1919

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Edson R. Sunderland
University of Michigan Law School

YALE
LAW JOURNAL

Vol. XXIX JANUARY, 1920 No. 3

VERDICTS, GENERAL AND SPECIAL

EDSON R. SUNDERLAND
Professor of Law, University of Michigan

I

In the year 1794, five years after its establishment, the Supreme Court of the United States tried its first jury case.[1] It was a contest between one Samuel Brailsford and the State of Georgia as to whether Brailsford had forfeited to the State his interest in a certain bond. The statute, in separate terms, provided for both sequestration and confiscation of the property of enemy subjects, and the question was whether the former or the latter applied to Brailsford's case. If the bond was subject only to sequestration, the State obtained no title, if subject to confiscation the bond had passed to the State.

The trial lasted four days, at the end of which time Chief Justice Jay, announcing that he expressed the unanimous opinion of the court, told the jury that the facts were all agreed to by both parties, said that the only matter left to consider was the question what was the law of the land arising from those facts, told them the court's opinion as to what the law was, and continued as follows:

"It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, how-

[1] *Georgia v. Brailsford* (1794, U. S.) 3 Dall. 1, 4, 1 L. ed. 483.

ever, we have no doubt, you will pay that respect, which is due to the opinon of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision."

The jury graciously decided to accept the unanimous opinion of the Supreme Court of the United States as to the law, and rendered a verdict accordingly.

For a century this remarkable case stood both unquestioned and unfollowed in the court which decided it, and at last, in 1894, in an elaborate opinion of some fifty pages, in the face of a still more elaborate dissenting opinion of some seventy pages concurred in by two judges, the court declared that neither on authority nor reason did the jury have any such right as Chief Justice Jay and his associates had accorded to it, and that even in criminal cases the court had the exclusive right to determine and declare the law.[2]

The arguments given in support of, and in opposition to, the doctrine laid down in the *Brailsford* case are interesting. The majority point with approval to the suggestion of Justice Curtis, sitting as judge in the First Circuit, in *United States v. Morris*[3] that the *Brailsford* case was not accurately reported because he could scarcely believe that the Chief Justice could have held so extraordinary an opinion as to the rights of a jury in civil cases. But the dissenting judges reply that such an explanation is hardly satisfactory because Mr. Dallas, the reporter, not only had the habit of submitting his reports, before sending them to the press, to an examination by the presiding judge of the court in which the case was determined, but he was himself one of the attorneys in the *Brailsford* case; and besides, the same charge, in identical language, was printed in a contemporary daily paper as the charge of the court. Furthermore, they show that several of the associate justices who sat upon the *Brailsford* case expressed similar views on other occasions, and in particular that Justice Wilson, who was perhaps the ablest member of the court, explicitly stated the same doctrine in his lectures on law at the Philadelphia College in 1790.

The most remarkable thing about this case of *Georgia v. Brailsford* is that a matter of such elementary importance in the daily administration of the law, after being announced in so dramatic a way by the Supreme Court of the United States at the very threshold of its career, could have dropped into oblivion for a hundred years only to be repudiated in a way hardly less dramatic by a sharply divided court.

The controversy here disclosed goes to the very heart of the jury system as it has been developed by the common law and is still almost

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[2] *Sparf and Hansen v. United States* (1894) 156 U. S. 51, 15 Sup. Ct. 273.
[3] (1851, C. C. 1st) 1 Curt. 23, 58.

universally administered in this country. A study of it will disclose what the writer believes to be a great weakness in our method of using the jury, and will indicate the line along which reform ought to move.

II

No maxim of the law has been more often quoted than that which asserts the jurisdiction of the jury over matters of fact and of the judges over matters of law. Coke's statement is classic:

> "The most usual triall of matters of fact is by 12 such men; for *ad quaestionem facti non respondent judices;* and matters in law the judges ought to decide and discusse; for *ad quaestionem juris non respondent juratores.*"[4]

Like most antithetical generalizations this statement is too broad. It is suggestive rather than scientific, figurative rather than literal. In neither branch will it sustain a close analysis.

The first branch of Coke's statement was considered twenty years ago by James B. Thayer in a notable article on *"Law and Fact" in Jury Trials,*[5] in which its inaccuracy was demonstrated and its real significance explained. He showed that many matters of pure fact were never put before the jury at all, being merely incidentally involved; he pointed out the inherent difficulty in drawing a line between "law" and "fact"; and he traced the tendency of the judges to take matters of fact away from the jury by the simple expedient of calling them matters of law. But the other branch of the maxim he passed over with a comparatively brief and summary treatment. It is this branch that now chiefly concerns us.

Certain preliminary propositions may be stated and proved in regard to the relation of the jury to questions of law.

There was no general common-law requirement that juries should have anything to do with matters of law. This appears clear from the fact that any legal controversy could be so conducted that no question of law affecting the merits of the case could possibly come up for final determination, until after the jury had been discharged. The power to do this rested indifferently with the parties or the jury, and either one of them, without the consent of the other, could produce this result.

On one hand, the parties were clothed with the power to divorce the jury from any contact with the law of the case by demurring to the evidence. By a demurrer to the evidence the demurring party admitted on the record all the facts which his opponent's evidence tended to prove, thus giving his opponent the same benefit he would

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[4] 1 *Coke upon Littleton* (1st Am. fr. 19th London ed. 1853) 155b.

[5] (1890) 4 HARV. L. REV. 147.

get from convincing the jury of the truth of every fact to which his evidence was relevant. So far as the facts were concerned the demurrer took nothing from the jury, for no facts were in dispute. If no facts were in dispute there was nothing for the jury to pass upon. The entire case, therefore, passed absolutely to the court, and the jury was discharged.

Chief Justice Eyre, in giving the decision of the judges in *Gibson v. Hunter*[6] in the House of Lords, described the demurrer to the evidence as

"a proceeding well known to the law, ... by which the Judges, whose province it is to answer to all questions of law, are called upon to declare, what the law is upon the fact shewn in evidence."

Ordinarily, he says, the judge states to the jury what the law is upon the facts which they may find, and they compound their verdict of the law and fact thus ascertained.

"But if the party wishes to withdraw from the Jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation upon that demurrer is, to take from the Jury and to refer to the Judge the application of the law to the fact."[7]

It had been urged by counsel that the demurrer to the evidence could be used only in cases where the evidence was documentary, but the Chief Justice pointed out with convincing logic that no distinction could be taken in this regard between written and parol evidence, for if the demurring party explicitly admitted on the record every fact which his opponent's evidence tended to prove, there would be no more uncertainty in the case of parol than in the case of written evidence, and the doctrine of demurrers to evidence "by which the application of the law to the fact on an issue is meant to be withdrawn from the jury and transferred to the judges" would be given the universal application to which it was in principle entitled.

Under the operation of the rule here exhibited, it is of course true that the party who wishes to take the law of the case entirely out of the jury's view, must at the same time refrain from raising any issue of fact for the jury to pass upon, for if the case must go to the jury on any question of fact affecting liability, this method of excluding the jury from any knowledge of, or concern with, the matters of law will not be available. Nevertheless, if the party wishes to use the demurrer to the evidence, it is always possible, even though it may be inadvisable, to put the law of the case where the jury can have no possible access to it.

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[6] (1793, H. L.) 2 Bl. H. 187, 205.
[7] *Ibid.*, 206.

On the other hand, the jury were clothed with the power to free themselves from any concern with the law of the case by rendering a special verdict. In *Dowman's Case*[8] it was declared that

"In all Pleas, as well of the Crown as in Common Pleas, *sc.* Actions real, personal and mixt, and upon all Issues joined, either between the K. and the Party, or between Party and Party, the Jury may find the Special Matter, which is pertinent, and tends only to the Issue joined, upon which, being doubtful to 'em in Law, they may pray the Opinion of the Court: And this they may do by the Com. Law, which has ordained, that Matters in Fact shall be tried by Jurors, and Matters in Law by the Judges."

And the permission to juries to find special verdicts, given by the statute of Westminster II, chapter 30, was held to be only declaratory of the common law.

If, therefore, it was within the power of the parties as against the jury, and within the power of the jury as against the parties, to eliminate from the jury all concern with matters of law, such matters cannot be said to belong to the jury as of right but only as a fortuitous incident to the choice of certain procedural methods.

The foregoing argument is supported by many corroborative historical facts.

(a) It was never the practice to allow the jury to find expressly as to matters of law, and when they overstepped the line and did so find the judges felt entirely free to ignore such findings.[9]

(b) Even the determination of questions of law incidentally through the use of the general verdict was considered by Coke to be questionable policy for the jury, for he says:

"Although the jurie if they will take upon them the knowledge of the law, may give a generall verdict, yet it is dangerous for them so to doe, for if they doe mistake the law, they runne into the danger of an attaint; therefore to find the speciall matter is the safest way where the case is doubtfull."[10]

(c) It was considered so questionable whether the jury had the right to meddle with matters of law by giving a general verdict in libel cases as to require an act of parliament in order to make it clear that in such actions the jury might find generally for one party or the other.[11]

(d) In modern times, by legislation in several American states, the common-law privilege of rendering either a general or special verdict,

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[8] (1586, C. B.) 9 Coke, 7, 12.

[9] *Townsend's Case* (1555, K. B.) 1 Pl. Com. 111, 2 Dy. 106a.

[10] 2 *Coke upon Littleton, op. cit.*, sec. 368. This is only an enlargement of the same suggestion contained in the Statute of Westminster II, ch. 30.

[11] Fox's Libel Act, 32 Geo., III, ch. 60.

as the jury might elect, has been curtailed, and the court must order the jury to render a special verdict if requested by one of the parties so to do.[12] Such statutes are constitutional and do not impair the right of trial by jury.[13]

It appears, therefore, that the jury have no vested claim to meddle in any way with questions of law. If such questions find their way into the deliberations of the jury at all it is through the use of that curious double-natured instrument known as the general verdict.

III

The peculiarity of the general verdict is the merger into a single indivisible *residuum* of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial reagents exist for either a qualitative or a quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. There are therefore three unknown elements which enter into the general verdict: (*a*) the facts; (*b*) the law; (*c*) the application of the law to the facts. And it is clear that the verdict is liable to three sources of error, corresponding to these three elements. It is also clear that if error does occur in any of these matters it cannot be discovered, for the constituents of the compound cannot be ascertained. No one but the jurors can tell what was put into it and the jurors will not be heard to say. The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom. The court protects the jury from all investigation and inquiry as fully as the temple authorities protected the priestess who spoke to the suppliant votary at the shrine. It is quite probable that the law is wise in not permitting jurors to testify as to how they compounded their verdict, for all stability would disappear if such inquiries were open. But it does not follow that there is not some better way of deciding controversies than by means of this mysterious agency. If the compound cannot be subjected to analysis perhaps it can be dispensed with.

As to the first element in the general verdict, the finding of *facts*, it is much better done by means of the special verdict. Every advantage which the jury is popularly supposed to have over the court as a trier of facts, is retained, with the very great additional advantage that the analysis and separation of the facts in the case which the

[12] Wis. St. 1898, sec. 2858; Calif. Code Civ. P. sec. 625; N. D. Code, 1905, sec. 7034; Ohio, Page & Adams Code, sec. 11462; R. I., Gen. Laws, 1909, ch. 291, sec. 6.

[13] *Udell v. Citizens' St. Ry.* (1899) 152 Ind. 507, 515, 52 N. E. 799.

court and the attorneys must necessarily effect in employing the special verdict, materially reduces the chance of error. It is easy to make mistakes in dealing at large with aggregates of facts. The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury really has done. The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial. The morale of the jury also is aided by throwing off the cloak of secrecy, for only through publicity is there developed the proper feeling of responsibility in public servants. So far, then, as the facts go, they can be much more effectively, conveniently and usefully tried by abandoning the general verdict and substituting the special verdict.

As to the second element in the general verdict, the *law,* it is a matter upon which the jury is necessarily ignorant. The jurors are taken from the body of the county, and it is safe to say that the last man who would be called or allowed to sit would be a lawyer. They are second-hand dealers in law, and must get it from the judge. They can supply nothing themselves; they are a mere conduit pipe through which the court supplies the law that goes into the general verdict. But 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? One who has never studied a science cannot understand or appreciate its intricacies, and the law is no exception to this rule. The very theory of the jury and its general verdict is thus predicated upon a premise which makes practically certain an imperfect or erroneous view of the principles of law which are to be compounded into the verdict. 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 the 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.

As to the third element in the general verdict—the *application of the law to the facts,* we find the same difficulty as in the case of the first element,—a merging of the law into the verdict in such a way that it is impossible to tell how or whether the jury applied the law. They may have applied it in a wholly wrong way, or they may have failed to apply it at all. No analysis of the verdict can be made which will throw any light on the process. Since the case can ordinarily go to the jury only if a verdict either way is legally possible, whatever

the jury does is presumed to be right, and this presumption excludes any inquiry from the jurors themselves. Cases may arise where the verdict shows on its face a failure to properly apply the law, usually as relating to the measure of damages, but in the vast majority of cases the verdict is a complete mystery, throwing a mantle of impenetrable darkness over the operations of the jury. Whether the jurors deliberately and openly threw the law into the discard, and rendered a verdict out of their own heads, or whether they applied the law correctly as instructed by the court, or whether they tried to apply it properly but failed for lack of understanding,—these are questions respecting which the verdict discloses nothing. So far, therefore, as the third element goes, the general verdict is an unknown and unknowable mystery, with the balance of probability against it.

It is this strange product of ignorance and chance which has given plausibility to the assertion, exemplified in the *Brailsford* case, that the jury has the right to pass upon questions of law. The answer to this assertion is that the jury's right in this regard can be no broader than its right to return a general verdict, since it is only as an incident to such a verdict that the right to determine the law is ever asserted to exist. But the jury has no inherent or constitutional right to return such a verdict in civil cases. Therefore it has no right to determine the law. Furthermore, there is an apparent failure to distinguish between right and power. The jury has the same power to pass upon the law in rendering a general verdict that a criminally minded person has to steal when there are no means for detecting him. But the jury is under the same duty to keep its hands off the law as given by the court that a person is under to keep his hands off other people's property even when he could steal without fear of discovery.

An argument might be advanced at this point in favor of the proposition that power and right are the same thing, for two reasons: (a) because in point of law there are no such things as moral tests of conduct, but only legal tests, and nothing is illegal for which the law supplies no remedy; hence it cannot be legally wrong for the jury to pass upon the law according to its whims, for there are no legal means to prevent it; (b) power to declare the law ought to include right, because only through such freedom of action on its part can the jury act as an ameliorating agency in hard cases against the rigors of too severe laws.[14]

The function of the jury just mentioned, which may be termed political, has often been defended in criminal cases, and there is much to be said for it there;[15] but in civil cases, which should be treated as essentially business controversies, such political meddling by the jury

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[14] 1 Holdsworth, *History of English Law* (2d ed. 1914) 167.

[15] This is learnedly argued by Justice Gray in his dissenting opinion in *Sparf and Hansen v. United States, supra.*

is as much out of place as the meddling of politicians in the public schools or the civil service.

As to the other argument, based on the want of a legal sanction to enforce the doctrines of law laid down by the court, it proves too much, for there is also a lack of means to compel the jury to base their verdict on the evidence in the case, and yet it is nowhere claimed that the jury has a legal right to disregard the proofs. A better explanation would seem to be that the lack of a sanction in both cases is due to the superior force of a rule of public policy which prohibits an inquiry into the deliberations of the jury as a means to prevent tampering with juries and the vexatious and corrupt upsetting of verdicts.[16]

We come, then, to this position, that the general verdict is not a necessary feature of litigation in civil actions at law, and that it confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations. Every one of these defects is absent from the special verdict. Why then should not the general verdict in civil cases be abolished and the special verdict take its place?

IV

The chief substantial objection which can be taken to the common use of the special verdict is that in practice it is difficult and hazardous to deal with. The risks are: (1) Immaterial matters may be included; (2) material matters may be omitted; (3) conclusions of law instead of facts may be found; (4) evidentiary instead of ultimate facts may be found; (5) questions may be put to the jury in such form as to be uncertain, misleading or prejudicial.

These are very serious risks, and a historical survey of the practice relating to special verdicts will disclose a rocky road strewn with innumerable wrecks.

As a fact, these difficulties inhere in the general as well as in the special verdict, but they are concealed from view. The jury is even more likely, in case of a general verdict, to include immaterial matters, or to omit material matters, or to draw and act upon legal conclusions, or to fail to distinguish between evidentiary and ultimate facts, or to obtain confused and misleading views of portions of the case, than it is to do these things in connection with the special verdict. But a rule of law is employed analogous to the rule which is said to govern the conduct of the ostrich when attempting to escape from enemies which pursue it. This legalistic bird puts its head in the sand

[16] *Mattox v. United States* (1892) 146 U. S. 140, 13 Sup. Ct. 50; *Phillips v. Rhode Island Co.* (1910) 32 R. I. 16, 78 Atl. 342.

and then by means of a convenient fiction suggested by the optical effect of sand on the eyes, assumes that the enemy has disappeared. Similarly, the law puts the general verdict out of sight and then, because no flaws appear in it, the conclusive presumption is indulged that no flaws exist.

The real objection to the special verdict is that it is an honest portrayal of the truth, and the truth is too awkward a thing to fit the technical demands of the record. The record must be absolutely flawless, but such a result is possible only by concealing, not by excluding mistakes. This is the great technical merit of the general verdict. It covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. In the abysmal abstraction of the general verdict concrete details are swallowed up, and the eye of the law, searching anxiously for the realization of logical perfection, is satisfied. In short, the general verdict is valued for what it does, not for what it is. It serves as the great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable.

Much of the trouble with procedure comes from the idea that it has some intrinsic merit, that it serves some purpose of its own, that the logical completeness of the processes which it exemplifies are ends in themselves worth striving for. But this is a wholly false view. It exalts form above substance. And it goes further. It makes reform almost impossible because it puts forward a test of excellence—logic—which is based on form, thus effectively forestalling any criticism founded on failure to produce results. Only by treating procedure as a concrete means to a practical end will it ever become a handmaid to justice.

So with the special verdict. It has been killed by being put into a logical straight-jacket. The general verdict can be put there because it is merely a hollow shell and a pretense. Tested only by its visible exterior it can readily be required to meet the most rigid and abstract standard. But the special verdict is devised for the express purpose of escaping the sham of false appearances. Its avowed purpose is to show the truth. Is it capable of being successfully employed as a practical instrument for getting the opinion of juries on matters of fact?

V

It is probable that no simplification of rules or liberality of construction, and no general development of professional skill, can be expected to make the preparation of special verdicts easy or safe under the system now prevailing. This system is based upon the theory that the special verdict is to be built up out of the facts shown in evidence, and that when so constructed it must on its face, taken in connection with the pleadings, constitute a technically sufficient foundation of fact for a judgment. Nothing else is to be looked to.

All controverted facts not found therein are to be deemed non-existent. This means that either omissions of material facts, or employment of conclusions of law or matters of evidence instead of ultimate facts, or the use of ambiguous and uncertain language, will destroy the special verdict as the foundation for a judgment. Special verdicts are prepared by the court or by the attorneys in the form of questions or findings. They are usually made up at the trial, with little opportunity for clear thought or careful wording, and it is only after the verdict is rendered and the jury is dismissed that the sufficiency of the verdict is subjected to any real inspection. Then for the first time can the matter be adequately considered. But it is then too late to remedy defects. If it then appears that an error has been made in preparing the verdict, the party having the burden of proof either loses entirely or is penalized by having to retry the case.

What is wanted is a method of using the *principle* of the special verdict under conditions which will make it a practical, workable tool for the ordinary lawyer in the ordinary case.

The facts which the jury should find are the ultimate facts of the case. The facts which the parties are expected to plead are the ultimate facts in the case. In other words, the facts which should be in the special verdict and in the pleadings are identically the same.[17] Now, if the allegations in the pleadings were drawn with a view to being employed without change of form as the findings of the special verdict, we might have a special verdict which would be subject to the same careful preparation, the same preliminary sifting process, and the same waivers of objections as the pleadings. While pleading itself is something of a risk, even under modern rules of liberal construction, that risk is an independent one and must be carried in any event. If no additional risk were to come from the use of the special verdict, the latter practice might fairly be considered free from risk. In such a case, the hazards which might affect the verdict would be chargeable to the pleadings and not to the special verdict.

Now it would be perfectly easy to draw the pleadings in such a form as to make them serve as the special verdict itself. At present they have the proper substance but their form is inconvenient for the use suggested. If they were required to be prepared in distinct, segregated, single, simply worded and consecutively numbered allegations, to be met by specific denials, the ultimate facts would thereby be spread upon the record in just the form for direct submission to the jury. The plaintiff would, for example, allege separate facts numbered (1) to (12), to which the defendant would interpose specific denials of allegations (5), (6) and (7) and would set up an affirmative defence in four numbered paragraphs, of which latter the plaintiff would specifically deny allegation (3). The pleadings

[17] This is elementary. See many cases cited in Clementson, *Special Verdicts* (1905) 207.

would then go to the jury with allegations (5), (6) and (7) of the complaint and allegation (3) of the answer marked as the facts upon which they should find. All defects of form, having been waived in the pleadings, would be equally waived in the special verdict, and no defects of substance could find their way into the special verdict which were not already operative to an equal degree in the pleadings. If the pleadings are sufficient to support a judgment the special verdict will equally well support it, and if they are insufficient for this purpose no verdict would save the judgment anyway.

Such a system of pleading would differ from the present system as employed in most jurisdictions only in form. It would particularly require singleness of allegation, and all grouping of facts into combinations, either in the conjunctive or the disjunctive, would be inappropriate.

Take as an example a typical modern pleading from the official forms authorized by the Michigan Supreme Court, Number 26,—a declaration for negligence in running a train over a crossing. It consists of six short paragraphs. If further broken up to meet the necessities of a special verdict it would read as follows:

The plaintiff says:

(1) That the defendant is a corporation organized under the laws of the state of ———.

(2) That on —— 19——, the plaintiff was crossing the defendant's railway on a public highway at ——.

(3) That the defendant's train then and there struck him.

(4) That the plaintiff was injured thereby.

(5) That the plaintiff was at the time in the exercise of reasonable care.

(6) That the defendant was negligent in the following respects: (a) In causing the train to run at an excessive speed; (b) in failing to cause the whistle to be sounded; (c) in failing to cause the bell to be rung.

(7) That the injury to the plaintiff was caused by the foregoing acts of negligence, namely: (a) By causing the train to run at an excessive speed; (b) by failing to cause the whistle to be sounded; (c) by failing to cause the bell to be rung.

(8) That the plaintiff was damaged to the amount of $———, as follows: right leg broken, internal injuries, loss of earnings as a ————, hospital expenses.

Let us assume that the defendant denies paragraphs (5), (6) and (7) in the above pleading.

VI

The special verdict will then consist of answers by the jury to the allegation in (5), and to each of those in (6) and (7), and to the general question of how much the plaintiff was damaged,—in all eight

questions. The questions would be transcribed for the sake of convenience, from the pleadings to a separate paper, with space for the answer to each, but they should conform in their language exactly to the issues as stated in the pleadings.

The simplicity and safety of this arrangement can be demonstrated by reviewing the chief objections which can be urged to a special verdict.

Incompleteness. Special verdicts fail in hundreds of cases because they omit some material element. Here this risk is entirely gone.

Irresponsiveness to the pleadings. Many special verdicts fail because of this error. This risk wholly disappears, since the allegations in the pleadings in effect constitute the special verdict.

Evidence, instead of ultimate facts, found. In this respect the special verdict is as strong as the pleadings. If evidence in the latter is a formal defect, it is waived if not objected to seasonably, and the waiver is equally applicable to the special verdict. If evidence in the pleadings is a substantial defect, the foundation for the judgment is gone in any event, whether the verdict were to be special or general. For the purpose of the case made by the pleadings, therefore, the rule that facts, not evidence, are to be found is fully satisfied in every case.

Conclusions of law, instead of ultimate facts, found. Here again the special verdict is necessarily as perfect as the pleadings, and it is therefore perfect for every purpose within the scope of the case presented to the court.

Uncontroverted facts omitted. This is a variety of the first objection in this enumeration, and arises from the fact that special verdicts are usually made up after the evidence is in and with special reference to the issues there raised. If made up of all controverted allegations in the pleadings this source of error will disappear.

Indefiniteness and uncertainty. This objection is a most prolific source of error in using the special verdict. But if the allegations in the pleadings, with the jury's answers, constitute the special verdict, this source of error also disappears, for these defects in the pleadings are either corrected on motion or special demurrer and hence never get into the special verdict, or they are waived by failure to seasonably object and therefore cease to have any legal effect.

Excessive number of questions. This objection, which is often made, cannot occur where the allegations in the pleadings form the findings.

Inconsistency between findings. This difficulty, which has produced great diversity of opinion as to its legal consequences, cannot exist where the findings are limited to the allegations in the pleadings.

Erroneous use of judicial discretion in refusing to submit questions. This again is an error necessarily incident to diversity in form and substance between the findings asked for and the allegations in the

pleadings. If the latter expressly fixed the form and content of the findings this objection would disappear.

All the difficulties, therefore, which have made the special verdict so hazardous to use, would substantially cease to operate, if the allegations of the pleadings, prepared with that end in view, were to be transcribed into the verdict.

If the practice here suggested could be made a compulsory substitute for the present general verdict system, it would by reflex action very wholesomely affect the art of pleading. At present pleadings are drawn with the primary purpose of furnishing a legal foundation for the expected judgement. They are more often than not vague, uncertain, complex, redundant, and verbose. And the other party seldom takes the trouble to have them corrected. If he can understand, or guess with a fair degree of confidence, what is meant, he lets the matter go. And in accord with this vague and careless system of allegations we find an almost universal use of those vague and careless varieties of traverse known as the general issue and general denial. Careless pleading produces careless analysis of cases and confusion of issues. It embarrasses judges, confounds juries and dissatisfies parties. If the use of pleadings as the immediate basis for, and formal embodiment of, a universally employed special verdict, would furnish a sufficient inducement to revive interest in pleading as an effective means for sifting cases and segregating issues, this would be an incidental benefit of no inconsiderable importance.

If all that is here being contended for should be granted, and the general verdict should give way to the special verdict as a universal means for taking the opinions of juries on matters of fact, we should not wholly escape the primary anomaly with which this paper has sought to deal, namely, the dabbling of juries in matters of law. It must be admitted that as long as the line of demarkation between law and fact is incapable of being drawn sharply, in accordance with well defined qualitative differences, there will always be a class of matters called mixed questions of law and fact with which juries will have to deal. These will necessitate instructions to the jury in matters of law. Most often they will amount to definitions of the legal terms which are employed in pleadings and for which no workable substitutes are likely to be found. Thus, in the illustration of a special verdict already given, based on pleadings drawn with the express purpose of serving as part and parcel of the verdict itself, there are terms which the court must define. "Reasonable care" and "negligence" would have to be explained to the jury. So in almost every case, some matters of law would be so inextricably mixed with the facts that the jury would have to deal with both. Instructions on the law could not be wholly eliminated. But the inherent intricacy of general instructions on the whole case is so great compared with the relatively simple instructions commonly requisite to put the jury in a position to render an intelligent special verdict, that the change from general to spe-

cial verdict would carry us a very long way toward the goal we are seeking. And it must be remembered that in procedural law we never deal with rigid and exact elements or processes, but with approximations only. All procedural rules are practical adjustments, and frequently compromises, aiming at comparative effectiveness. They have no resemblance to mathematical *formulae,* nor to the methods employed in the exact sciences. It is therefore no reflection upon the soundness of a principle of procedure that it operates only within limits. This rather demonstrates its merit as something free from the visionary claims of a Utopian panacea.