, upon the basis of which the legal effect of the facts is to be determined.

"... This provision of the statute authorizes the offering of propositions of law to be passed upon by the court, so that questions of law arising in the case as to the applicability, force and effect of the evidence may be preserved and passed upon by the courts of review. They are termed propositions of law to be held or refused by the court, in contradistinction to the instructions that are to be presented and given for the guidance of juries, but so far as their substance and form is concerned they must in all material respects be the same. Any form of stating a proposition of law that would not be proper in an instruction to a jury would likewise be improper when offered to the court trying a case in the absence of a jury. Such propositions should state the law, only, and not assume a state of facts existing or attempt to find a given fact or state of facts. They should be framed upon a hypothesis which there are facts in the record tending to establish, and should ask the court that if those facts are found by the court, the law applicable to those facts is as stated in the propositions. . . ."\(^{37}\)

After introduction of the evidence and submission of the propositions of law, the court is ordinarily required, as a condition precedent to rendering judgment, to do two things: (1) state conclusions of the ultimate facts, deduced from the evidence, as indicated above; and (2) state conclusions of law, resulting from application of the legal propositions, approved as above explained, to the ultimate facts.\(^{38}\) All this procedure is intended to serve the purpose of placing before an appellate court specific findings and rulings of the trial court, on both the facts and the law, in order that the case may be reviewed on the basis of error, and not in the form of a trial \textit{de novo}, as in a chancery case. However efficacious this procedure may be for the purpose of segregating

\(^{37}\) Crerar v. Daniels, 209 Ill. 296, 300, 70 N.E. 569 (1904).

\(^{38}\) See note 34 \textit{supra}; 53 Am. Jur. 793 (1945); 64 C.J. 1227-8 (1938).
the court's rulings and setting the stage for a review of possible specific errors, it cannot be denied that it offers a fruitful field for the commission of error in the mere mechanics of its operation. Although the statutes differ in the various states, following are some of the more usual statutory requirements attempts to comply with which may lead to error.

The court may commit error in the approval or rejection of a proposition of law submitted, just as it might commit error in giving or refusing an instruction to a jury. Its conclusions of fact may be found by an appellate court to be contrary to the evidence, just as a verdict of a jury may be disapproved as not supported by the evidence, the specific findings bearing somewhat the same relation to a general finding that answers to interrogatories submitted to a jury bear to a general verdict. In most jurisdictions, conclusions of law and conclusions of fact must be segregated and failure to do so may cause reversible error. In undertaking to state a conclusion of fact, the court must be careful that the statement does not amount to a conclusion of law. It is not always easy to tell what is a conclusion of fact and what is a conclusion of law; and the problem of differentiation poses the same difficulties of diagnosis and possibilities of error that are so conspicuous in the field of pleading. Finally, although proper conclusions of fact may be stated, of course the court may err in applying legal principles to the facts and so indulge in erroneous conclusions of law, just as it may err in applying the law to the facts found by a jury in a special verdict.

Whether for better or for worse, for purposes of appellate review, most of these hazards are avoided under the simple terms of the West Virginia statute.

"The court, in an action at law, if neither party require a jury, or if the defendant has failed to appear and the plaintiff do not require a jury, shall ascertain the amount the plaintiff is entitled to recover in the action, if any, and render

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31 53 Am. Jur. 797-8 (1945); 64 C.J. 1257 (1933).
32 Brown v. Johnson, 43 Utah 1, 134 Pac. 590 (1913).
33 See Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738 (1886); Darling v. Miles, 57 Ore. 593, 112 Pac. 1084 (1911); Utah National Bank of Salt Lake City v. Nelson, 38 Utah 169, 111 Pac. 907 (1910); 64 C.J. 1246-7 (1933). For numerous illustrations, see 53 Am. Jur. 786-7 (1945).
34 64 C.J. 1254-5 (1933).
judgment accordingly. In any case, except a case of felony, in which a trial by jury would be otherwise proper, the parties or their counsel, by consent entered of record, may waive the right to have a jury, and thereupon the whole matter of law and fact shall be heard and determined, and judgment given by the court. . . .”

It will be noted that this statute makes no provision for the submission of propositions of law to the court, nor does it require, or permit a party to require, any specific findings of fact or law. The only finding is a judgment for the plaintiff or the defendant, which disposes of both law and facts. So far as there is any analogy, the disposition which the court makes of the facts may be compared to a general verdict of a jury. The trial process, however, more nearly resembles that involved in the hearing and decision of a suit in chancery, where the court deals with both the law and the facts. Likewise, the appellate procedure strongly suggests the chancery analogy. No exception to the judgment is necessary as a prerequisite to appellate review. If the case is reversed, normally the Supreme Court of Appeals renders its own judgment disposing of it without remanding it for further procedure in the trial court, as normally happens when a jury case is reversed.

CONCLUSION

In conclusion, attention may be called to a few distinctions and comparisons not emphasized in the prior discussion.

As has been heretofore noted, an agreed case may be submitted entirely without pleadings and, if pleadings have been filed before the case is agreed, it is not necessary that the pleading process shall

45 W. Va. Code c. 56, art. 6, § 11 (1931).
48 Board of Education v. Parsons, 24 W. Va. 551 (1884); State v. Miller, 26 W. Va. 106 (1885); State v. Decker, 75 W. Va. 565, 84 S.E. 376 (1915).
be pursued until an issue results. However, in a trial by the court in lieu of a jury under the statute, pleadings are essential and the issues must be defined. Since the only effect of the statute is to substitute the court for a jury as trier of the facts, the court has no more power than a jury to try the facts unless the issues have been defined by the pleadings.50

The mere circumstance that facts in the case have been agreed will not constitute the case a technical agreed case. It is ordinary practice in the trial of a case before a jury, in order to dispense with proof, for the parties to stipulate evidentiary or probative facts, from which the jury is at liberty to draw conclusions. A like stipulation may be made in a trial by the court in lieu of a jury and the court may likewise indulge in conclusions of fact. The only effect is to dispense with proof, and not to change the nature of the trial. Even the circumstance that all the facts in the case are stipulated before the court will not alone label the case as an agreed case.51 Whether, when all the facts are stipulated, it is the intention of the parties that the court shall deal with the case as an agreed case or as a case to be tried by the court in lieu of a jury under the statute, will depend upon the language used in submitting the case to the court and defining the manner in which the court may deal with the facts.52

When an agreed case is submitted to the court under the common law, it is not the practice to submit propositions of law to the court to be approved or disapproved, as in a case tried by the court in lieu of a jury,53 although of course propositions of law may be urged in briefs or in the argument as controlling the legal effect

50 Western Maryland Ry. v. Cross, 92 W. Va. 9, 114 S.E. 438 (1922).
51 Dearing’s Adm’x v. Rucker, 18 Gratt. 426 (1868); Hatfield v. Cabell County Court, 75 W. Va. 595, 84 S.E. 335 (1915); Legg v. Junior Mercantile Co., 105 W. Va. 287, 142 S.E. 259 (1928).
52 “This cannot be regarded as a case submitted to the court under the provision of the Code, c. 162, § 9, because the record states that a ‘case was agreed’ by the parties ‘to be argued in lieu of a special verdict.’” Sawyer v. Corse, 17 Gratt. 220, 248, 94 Am. Dec. 445 (1867).
53 “. . . But this was not a case agreed to be argued in lieu of a special verdict, as in Sawyer v. Corse, 17 Gratt. 220 (sic), where the court could not do otherwise than apply to the case the same rules that would have been applied to a special verdict. In this case the whole matter of law and fact was submitted to the court in pursuance of the statute. The facts stated by agreement of the parties were submitted to the court, without any restriction as to the mode in which they should be treated. It was, therefore, competent for the court to make such inferences from the facts thus submitted to it as the jury might have made from the same facts, if they had been submitted to them.” Dearing’s Adm’x v. Rucker, 18 Gratt. 426, 431 (Va. 1868).
of the facts stated; nor is the court required to state specific conclusions of law as a basis for its judgment. Of course, in an agreed case, the court is not required, nor permitted, to state findings of ultimate facts, as in a case tried by the court in lieu of a jury, because those facts will have been established as agreed when the case is submitted.
