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Special Interrogatories

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SPECIAL INTERROGATORIES.—Our Statute provides that upon the trial of any issue by a jury the trial court *may*, on motion of any party, direct the jury to render separate special verdicts and make separate findings of fact, in addition to the general verdict.[1] This action of the trial court is reviewable.[2] When any special finding or findings shall be inconsistent with the general verdict, the special findings shall prevail and the court shall enter judgment thereon.[3]

This provision of our statute has been the subject of judicial construction through a rather long line of decisions by our Supreme Court of Appeals. The first case[4] in which our court was called upon to construe this section, held that the lower court was justified in its refusal to submit to the jury certain special interrogatories because they, if submitted, would be inconclusive of the issue; that the submission of special interrogatories was within the sound discretion of the court, which discretion was reviewable, and that the questions submitted *must* be such that if their answers are contrary to the general verdict, they would control it. The next case[5] held that the refusal of the trial court to submit certain special questions was proper, because they were irrelevant and immaterial, and, if answered contrary to the general verdict, would not control it. This doctrine has been reaffirmed time and again in language varying little, if any, from that originally used.[6] Special interrogatories too general in their terms are rightly refused.[7]

Since our statute provides that a general verdict will be overthrown by inconsistent answers to special interrogatories, it is important that an attempt be made to discover when such inconsistency exists. Our court has given no categorical answer to this question. It is, no doubt, well that the court has not attempted to lay down a mathematical formula whereby all problems of inconsistency or alleged inconsistency might be solved. Certain

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1 Ch. 131, §5, BARNES W. VA. CODE, 1923.

2 *Idem.*

3 *Idem.*

4 Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493 (1888).

5 Wheeling Bridge Co. *v.* Wheeling & Belmont Bridge Co., 34 W. Va. 155, 11 S. E. 1009 (1890).

6 Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414 (1892); Richards *v.* Iron Works, 56 W. Va. 510, 49 S. E. 437 (1904); Millan *v.* Bartlett, 78 W. Va. 367, 89 S. E. 711 (1916); Glinco *v.* Wimer, 88 W. Va. 508, 107 S. E. 198 (1921); Brogan *v.* Traction Co., 76 W. Va. 698, 86 S. E. 753 (1915); Ward *v.* Salt & Coal Co., 79 W. Va. 371, 92 S. E. 92 (1917); Bentley *v.* Insurance Co., 40 W. Va. 729, 23 S. E. 584 (1895); Charlton *v.* Pancake, 98 W. Va. 363, 127 S. E. 70 (1925); Mingo County Court *v.* Coal Company, 142 S. E. 430 (W. Va. 1928).

7 Bice *v.* Electrical Co., 62 W. Va. 685, 59 S. E. 626 (1907).

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rules, principles and standards have been declared, however, that will prove useful in determining whether the special findings and the general verdict are consistent in each individual case as it arises.

When our court began to construe that phase of Section 5 dealing with the consistency of the general and special findings of the jury it laid down the broad general doctrine that whenever the answer to a special finding was inconsistent with the general verdict, the answer to the special finding prevailed and judgment should be entered accordingly.[8] The court has since materially modified and qualified its language. It no longer adheres to the broad general doctrine laid down in the Bess Case, but in order for special findings to prevail over the general verdict certain stricter requirements must be measured up to. For example the special findings must be *irreconcilably inconsistent* with the general verdict.[9] The special findings must exclude *every* reasonable conclusion that will authorize the verdict,[10] when the special findings and general verdict cannot be reconciled under any supposable facts provable under the issue,[11] when the special findings are *invincibly* opposed to the general verdict,[12] when the special findings *wholly destroy* the general verdict,[13] when the special findings *taken as a whole* are clearly inconsistent with the general verdict, provided the special findings are consistent with each other,[14] when a special finding negatives an *indispensable element making up the grounds of recovery* there is such irreconcilable inconsistency as *to warrant a new trial.*[15] When the answer to a special finding negatives an *essential element for recovery* and the court cannot find in the evidence any reasonably accurate or substantial basis for the ascertainment of the loss sustained, there is such irreconcilability between the special findings and general verdict as to warrant a new trial.[16] In these last two cases the special findings absolutely negatived grounds for recovery while the general verdicts were for the plaintiff. Yet, in these cases of unquestioned incon-

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[8] Bess *v.* C. & O. Ry. Co., 35 W. Va. 492, 14 S. E. 234 (1891).

[9] Trobie *v.* Ritter-Conley Co., 89 W. Va. 123, 108 S. E. 596 (1921); Prager *v.* Wheeling, 91 W. Va. 597, 114 S. E. 155 (1922).

[10] Box Company *v.* The Hub, 89 W. Va. 101, 108 S. E. 601 (1921); Anania *v.* N. & W. Ry. Co., 77 W. Va. 105, 87 S. E. 167 (1915).

[11] *Idem.*

[12] *Idem.*

[13] Duckworth *v.* Stalnaker, 74 W. Va. 247, 81 S. E. 989 (1914).

[14] Peninsular Company *v.* Insurance Co., 31 W. Va. 666, 14 S. E. 237 (1891).

[15] *Supra,* n. 8.

[16] Grass *v.* Development Co., 75 W. Va. 719, 84 S. E. 750 (1915).

sistency the court showed its reluctance to enter judgment on the special findings, and ordered a new trial.

A rather careful investigation has failed to disclose a single case where the court has sustained a judgment entered on the special findings or ordered one to be so entered. The Duckworth Case[17] on first impression would seem to be such a case. But a closer reading of that case discloses the fact the jury returned a general verdict of $1,500 for the plaintiff and a number of special findings aggregating $1,400. The trial court was of the opinion that one special finding of $200 was not supported by the evidence and entered judgment for $1,200 on the general verdict, *corrected as to amount by the special findings.* While the opinion in this case is somewhat confusing and contradictory, it makes it clear that the action of the lower court in overruling defendant's motion to set aside the general verdict is sustained; that the judgment entered on the general verdict is affirmed and no difficulty met with in harmonizing the special findings with the general verdict.

The reluctance of the court to allow special findings to overthrow the general verdict is further shown by the fact that the court will indulge no presumption in favor of the special findings while every presumption will be indulged in favor of the general verdict.[18] Nor will the court *strain* the language of the special findings to *override* the general verdict.[19] And further, it is the duty of the court, if possible, to harmonize the special findings with each other and with the general verdict.[20] The court may refer to the evidence to determine whether the special findings and the general verdict are consistent or not.[21] In an early case[22] Judge Holt by way of dictum had said that only the pleadings, general and special findings could be considered. This dictum has been dealt with by name in a later case[23] and expressly disavowed. In one case,[24] at least, in which the trial court had set aside the general verdict and entered judgment for defendant, notwithstanding verdict as a result of special findings, the upper court reinstated the general verdict and entered judgment thereon. A special finding sustained by the evidence, sufficient to support the general verdict, is not inconsistent therewith.[25]

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17 *Supra,* n. 13.
18 Runyan *v.* Light Co., 68 W. Va. 609, 71 S. E. 259 (1911).
19 *Idem.*
20 *Supra,* n. 13.
21 *Supra,* n. 10.
22 *Supra,* n. 14.
23 *Supra,* n. 10.
24 State *v.* Surety Co., 99 W. Va. 123, 127 S. E. 919 (1925).
25 Moorefield *v.* Lewis, 96 W. Va. 112, 123 S. E. 564 (1924).

It is not error to *refuse* to submit to the jury special questions when the general verdict will furnish a complete answer to them.[26] Nor is it error to refuse them when the issues are few and uncomplicated, and no aid will be given the jury in reaching a correct conclusion.[27] It is submitted that the language of the court is not strong enough in this regard and that it should be positive error to submit special questions, when the circumstances are such as those just enumerated. In an early case[28] dealing with the subject of special interrogatories our court warned against the giving of large numbers of them to the jury and called attention to a tendency even that early to restrain rather than expand the practice of their submission. In this connection the court said:

> "It is an abuse fraught with evil, for it tends to bewilder the jury rather than to aid them."

It is not error to refuse to submit one of two special questions when the answer to the one negatives the answer to the other.[29] Two special questions covering the same matter should not be given, but if one of the questions is so drawn as to more definitely or pointedly inquire into the matter, it should be given.[30] Special questions should not be submitted for purposes of itemizing damages assessed.[31] The statute does not apply to criminal cases.[32]

In connection with the problem as to when special questions should and should not be submitted to the jury, it is well to consider the purpose of the statute providing for their submission, as construed by our court.

> "The purpose of the statute is to ascertain and separate one or more controlling facts, to the end that the existence or non-existence of some facts upon which the issue turns may be *deliberately examined, patiently considered* and *expressly found,* so that a proper judgment may be rendered according to the truth and *the very right of the case.*"[33]

The object of the statute is that a proper judgment may be rendered *according to the very right of the case*;[34] to prevent poorly

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26 Moran *v.* Moran, 93 W. Va. 344, 116 S. E. 709 (1923).
27 Lovett *v.* Lisagor, 100 W. Va. 154, 130 S. E. 125 (1925).
28 *Supra,* n. 14.
29 Harman *v.* Power Co., 77 W. Va. 48, 86 S. E. 917 (1915).
30 Veith *v.* Coal Co., 51 W. Va. 96, 41 S. E. 187 (1902).
31 Lyons *v.* Real Estate Co., 71 W. Va. 754, 77 S. E. 525 (1913).
32 State *v.* Boggs, 87 W. Va. 738, 106 S. E. 47 (1921).
33 Griffith *v.* Coal Co., 78 W. Va. 34, 88 S. E. 595 (1916).
34 *Supra,* n. 14.

considered and ill advised general verdicts;[35] to find controlling facts, so that the very right of the case can be reached.[36]

At first the court laid down the broad general rule that special questions should be submitted at a time so as not to work surprise or be manifestly unfair, but the matter was largely in the discretion of the trial court.[37] In a case handed down a few days later Judge Brannon urged the submission of special interrogatories before argument of counsel and said that a rule requiring it would be advisable.[38] In a much later case[39] our Court has said that the statute contemplates the submission of *instructions* prior to the argument of counsel and adds that proper practice dictates a *like rule* respecting special interrogatories.

When special questions have been submitted and the jury is discharged after bringing in a general verdict only without the party submitting the questions asking the court to have them answered, he is presumed to have waived such answers.[40] It has been held, however, that even though the special questions have been submitted after the argument of counsel and the giving of instructions, the withdrawal of the questions after the jury had deliberated two hours over the protest of the party offering them, is error.[41]

Answers to special interrogatories should be direct, definite and complete.[42] Answers expressing opinions without the facts on which such opinions are based will not overthrow the general verdict.[43] Questions requiring mere speculation on the part of the jury should not be submitted;[44] nor should those assuming controverted facts.[45] It is error, however, to refuse to ask the jury how much they had included in their verdict for actual damages, or in the alternative, how much for exemplary damages.[46]

—ARLOS JACKSON HARBERT.*

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[35] *Supra*, n. 27.
[36] Wills *v.* Coal Co., 104 W. Va. 12, 20, 138 S. E. 749 (1921).
[37] *Supra*, n. 14.
[38] McKelvey *v.* C. & O. Ry. Co., 35 W. Va. 500, 14 S. E. 261 (1891).
[39] Proudfoot *v.* Transp. Co., 100 W. Va. 733, 132 S. E. 746 (1926).
[40] Carrico *v.* Ry. Co., 39 W. Va. 86, 19 S. E. 571 (1894); Griffith *v.* Coal Co., 78 W. Va. 34, 88 S. E. 595 (1916).
[41] *Supra*, n. 38.
[42] *Supra*, n. 18.
[43] *Supra*, n. 18.
[44] *Supra*, n. 18.
[45] *Supra*, n. 18.
[46] Pennington *v.* Gillespie, 66 W. Va. 643, 66 S. E. 1009 (1910).
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