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Trial by Jury in Civil Cases--A Proposed Reform

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In these hectic days we hear much of reform. On every side lawyers especially are beset by zealous individuals or organizations proclaiming that their particular innovation in the legal or social scheme will remedy the most conspicuous evil of society. In the turmoil surrounding these multitudinous contentions discrimination is necessary, for we cannot change the face of civilization in a day especially by solemnly passing ill-considered laws. Nor, indeed, has it ever been demonstrated, although not infrequently argued, that if such a result were attainable, it would be desirable. At best, we cannot do more than correct some of the most obvious evils of the existing order.

It is perhaps a work of supererogation to argue that the most outstanding reforms confronting lawyers are those involving procedural matters in the trial of civil cases. So far as the substantive law is concerned there is no widespread complaint; it is the practical application of the substantive principles in order to render justice between plaintiff and defendant that gives rise to injustices.

For example, consider the jury system particularly as applied to the trial of civil cases. Lawyers have come by a mystical heritage to regard that form of procedure with an awe and reverence far out of proportion to its usefulness. They jump with alacrity to its defense and such phrases as "the safeguard of our ancient liberties" roll from unfamiliar tongues, and Magna Charta is murmured dimly.

But the din of the reformers, both lay and professional, grows in volume, and though falling upon stubborn ears, is penetrating the sound-proof halls of the lawyers. Intelligent men, wearied of the delay, expense and seeming imbecility of the accepted form of jury trial, are demanding of lawyers that certain evils in the system be eliminated. The problems are not new, but they are nevertheless problems, and as such they have been the subject of comment by lead-
ing members of the bar the nation over. In our own state, Mr. Kemble White, as recently as October, 1927, in an address before the West Virginia Bar Association,¹ said:

“As yet this association has not formulated any policy respecting two important agencies in the administration of justice, namely, the common law jury and the office of Justice of the Peace. * * * * It is beyond our thought that the jury system should be abolished, but it is certainly to be desired that as an agency to enforce property rights it should be so constituted that justice may be administered promptly, effectively and without prohibitive expense.”

What are the charges against the present system of trial by jury? They are numerous, but the ones here under discussion may be summarized generally as (1) the risk of error in giving general instructions to the jury; (2) as a result of (1), the frequent reversal of cases by the Supreme Court, with the resultant delay and expense of one or two new trials; (3) the inscrutability of the general verdict for the reason that no one can say how the jury reached its conclusions; (4) as a result of (3) the determination of the rights of parties on substantially a compromise basis with little regard to the weight of evidence.

Of these evils, which must be admitted by an impartial observer, two factors appear as the underlying causes, namely, general instructions and the general verdict. Some patient analyst has shown, by an examination of cases decided by appellate courts, that the most prolific cause of reversal of cases is that of erroneous instruction to the jury. Lawyers know that in the majority of instances the “errors” are of so technical a nature as to be hardly understandable. A word omitted here, a phrase inserted there, and the case goes back for the tedious trial all over again. Perhaps the jury did not hear, much less understand, the instructions, yet the Supreme Court takes the view that “prejudice” has been inflicted upon the complaining party. Or, if the jury actually were listening and if (however preposterous) they understood, in all probability they decided which party “ought to win” and if damages were involved, each juror set out his own estimate and the sum total was divided by twelve. Of course every lawyer knows that

quotient verdicts are improper, if agreed upon beforehand, but who besides the jurors can reveal the facts, and to this end their lips are sealed. In discussing general instructions to the jury, Professor Edson R. Sunderland, a recognized authority upon the law of procedure, and whose casebook on Common Law Pleading is now in use in the College of Law of West Virginia University, has said that:

"** * * * * while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour. Indeed, can anything be more fatuous than the expectation that the law which the judge so carefully, learnedly and laboriously expounds to the laymen in the jury box will become operative in their minds in its true form? * * * * The instructions upon the law given by the court to the jury are an effort to give, in the space of a few minutes, a legal education to twelve laymen upon the branch of law involved in the case. Law cannot be taught in any such way. As to this element, accordingly, the general verdict is almost necessarily a failure."

Plainly, such pronouncements are not academic theorizing for every lawyer who has seen justice fail because of a technical error in an instruction must recognize that Professor Sunderland is dealing with deadly fact. He has likewise said of the general verdict that "the peculiarity of the general verdict is the merger into a single indivisible residuum of all matters, however numerous, whether of law or fact."

Of course if a system of trial whereby uncomprehended rules of law and unknowable mental processes of twelve men, compounded together into a verdict incapable of synthesis, is the highest type of justice to which judicial procedure can attain, no more need be said. But intelligent laymen and lawyers are crying out that such methods and results are not justifiable and that better procedure can be evolved. Lawyers, as a class, are prone to believe in the fundamental perfection of whatever procedure they are called upon to administer, but the average citizen may inquire in this wise:

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3 Ibid., pp. 258-259.
If erroneous instructions to the jury are the most frequent cause of error, injustice, and prolonged litigation, why not abolish such instructions altogether?

If jurymen reach their verdicts haphazardly, or in such a way that no one, even the parties concerned, can tell how they were arrived at, why not abolish general verdicts altogether?

Now, it is submitted that the average citizen has the right to ask such questions, since he is the party most affected by the existing defects in the system. And he has a right to insist upon a reasonable answer; one that will satisfy not juridical theory or legal casuistry, but common sense. The members of the legal profession must admit this position, unless they are prepared to defend the proposition that judicial procedure does not exist for the purpose of serving litigants, but that substance must wait upon form, regardless of the result. Assuming that the reasonableness of the questions which our hypothetical man in the street has asked is undisputed, we are confronted with the problems of answering them. Can general instructions and general verdicts legally be abolished? If so, what shall be substituted in lieu thereof? Will the substitute cure the existing defects? Even so, what are the possibilities of creating new and greater evils than those proposed to be eliminated? It is with some hesitation and with great deference that the writer submits his view of the answers to these troublesome matters.

(1) Can general instructions and general verdicts be legally abolished? The Constitution of West Virginia expressly preserves the right of trial by jury in civil cases where the amount in controversy is over $20.00, unless waived by the parties. Certainly the entire system could be wiped out by an amendatory stroke; but that such a result would be desirable is, in the words of Mr. White, perhaps, "beyond our thought." True, advanced thinkers are predicting the ultimate destruction of the common-law jury, and their arguments are singularly convincing. By the end of the century such a change may be accomplished. But we are here concerned with the immediate future, that is, the next sev-
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enty-five years. It is always hazardous to make predictions upon these matters, especially in such nebulous fields as the trend of thought and opinion. What must be considered here is whether by act of the legislature general instructions and general verdicts can be eliminated. As long as the essential substance of the jury system is preserved: that the jury shall hear the evidence as admitted by the Court; that they shall determine the weight of evidence and credibility of witnesses; that from the evidence they shall determine the ultimate facts in the case; and assess damages to the party entitled thereto under such facts and the law, no valid reason is perceived nor can a reasonable one be imagined why the change cannot be accomplished by legislative enactment.\(^6\) The next step in the problem is the creation of a modified form of jury trial, preserving its essentials, and yet taking away the most objectionable features. The burden of this paper will therefore be the presentation of a proposal to that end. The writer lays no claim to originality in this; nor does he offer the agreeable stimulation of newness and innovation never before attempted. The states of Texas, Wisconsin, and North Carolina now have trials by means of special interrogatories to the jury, at the option of the parties or on the court's own motion. Professor Leon Green calls it a "new development in jury trial." He has made a thorough analysis of the procedure in these three states and his conclusions are set forth in the December, 1927, issue of the American Bar Association Journal. In our own state, Mr. Thomas H. S. Curd made a similar proposal.\(^7\) The writer was impressed by the advantages of such a system, and in collaboration with Mr. Curd and with the very helpful advice of Honorable James W. McClendon, Chief Justice of the Court of Civil Appeals, Third District, Texas, has drafted the following statute. The method followed was to make an analysis of the statutes of the three states referred to, and select from each the most advantageous provisions. Most of the decisions of these states construing

\(^6\) "The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form." Scott, "Trial by Jury and the Reform of Civil Procedure," 31 HARV. L. REV. 669 (1918).

\(^7\) 33 W. VA. LAW QUAR. 298.
such statutes were likewise examined with a view to determining what portions of the statutes had been under construction and definition, so that disputed matters and ambiguities might be made clear in drafting a new form of enactment. The statute so evolved is therefore a composite of the similar statutes of Texas, Wisconsin and North Carolina, as illumined by judicial construction. It is offered to the members of the bar of West Virginia as a definite starting point in reaching the goal of a better, simpler, more useful form of trial by jury in civil cases.

IV

AN ACT PROVIDING FOR A COMPREHENSIVE SYSTEM OF JUDICIAL PROCEDURE IN THE TRIAL BY JURY OF CIVIL ACTIONS AT LAW AND ABOLISHING GENERAL INSTRUCTIONS TO JURIES AND GENERAL VERDICTS OF JURIES, AND SUBSTITUTING IN LIEU THEREOF TRIAL BY ANSWERS OF THE JURY TO SPECIAL INTERROGATORIES.

Be It Enacted by the Legislature of West Virginia:

I

PURPOSE OF THIS ACT

Sec. 1—The purpose of this act is hereby declared to be as follows: To eliminate delay and confusion in the trial by jury of civil actions at law; to decrease the probability of error arising out of general instructions to juries; to enable juries more efficiently and accurately to determine the material facts in issue between the parties in any case; to insure that juries shall be confined to the finding of facts only, and the court to the application of the law to the facts as thus found; and to decrease delay and expense caused by reversal of cases by the appellate court made necessary by erroneous general instructions to juries.

II

DEFINITIONS

Sec. 2—The words used in this act shall be given their ordinary meaning and usage, subject to the exceptions hereinafter defined.

Sec. 3—A special interrogatory is a question submitted to a jury in writing, admitting of a direct answer, and which calls upon the jury to determine some issue of fact between the parties.
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Sec. 4—A main issue of fact is a material question of fact affirmed by one party and denied by the other, arising upon the pleadings and which must be proved by the party affirming it as a necessary part of his cause of action or of his defense, unless by some presumption or principle of law the burden shifts.

III
FORM, PREPARATION AND SUBMISSION

Sec. 5—Upon the trial by jury of all civil actions at law, the attorneys for the respective parties shall, before argument to the jury, prepare and submit to the trial court special interrogatories in writing.

Sec. 6—The said special interrogatories shall embrace the main issue or issues of fact raised by the pleadings and supported by any appreciable evidence in the case.

(This "appreciable evidence" is inserted to avoid confusion. Without it, the language could be construed to require submission of an issue although there was a failure of proof to sustain it.)

Sec. 7—Each issue shall be submitted distinctly and separately in a single special interrogatory, and shall be answered by the jury separately in writing.

Sec. 8—So far as possible, such interrogatories shall not be leading in form and shall admit of a direct answer. But no case shall be reversed for the reason that an intelligent juror might be able to infer from the form of such interrogatory, the outcome of the jury's answer thereto upon the rights of the parties. (The last sentence is deemed advisable, following the holding of the court in Banderob v. Wisconsin, 113 N. W. 788.)

Sec. 9—All main issues of fact upon which the law and the evidence in any particular case raise a jury question and which are necessary to a determination of the rights of the parties, and arising upon the pleadings, and supported by the evidence, must be submitted to the jury by such interrogatories. Such

*See Texas City Transp. Co. v. Winters, 222 S. W. 640 (Tex. 1920) wherein the Court, by McClendon, J., says:*

"By the expression 'issues of fact' is not meant the various controverted specific facts which may enter into the main issues of fact, but only the independent ultimate facts which go to make up plaintiff's cause of action and defendant's ground of defense. If such ultimate issues of fact are fairly presented, the mode of presenting them by the trial court will not be reviewed, even upon timely objection, in the absence of correct special issues tendered by the objecting party, unless there is affirmative error in the issue submitted by the Court."

*See also Baxter v. Chicago etc. Ry. Co., 104 Wis. 307, 80 N. W. 644 (1899) where Court, by Marshall, J., said:*

"A failure to distinguish between such facts (material issues of fact raised by the pleadings) 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."
issues which under the law and the evidence are questions for the court need not be submitted to the jury.

Sec. 10—Failure to submit an issue shall not be deemed a ground of reversal of the judgment by the appellate court unless its submission was requested by the party complaining of such omission by tendering to the trial court an interrogatory in writing, covering the same in proper form.

(This provision is so worded that counsel cannot verbally request an interrogatory at the last moment, and then take advantage of their omission to have the case reversed.)

Sec. 11—In event that counsel for the respective parties cannot agree upon the material issues to be submitted, or upon the form of interrogatory embracing the same, the trial court shall thereupon settle the issues by preparing interrogatories covering such issues as counsel are unable to agree upon. Either party may object to the action of the court in so doing, and save an exception thereon; but the action of the court shall not constitute reversible error unless the rights of the complaining party have been clearly prejudiced.

(This provision is in accordance with what Mr. Chief Justice Stacy, of the North Carolina Supreme Court, states is the practice in that jurisdiction. Some confusion might arise here, as any "objection" might be construed as a "disagreement," with the result that the trial court would have all of the labor of preparing the interrogatories. Perhaps this section would be better omitted.)

Sec. 12—In submitting special interrogatories, the trial court may, upon request of either party, in writing, or on the court's own motion, submit in writing such explanations and definitions of legal or technical terms as shall be necessary to enable the jury to pass upon and properly render correct answers to, the issues of fact embraced in said interrogatories.9

Sec. 13—The trial court may also instruct the jury upon the burden of proof, the measure of damages, the law relating to the credibility of witnesses, and the legal effect of writings introduced in evidence. But this provision shall not authorize the trial court to deliver a general charge or instructions to the jury,

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9 Cf. Owens v. Navarro County Levee Imp. Dist., 115 Tex. 263, 280 S. W. 582 (1925). "It is only when it is necessary to enable the jury to properly pass upon and render a verdict on the issues submitted that the court is by statute required to submit explanations in regard to special issues." See also, Carter v. Haynes, 269 S. W. 216 (Tex. 1925); and Westchester Fire Ins. Co. v. Dickey, 246 S. W. 730 (Tex. 1923).
nor to comment upon the weight of the evidence.

Sec. 14—Any special interrogatory prepared by counsel for either or any of the parties, if leading in form, or if involving the determination of more than one main issue of fact, or if embraced in another interrogatory previously submitted, or if otherwise objectionable as likely to confuse or mislead the jury, shall be refused or modified by the trial court; to which either party may object and save an exception thereon. But if not objectionable, the court shall submit such interrogatories in the form prepared by counsel.

Sec. 15—In all cases, the trial court shall indorse upon each interrogatory "Refused," "Given," "Refused as Modified," or "Given as Modified," according to the action taken thereon. Any modification so made shall be distinctly noted on such interrogatory. In all cases, in addition to the foregoing indorsement, the judge of said court shall place his initials thereunder.

Sec. 16—Such given, refused, or modified interrogatories, when objected to by counsel and so indorsed as above provided, shall constitute a bill of exceptions and the action of the trial court thereon shall be reviewable upon writ of error, certiorari, or other proper mode of appellate review, or petitions therefor, by the appellate court in the same manner and to the same effect as if set forth in a special bill of exceptions. It shall be conclusively presumed that the party requesting any said interrogatory which was refused or modified, or refused or given as modified, and excepting thereto, presented the same to the trial court at the proper time, excepted to such refusal or modification, and that all the requirements of law have been observed.

Sec. 17—Special interrogatories shall be submitted to the jury in substantially the following form:

"A. B. vs. C. D.

Gentlemen of the Jury, you are instructed to return in writing your answers to the following questions, as you may believe or not believe them to be established by a preponderance of the evidence:

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Footnote:

19 In Baxter v. Chicago, etc. Ry. Co., supra, n. 8, the Court also said: "The issues of fact raised by the pleadings are to be passed upon by the jury. The legal conclusion to be drawn from such findings is to be referred to the court with an additional conclusion by the jury, express or implied, that if the court should be of the opinion, upon the whole case, as found, that plaintiff has a good cause of action, they find for the plaintiff, otherwise for the defendant." It was therefore thought advisable to incorporate this holding of the court expressly, instead of leaving the matter for interpretation or implication.
Question 1 * * * * (Answer Yes or No) * * * *” (and so on).

(Here the court may insert proper explanations and definitions authorized by Sections 12 and 13.)

(At the conclusion thereof the following shall be appended, to be signed by the foreman of the jury):

“We, the jury, upon the facts in this case as found by us in answer to the above interrogatories, if the law be for the plaintiff then we find for the plaintiff and assess his damages in the sum of $................; but if the law be for the defendant, then we find for the defendant (and assess his damages at $................., in any case involving a set-off.)”

(This proposed form of verdict is inserted chiefly to avoid error, and also in an effort to make the statute definite in detail. It is perhaps unnecessary and possibly undesirable.)

Sec. 18—Upon the return of the answers of the jury to said interrogatories the Court shall receive the same, if proper, and render judgment thereon. But if such answers are contrary to the preponderance of the evidence, the Court shall disregard the same and render judgment for the party entitled thereto as a matter of law.

(The problem is presented in Henne and Mayer v. Moultrie, 77 S. W. 607. There the court holds that the trial court “has no power to enter judgment upon facts well-pleaded and undisputably proved, unless the issue presented and proved has been found by the verdict in favor of the party for whom judgment is rendered.” But, further holds that “the Court of Civil Appeals, upon reversing judgments of the trial courts, may enter final judgment when it appears from the evidence in the record that one party, as a matter of law, is entitled to such judgment, the evidence being of such conclusive nature that the trial court, in the performance of its duty, should have directed a judgment in favor of that party.” * * * “In a proper case the judge may direct the verdict, but he cannot disregard a verdict properly returned, and give such judgment as the party is entitled to upon the undisputed evidence.”

Such a construction is due to the peculiar wording of the Texas statute. Judge McClendon is strongly in favor of giving the trial court the power to disregard a verdict and to enter judgment for the party
"entitled thereto as a matter of law.""

Sec. 19—Such special interrogatories, with the answers of the jury thereto, and the explanations of the court as hereinbefore authorized, when returned by the jury and signed by the foreman, and received by the court, shall be and constitute a part of the record of the case and shall be entered by the clerk in the law order book, and shall be reviewable upon writ of error, certiorari, or other proper mode of appellate review, or petitions for the same, without the necessity of a special bill of exceptions.

Sec. 20—The jury must agree unanimously upon its answers to each and all of the special interrogatories submitted to it. If such unanimous agreement cannot be reached no judgment shall be rendered, nor any answers received, but the trial court shall dismiss the jury and order a new trial.

Sec. 21—The provisions of this act shall not prevent either party from moving to strike out the evidence of the other party and to direct a verdict; and if both parties so move to strike out and direct, such motions shall not be a waiver of trial by the jury as to either of the parties. This act shall not prevent either party from demurring to the evidence, or from making any proper motion which heretofore might have been made but for this act. (See 294 S. W. 331).

Sec. 22—The jury, in actions founded on contract or actions on bonds conditioned for the payment of money, as provided by Chapter 131, Sections 14 and 16 of Barnes' Code of 1923, shall assess damages to the party entitled thereto, including principal and interest to the date of the jury's finding on the interrogatories.

Sec. 23—The jury shall assess damages to the party entitled thereto, as provided in Section 17, in all actions of assumpsit, debt, covenant; on motions for judgment where the pleadings are made up and trial by jury is not waived; and likewise the jury shall assess all damages in all actions of trespass or trespass on the case wherein pecuniary damages are permitted; or upon writ of inquiry; or in any case wherein the Court has directed a verdict for either

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11 See also Kistler v. Latham, 255 S. W. 983 (Tex. 1923), in which there was an issue as to whether there had been a parol modification of a written contract. The Court thought the evidence inadmissible but nevertheless submitted to the jury an interrogatory upon the question of whether there had been such modification. Trial court entered judgment non obstante veredicto, the Court of Civil Appeals held such evidence to be admissible and reversed the trial court; then the Supreme Court finally agreed with the trial court and reversed the Court of Civil Appeals. Had it not been for the submission of the issue to the jury, judgment could not have been entered, and the case would have been sent back for a new trial. This is one illustration of the utility of this form of procedure. (The writer is indebted to Judge McClendon for calling his attention to this case.)
party; or on demurrer to the evidence.

Sec. 24—In any action not requiring the assessment of pecuniary damages, the jury shall return the same form of verdict provided in Section 17, omitting however, the assessment of damages.

(This section is perhaps unnecessary, but is intended to cover actions of detinue, unlawful entry and detainer, and ejectment.)

**JUDGMENT IN SUPREME COURT OF APPEALS**

Sec. 25—Upon writ of error, certiorari, or other proper mode of appellate review, any incidental or subordinate issues of fact not submitted and not requested, in the lower court, shall be deemed a waiver of trial by the jury, pro tanto, and any such issue shall be conclusively presumed to be found by the trial court in such manner as to support the judgment, provided there is any appreciable amount of competent evidence to sustain such presumed finding on said omitted issues.

Sec. 26—The provisions of Section 25 shall not extend to main issues of fact as defined in this act, and all such main issues essential to the plaintiff's cause of action or to defendant's defense, must be submitted to the jury and answered by it, unless expressly waived.

(The last two sections are an effort to avoid the confusion arising in the case of Citizens National Bank of Brownwood v. Texas Compress Co., 294 S. W. 331. There the Court, by McClendon, C. J., said, "In a trial by jury on special issues there must be an affirmative finding on every issue necessary to support the judgment. The power of the judge to make findings where none are submitted or requested does not extend to independent grounds of recovery or defense, but only to incidental or subsidiary findings necessary to support the judgment in connection with the issues of fact submitted to and found by the jury. A party may waive an issue upon which he relies for recovery or defense by not requesting its submission. In such case the issue is treated as abandoned, and goes out of the case. There is no affirmative finding thereon, and the judge is not given the power to make such affirmative finding, merely because the opposing party, upon whom no duty in that regard rests, has not requested its submission."

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Therefore, the act is so framed that all main issues must be submitted to and answered by the jury, unless expressly waived. This is intended to compel counsel to state with exactitude the grounds of recovery or defense relied upon. For example, in an action on the case for injuries caused by the careless operation of an automobile, there may be two or three counts. One is based upon excessive speed, one on failure to give a warning signal, and one on failing to drive upon the right side of the highway. Suppose the evidence only supports one of these grounds. Counsel should not be permitted to omit the submission of the other two grounds of liability, and then attempt to take advantage of that omission by declaring that the statute makes the finding in accordance with the judgment. It is thought better to provide for an express waiver of any main issue, upon which counsel do not intend to rely.

Sec. 27—Upon writ of error, certiorari, or other mode of review, the appellate court shall enter such judgment upon the findings of the jury and the aforesaid presumed findings of the trial court upon omitted issues, if any, as the trial court should have entered, and render judgment for the party entitled thereto as a matter of law; or shall grant a new trial where the lower court should have granted the same.

Sec. 28—No new trial shall be granted or judgment reversed, unless judgment according to the truth and right of the case cannot be ascertained from a consideration of the pleadings, the findings of the jury and the findings conclusively presumed on omitted issues, if any, and the evidence in the case.

ACTS REPEALED AND MODIFIED

Sec. 29—General instructions to juries and general verdicts of juries in civil actions at law, except as herein provided for, are hereby abolished.

Sec. 30—The following acts or parts of acts are hereby repealed in so far as the same conflict with the provisions of this act:

Barnes' Code of 1923; Section 5, of Chapter 131; Chapter 131, Sections 22, 23, 24, and 25.

But this act shall not be construed to repeal the following provisions of Barnes' Code of 1923:
Chapter 131, Sections 13 and 14.
Chapter 116, Section 29
Chapter 106, Section 16.
Sec. 31—All acts or parts of acts in conflict with the provisions of this act, whether herein expressly enumerated or not, are hereby repealed.

Having now set forth a definite substitute, or at least the embryo from which one may be developed, we come to the third question raised, namely: Will the substitute cure the existing defects? In discussing this the reader should constantly bear in mind that we mean the general method of special interrogatories, not necessarily the statute hereinbefore set out. It seems perfectly obvious that if the existing defects are inherent in general instructions and general verdicts, then to ask the question is to answer it. No longer can there be reversal of cases for erroneous instructions, for there are none in such a system of procedure as special interrogatories. Likewise the principal criticism of the general verdict, viz: its obscurity, is obviated, for in the verdict by special interrogatories we have a detailed story of what the jurors thought about every material issue in the case.

But we are in danger of claiming too much virtue for the proposed change in procedure. The real objection to the special interrogatory method is not that it fails to do precisely what it was created to do. It does remedy the old evils. The most critical objections to it are raised in the fourth question: Does it create new and greater (or equally great) evils than those eliminated?

Professor Sunderland lists the objections to special interrogatories, among others, as: (1) immaterial matters may be included or material matters omitted; (2) conclusions of law instead of conclusions of fact may be found; (3) evidentiary instead of ultimate facts may be found; and (4) questions may be put to the jury in such form as to be uncertain, misleading, or prejudicial. Even in listing these objections, he admits:

"The real objection to the special verdict is that it is an honest portrayal of the truth, and the truth is too
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awkward a thing to fit the technical demands of the record.”

With all due deference to Professor Sunderland, it is submitted that the objections he has raised (and if there were others he would doubtless have raised them) are theoretical, academic, and speculative. Certain things may be done or be omitted. Quite true, and the plaintiff may omit to prove a breach of the promise, although he has proved every other essential allegation of his declaration in assumption. Yet no one contends that this is the fault of procedural system. Rather one employs another lawyer. So far as dealing with special interrogatories is concerned, there is less likelihood of mistake, error or omission for the plain reason that it is easier to ask questions concerning facts than to propound accurate statements of law. For example: P sues D for damages arising out of an automobile accident. Suppose there is no issue of contributory negligence. We ask the jury:18

“Did D drive his automobile at the time and place of the injury, in excess of the speed limit?”

“If so, was D’s act in so doing the proximate and direct cause of P’s injuries?”

Can there be anything uncertain, misleading, or prejudicial in those questions? It may be contended that the jury knows how its answers will affect the verdict and the judgment of the Court, and therefore are prejudicial. If so, it is a simple matter to insert the provision of Section 8.

As a practical matter, he is a poor lawyer who does not know what facts are essential to his client’s case, and what facts are evidentiary and supporting only. It is essential, for instance, that the jury determine whether D violated a law enacted for the protection of individuals, viz: the speed limit. It is non-essential to know whether, five minutes prior to the collision, D stopped at the corner drug store and bought a cigar. An effort has been made in the statute hereinbefore submitted, to define material issues, and to provide that all of them must be submitted to the jury, unless waived. As coordinate with this provision it is also provided that issues which are not “main issues,” which

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18 See Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S. W. 517 (1922), where the court said: “In submitting either negligence or contributory negligence, special issues should be restricted to specific acts of negligence alleged and proven.”
are not submitted and not requested, shall be deemed found by the Court in such manner as to support the judgment.

Now in discussing the whole matter of reform in jury procedure, we have regarded along with the considerations of a technical nature which must make their appeal to lawyers only, also those of a non-technical nature, in an effort to look at the question from the side of the general public whose rights and remedies are affected. Suppose we have succeeded in explaining to Mr. A (not a lawyer) the differences between general instructions and verdicts and answers to interrogatories; and how certain evils may be eliminated. Suppose that Mr. A then asks, "What is the objection to interrogatories, if they accomplish these ends?" We then say blandly, "The real objection to the special verdict is that it is an honest portrayal of the truth." The next serious question would then be whether Mr. A should be indicted for felonious assault or whether a committee should be appointed for him. In either case one's sympathies are with the beleaguered, uncomprehending citizen.

What is really meant by such criticism is that, from a professional point of view, it breaks in upon the procedural system as a highly perfected, impeccable order in which outward form is the chief consideration. That is, with the general verdict we have something complete and enigmatic within itself, embodying a final and conclusive answer which cannot be attacked, if properly rendered. Specifically, it satisfies the requirements of form admirably if, at the conclusion of a trial, the jury simply says, "We find for the plaintiff." There is an end of the matter.

There are several answers to this objection. Primarily, that it is largely psychological and deep-rooted by usage and prejudice. That it is not substantial\(^\text{14}\) is shown by the very evident success of the special interrogatories or "special verdict" in the three states which now employ the latter method. Again, we advert to the proposition that form

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\(^{14}\) In the Baxter Case, supra, n. 10, the court also said: "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. (Citing cases). 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."
should be of secondary consideration where it seriously hampers the administration of justice.

Further criticism will doubtless be forthcoming for less laudable and more subtle reasons. There will be lawyers to complain of the labor involved in preparing interrogatories. Yet it remains to be shown that it is harder to ask questions than to write law. There may be some who claim to be members of a high profession, to protest that if judicial administration is made too simple and workable, the business of the lawyers will be diminished. For the hard facts are that new trials are conducted not without compensation; and personal injury verdicts may be lessened in amount when the jury submits its computations to inspection.

But criticisms inspired either by indolence or avarice need not detain us long. The point is that in analyzing differences of opinion one should not be deceived by the elaborate rationalizations of those prompted by self-interest.

In conclusion it should perhaps be reiterated that the writer has no delusions as to the perfection of the system here proposed in detail. Doubtless changes will be necessary, granting that at some future time it may be seen fit to adopt such a modification of our procedure. Valid criticisms heretofore unconsidered may interpose insurmountable obstacles. If so, the writer hopes that he will be the first to acknowledge their validity and cogency. The most important single factor is the attitude of approach. Mr. Glenn Frank, one of the clearest and shrewdest of contemporary observers, has said:

"I am concerned only to insist that politicians, educators, and parsons, while their actions at any given moment must, in a marked degree, conform to the custom of the time, should do their thinking about the future as if they had a clean slate upon which to write. Only so will they free their minds from some ruinous if respectable traditions."

Finally, the writer desires to express his sincere appreciation of the generous aid and unselfish cooperation of Mr. Thomas H. S. Curd; Honorable W. P. Stacy, Chief Justice of

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