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# Special Interrogatories to the Jury--Their Nature and Purpose--Court's Discretion Relative to Their Submission

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## STUDENT NOTES AND RECENT CASES

SPECIAL INTERROGATORIES TO THE JURY—THEIR NATURE AND PURPOSE—COURT'S DISCRETION RELATIVE TO THEIR SUBMISSION.—The Supreme Court of Appeals of West Virginia has recently considered, on a writ of error, a case in which the plaintiff brought an action for trespass, and recovered judgment for one hundred seventy-five dollars, against the defendant company. The acts of which the plaintiff complained were the construction of a drain from the defendant's mine to the surface in such a manner that it caused the plaintiff's land to be overflowed; and the erection of power poles on his property—both acts being done without right. The appellate court, in its opinion, casually mentions that "Interrogatories answered by the jury show that $150 was assessed for damages because of the drain, and $25 for damage because of the power poles."[1] The court did not condemn, nor even comment upon the propriety of submitting, these interrogatories. Yet it is quite apparent that there is no conceivable answer that the jury might have returned to them which would negative the plaintiff's rights to recover; and it seems that the purpose of propounding these questions must have been to secure from the jury an itemization of the damages assessed. And such a purpose flies in the face of the construction which the Supreme Court has repeatedly placed upon the West Virginia statute authorizing the rendition of special verdicts or of special findings of fact, in addition to a general verdict. Apparently, in handing down its recent decision, the attention of the court was not called to its line of cases construing the statute.

It is well settled that, even in the absence of statute, a court, in the exercise of its discretion, has the power of submitting proper special interrogatories to the jury, but the practice is almost entirely statutory in its origin and development.[2] The Massachusetts trial court resorted, at an early day, to the device of special questions in instances

[1] Armstrong *v.* Pinnacle Coal & Coke Co., 101 W. Va. 15, 131 S. E. 712 (1926).
[2] 27 R. C. L. 866.

where it was surprised by the jury's verdict and was desirous of determining upon what ground or grounds it was based.[3] The practice of asking special questions appeared in New York even before that state adopted its code of civil procedure, in 1848,[4] which code authorized the continuance of the practice;[5] and since then it has spread to many other states.[6] The right of a court to question the jury specially in this regard has been denied in England.[7]

Our West Virginia statute in point which was enacted by Acts of 1872-3, as amended in 1875 and 1882, provides (in part):

> "The court may on motion of any party direct the jury, in addition to rendering a general verdict, to render separate verdicts upon any one or more of the issues, or to find in writing upon particular questions of fact to be stated in writing. The action of the court upon such motions shall be subject to review as in other cases. Where any such separate verdict or special findings shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."[8]

How has the West Virginia Court interpreted this enactment? Has it been held proper to submit special interrogatories to the jury for the purpose of an itemization of damages, to show that excessive damages have been assessed as to one item, when such fact would not appear from a general verdict, so as to scale down the amount of the recovery, or lay the basis for a motion for a new trial, without, however, eliciting an answer going to the merits of the action, and thus affecting the very right of recovery? What attitude has the West Virginia Court taken, and is it in line with the holdings of other states having similar code provisions? These are the questions here presented for consideration.

Turning first to the West Virginia decisions, one of the earliest leading cases found on the subject is *Peninsular Land Transportation & Manufacturing Company* v. *Franklin Insurance Company*,[9] which states the purpose of the statute to be

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[3] THOMPSON ON TRIALS, §2667.
[4] *Ibid.*
[5] *Ibid.* §2668.
[6] *Supra*, n. 3.
[7] *Supra*, n. 3.
[8] W. VA. CODE, c. 131, §5.
[9] 35 W. Va. 666, 14 S. E. 237 (1891).

to ascertain one or more controlling facts, so that the existence or non-existence of some fact upon which the issue turns may be expressly found and judgment rendered "according to the truth and very right of the case;" and that questions, the answers to which would be inconsistent or immaterial, should be refused, and that a finding which is not "irreconcilably antagonistic to a general verdict for the plaintiff" is immaterial. Judge Brannon, in *Bess* v. *Chesapeake & Ohio Railroad Company*,[10] explains that "Before this statute allowing special questions to the jury, the essential matters of fact involved in a trial were wrapped up in the general verdict; and it could not be told whether each and all those essential facts were in fact, in the opinion of the jury, found for the party prevailing;" and he quotes the Kansas court as saying: "It is a matter of common knowledge that a jury, influenced by a general feeling that one side ought to recover, will bring in a verdict accordingly, when at the same time it will find a certain fact to have been proved, which in law is an insuperable barrier to a recovery in accord with the general verdict." The Bess Case illustrates nicely a situation where it is proper to submit special interrogatories, the answers to which are wholly irreconcilable to the general verdict and go, not to the measure of damages, but to the very right of recovery. Here, an action was brought against the railroad company for a wilful wrong of an employé in putting a boy off a moving freight train, whereby he was injured; and a general verdict was returned for the plaintiff, accompanied by a special finding that the boy was a trespasser and not a passenger, and that the name and duties of the employé were not found; and, therefore, it not being found that the employé was acting within the scope of his authority, where the boy was a trespasser, an essential element in the defendant railroad company's liability was lacking and made the general verdict improper.

Even prior to the cases discussed *supra*, the court, in *Wheeling Bridge Company* v. *Wheeling & Belmont Bridge Company*,[11] had held it proper not to permit to be propounded a question, the answer to which, if contrary to the general ver-

[10] 35 W. Va. 492, 14 S. E. 234 (1891).
[11] 34 W. Va. 155, 11 S. E. 1009 (1890).

dict, because of immateriality, would not be conclusive of the verdict. And also, in the later case of *Lyons* v. *Fairmont Real Estate Company*,[12] the Supreme Court reiterates the proposition that the trial court may properly refuse interrogatories which are not so framed as to make an answer to one or answers to all fatal to a general verdict against the party asking for them, and entitle him to final judgment on the special finding or findings if they are favorable to him; and that it was not the intent or purpose of section 5, of chapter 131 of the Code, that the special interrogatories should seek merely an itemization of the damages assessed, on the assumption of an adverse general verdict, or the disclosure of some other inconclusive fact, so as to scale down the verdict, or lay the basis for a motion for a new trial. The trial court, in this instance, was sustained in refusing nine interrogatories, five of them being either immaterial or inconclusive, and, of the others, the court said: "The remaining four seek only an itemization of damages, in case of liability. They do not go to the question of liability at all. No combination of answers to all of them would have precluded a recovery." The statute was not intended to "permit any and all sorts of questions, nor questions bearing upon material matters involved * * * merely because of their materiality." Moreover, "it was not intended to allow these interrogatories for the purpose of finding some ground upon which to obtain a new trial for insufficiency of the evidence as to some item of the demand sued for or the like, but to enable the court to see whether it shall give final judgment for the plaintiff or the defendant." The court, in the Lyons Case, cites with approval *Wheeling Bridge Company* v. *Wheeling & Belmont Bridge Company*,[13] *Kerr* v. *Lunsford*,[14] *Bess* v. *Chesapeake & Ohio Railway Company*,[15] *and Peninsular Land Transportation Manufacturing Company* v. *Franklin Insurance Company*,[16] and quotes from the latter decision, to the effect that "the special findings, taken as a whole, must be clearly inconsistent with the general verdict, and, to be inconsistent,

[12] 71 W. Va. 754, 77 S. E. 525 (1913).
[13] *Supra*, n. 11.
[14] 31 W. Va. 659, 8 S. E. 493 (1888).
[15] *Supra*, n. 10.
[16] *Supra*, n. 9.

they must clearly exclude every conclusion that would authorize a verdict for the plaintiff."

Later, in *Harmon* v. *Appalachian Power Company*,[17] and consistently with the earlier adjudications, the court held that it was not error for the trial court to refuse to submit either of two interrogatories, an affirmative answer to one of which would necessarily be a negative answer to the other and decisive of the issue. Shortly thereafter, in *Griffith* v. *American Coal Company*,[18] the court, still adhering to the construction which it had repeatedly put upon the statute, regarded a question sought to be propounded as immaterial, unless an answer thereto, if contrary to the general verdict would control the latter and be conclusive; and the court considered it not to be error to refuse to permit particular questions, if immaterial or irrelevant, to be propounded, and sustained the lower court in its rejection of such inconclusive interrogatories. *Millan* v. *Bartlett*,[19] and *Ward* v. *Liverpool Salt & Coal Company*,[20] are decisions to the same effect, the court in each instance holding that it is proper to refuse interrogatories, which, whatever might be the jury's finding thereon, would result in immaterial or inconclusive answers.

It was pointed out, in *Runyan* v. *Kanawha Water & Light Company*,[21] that a general verdict is not affected by an interrogatory defective, in that it seeks the jury's opinion concerning some matter involved, without asking as to the facts upon which it is based; or, in other words, a question put to ascertain the merely speculative opinion of the jury as to what might or might not have been in a certain contingency, should be refused.

In *Brogan* v. *Union Traction Company*,[22] and in *Glinco* v. *Wimer*,[23] the court reaffirmed its former rulings as to the propriety of declining to propound interrogatories raising immaterial issues. And it has been held that it is the duty of the court to harmonize the special findings with each other and with the general verdict, corrected as to amount

[17] 77 W. Va. 48, 86 S. E. 917 (1915).
[18] 78 W. Va. 34, 88 S. E. 595 (1916).
[19] 78 W. Va. 367, 89 S. E. 711 (1916).
[20] 79 W. Va. 371, 92 S. E. 92 (1917).
[21] 68 W. Va. 609, 71 S. E. 259 (1911).
[22] 76 W. Va. 698, 86 S. E. 753 (1915).
[23] 88 W. Va. 508, 107 S. E. 198 (1921).

by the special answers;[24] and special findings will not overrule the general verdict, unless they are irreconcilably inconsistent with the verdict and exclude all possibility of harmonizing the special questions and the answers thereto with the general verdict.[25]

Up to this point, as it has been noted, the construction placed upon the statute has been constant and consistent —that for special interrogatories to be properly submitted to the jury, the answer thereto must be such as would go to the very right of recovery, and being "irreconcilably inconsistent" with the general verdict, would overcome and be conclusive of it. But in *The Virginian Tower Company* v. *W. T. W. Brotherton et als*,[26] the court departed from its former unvarying construction of section 5, chapter 131 of the Code. The proceeding in which the opinion was handed down was a condemnation suit to take a strip of land and eight or ten trees for a right of way. The highest value placed on the land by any of the defendants was one hundred twenty-five dollars per acre; and the trees taken were valued at ten dollars each. A special finding of the jury, on interrogatories propounded by the plaintiff company, showed that seven hundred dollars were assessed for the one and thirty-four-hundredths acres covered by the right of way, one hundred fifty dollars for the trees taken, and one hundred and fifty dollars as damages to the residue of the land not taken, in regard to which latter item the Supreme Court mentioned that "many authorities say that such elements of damages are too speculative and remote to be considered in a condemnation proceeding." There were several grounds urged on appeal, but "the principal ground relied on for reversal is [was] that the verdict and judgment are [were] excessive, considered in the light of the evidence and the special finding of the jury on interrogatories submitted to them on the application of the plaintiff." The judgment was reversed and the case remanded. Here, clearly the jury's response to the interrogatory did not go to the right of recovery, but was intended merely to show that the damages assessed in the general verdict were excessive, and thus lay the basis for a motion for a new trial;

[24] Duckworth v. Stalnaker, 74 W. Va. 247, 81 S. E. 989 (1914).
[25] Trobie v. Riter-Conley Co., 89 W. Va. 123, 108 S. E. 596 (1921).
[26] 90 W. Va. 155, 110 S. E. 546 (1922).

and that was the very thing which the court expressly stated in *Lyons* v. *Fairmont Real Estate Company*,[27] as well as impliedly in other cases, should not be permitted. The suit here was a condemnation proceeding, but it has not been suggested that that fact, of itself, should make any difference in this instance. And now in the recent case of *Armstrong* v. *Pinnacle Coal & Coke Company*,[28] the court accepts, without remonstrance and as a matter of course, the submission of interrogatories, to which no answer could possibly be given which would affect the right of recovery. But in neither The Virginian Power Company Case nor the Armstrong Case was objection made to the interrogatories; if they had been objected to, a contrary result might have been reached in these two cases. Quite conceivably the West Virginian statute is broad enough in the language in which it is phrased, to cover the submission of interrogatories such as were propounded in The Virginian Power Company and the Armstrong Cases; but, as a matter of fact, the court had previously put the more narrow construction upon the statute, and it was accepted as well established law. Whether or not the latter two cases arrive at a better result than would have been reached under the stricter rule of the older decisions is an open question, but it must be conceded that the court has changed its position in construing the object to be effected by section 5, of chapter 131. The earlier cases are correct, if it was the legislative intent that the interrogatories should go only to the *right* of recovery; but the later decisions are correct, if it was intended that the interrogatories should go to the *amount* of recovery also.

In turning one's attention to the reports of other courts to ascertain the rules applied in foreign jurisdictions to the use and effect of special interrogatories, it is well to remember that the submission of special questions is almost entirely a statutory matter, which is little used, if at all, in some states, and that where this procedural device is employed, it is subject to local statutes varying in degree. In searching through the reports, one finds that the practice of submitting special interrogatories is widespread, but is most extensively employed in the states of the middle west and

[27] *Supra*, n. 12.
[28] *Supra*, n. 1.

the southwest; and the practice seems to have reached vast proportions, especially in Ohio, Indiana, Illinois, Michigan, Kansas, Iowa, Texas, and perhaps one or two other jurisdictions. No attempt is made here to review the cases of all the states, nor all the decisions of any one state bearing on the subject of interrogatories, but merely to indicate the high points of this phase of the law in a small number of states, which may be taken as typical of the whole.

In the neighboring state of Ohio, the purpose of the statute has been adjudged to be that of eliciting from the jury such special findings as test the correctness of the general verdict and that is does not require submission to the jury of questions merely for the purpose of ascertaining the mental processes by which the jury arrived at their conclusions of fact.[29] The "particular questions of fact" upon which the jury may be directed to find specially are those the answers to which will establish ultimate and determinative facts, and not such as are only of probative character;[30] but the court should allow the submission of special questions, where the answers thereto will establish probative facts from which ultimate and controlling facts may be inferred as a matter of law.[31]

Under the Indiana statute, it is held that interrogatories which do not call for the finding of essential facts within the issues are properly rejected.[32] And in *Southern Indiana Railway Company* v. *Moore,*[33] the court refused to submit the following interrogatories to the jury: "How much do you find the value of the board of appellant's son from his death until he was twenty-one years of age, had he lived?"; and "How much do you find the value of the clothing of plaintiff's son from his death until he was twenty-one years of age, had he lived?" Here, decedent was an infant living with his mother; and the theory of the mother's suit was that the railway company had directed her son to work in an unsafe place. The court held that "in the refusal of these questions there was no error, for the reason that in actions for tort it is not proper to require the jury to item-

[29] Cleveland & E. Electric R. Co. *v.* Hawkins, 64 Oh. St. 391, 60 N. E. 558 (1901).
[30] Schweinfurth *v.* Cleveland, etc. Ry. Co., 60 Oh. St. 215, 54 N. E. 89 (1899).
[31] Gale *v.* Priddy, 66 Oh. St. 400, 64 N. E. 437 (1902).
[32] People's State Bank *v.* Ruxer, 38 Ind. App. 420, 78 N. E. 387 (1906).
[33] 34 Ind. App. 154, 72 N. E. 479 (1904).

ize the elements of damage." Again, in *Farmers' Insurance Association of Madison County* v. *Reavis*,[34] "appellees sued appellant in two paragraphs." In paragraph No. 1, the plaintiffs sought to recover on a fire insurance policy; while in paragraph No. 2, recovery was sought on the basis of an account stated. A general verdict was found for the plaintiffs, accompanied by answers to several interrogatories. The questions raised on appeal were based on the trial court's order overruling the defendant's motion for judgment in its favor on the special findings notwithstanding the general verdict, and sustaining the plaintiff's motion for judgment on the general verdict. The jury had answered an interrogatory, by saying that they found for the plaintiff on the second paragraph. The appellate court indicated that that interrogatory should not have been propounded to the jury, for the answer called for did not relate to a fact decisive of an issue of the cause, as the Indiana statute contemplated. In another Indiana case,[35] the plaintiff, an infant, sought to recover for injuries resulting from the alleged negligence of the defendant in lowering the boom of a derrick; and the defendant tendered interrogatories for the jury to answer in case they returned a general verdict for the plaintiff—*Held*, "The court properly refused to submit these questions to the jury. The information so sought to be obtained was not such a 'question of fact' on the issue of the cause as is contemplated by" the statute. Again, in an action for wrongful death brought by the administrator, based upon negligence, the defendant submitted six interrogatories to be answered, if the verdict should be for the plaintiff, showing on what paragraph or paragraphs it rested; and the trial court was sustained in refusing them—"interrogatories for this purpose are not authorized by the statute." See also in accord, *Clear Creek Stone Company* v. *Dearmin*.[36]

In an action at law for damages from fraud and misrepresentation in the sale of a mill property, the defendant tendered two special interrogatories, which were rejected. On appeal, the Iowa Supreme Court said: "These requests were refused, and the ruling is, in our judgment, correct.

[34] 163 Ind. 321, 70 N. E. 518 (1904).
[35] Consolidated Stone Co. *v.* Morgan, 160 Ind. 241, 66 N. E. 696 (1903).
[36] 160 Ind. 162, 66 N. E. 609 (1903).

Both interrogatories are compound, calling for findings on several distinct propositions, and thereby tend to confuse the jury. Neither do they call for the ultimate facts upon which plaintiff's right of recovery depends * * *. The damages claimed by plaintiff cannot be apportioned or itemized, and, if he is entitled to recover, it is for the damages resulting from defendant's misrepresentations as a whole, and not for the aggregate of distinct and independent items on account of various misrepresentations considered severally."[37] And in *Jones* v. *Ford*,[38] it was held that it was not error to refuse to submit to the jury special interrogatories where the proposed questions do not call for findings of fact which would determine any issue in the case.

In an Illinois case, the plaintiff brought an action to recover damages for the flooding of certain land consisting of six detached pieces; and the court held that special interrogatories requiring the jury to find the damage done to each piece according to the natural or artificial divisions thereof were not proper, because they required no answer inconsistent with the general verdict.[39] It has also been held in the same jurisdiction that it is not requisite that the trial court propound a special interrogatory, unless it relates to ultimate facts of such character that it would control a general verdict.[40]

A special interrogatory is improperly submitted to the jury where the answer thereto cannot control the general verdict.[41] And the United States Supreme Court, in a case arising in Oklahoma, affirmed the judgment of the state court, in holding that the trial court need not require the jury to answer a special interrogatory which inquires into a fact only incidental to the issue, and, if the special question tendered is immaterial or confusing, it should be rejected.[42]

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[37] 122 Iowa 59, 96 N. W. 983 (1903).

[38] 154 Ia. 549, 134 N. W. 569, 38 L. R. A. (N. S.) 777 (1912).

[39] Smith *v.* Sanitary Dist. of Chicago, 260 Ill. 453, 103 N. E. 254 (1913).

[40] Springfield Coal Min. Co. *v.* Gedutis, 227 Ill. 9, 81 N. E. 9 (1907).

[41] Chicago & Alton Ry. Co. *v.* Seevers, 122 Ill. App. 558 (1905); Second Nat. Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064 (1909); Moss *v.* Detroit & Mackinac Ry. Co., 182 Mich. 40, 148 N. W. 204 (1914).

[42] Drumm-Flato Commission Co. *v.* Edmission, 17 Okla. 344, 87 Pac. 311, 28 Sup. Ct. 357, 208 U. S. 534 (1908).

In the brief compass of this note, it has been possible to review only a few of the decisions of a comparatively small number of courts which have had to deal with special interrogatories; but from a brief review such as here undertaken, and bearing in mind that the problem herein discussed is statutory in nature, the conclusion that may well be reached is that the practice noted in recent decisions of the West Virginia Supreme Court of Appeals not only indicates a departure from the rule of construction applied to the statute permitting special interrogatories, previously well settled in this state, but also that perhaps it may not be strictly in accord with the adjudications of the courts of most of the other states having similar statutory provisions.

—G. D. H.

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DIVORCE—EFFECT OF GENERAL AND PENAL RESTRICTIONS ON EXTRATERRITORIAL SUBSEQUENT MARRIAGES OF DIVORCED PERSONS.—The West Virginia Code provides that neither party to a divorce suit shall again marry until six months after the date of the decree, except to each other, and that the court has the power to decree that the guilty party shall not again marry for such period after the date of the decree as the court shall deem wise, provided that it be not over five years. It is further provided that if either of the parties shall marry within the prohibited periods, except to each other, the marriage shall be void, and the party shall be criminally liable as if no divorce had been granted.[1] These drastic provisions when the restricted party does marry in defiance of the court should be especially noted. After the expiration of one year from the date of the decree the court may modify the restraint imposed on the guilty party if good reason is shown for such action.[2]

The restrictions to prevent divorced persons marrying again after a decree granted fall within two distinct classes,—one, the same time restriction is put on both parties regardless of guilt; and two, the restriction is imposed only on the guilty party. These have been handled so differently in the various jurisdictions that they are best hand-

[1] W. VA. CODE, 1923, c. 64, §14.
[2] *Supra*, n. 1.