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SPECIAL VERDICTS AND INTERROGATORIES†

PAUL R. STINSON*

The proposed General Code of Civil Procedure for the state of Missouri, Plan II, raises squarely the question whether the practice of Special Verdicts and Interrogatories should be adopted for the courts of Missouri. The Advisory Committee made no recommendation on type of verdict, but in Article 9 the supreme court has proposed two alternative sections for study. Section 15 is Federal Rule 49,¹ which permits the trial court to require the jury to return a special verdict, or to submit special interrogatories to be answered along with the general verdict. Section 16, which is Missouri

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1. Federal Rule 49. SPECIAL VERDICTS AND INTERROGATORIES.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other, but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.
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Revised Statutes 1939, Sections 1120-1121, would continue present practice. Since the bar of Missouri is at the present time almost entirely unfamiliar with the type of practice proposed under Section 15, it is necessary that consideration be given to its background and its operation in other jurisdictions in which it has been used, before a rational choice can be made.

The General Verdict

The Missouri statutes provide for both general and special verdicts, but "in every issue for the recovery of money only, or specific real or personal property, the jury shall render a general verdict." Since the statutes also provide that a party is entitled to trial by jury as a matter of right on "an issue of fact in an action for the recovery of money only, or of specific real or personal property," it will be seen that the instances where the general verdict must be used are usually those where the right of trial by jury exists in civil cases. The special verdict is relegated in Missouri to those cases where the right of trial by jury does not exist but in which the court is of the opinion that a fact should be determined by a jury or in which it wishes to take the advice of a jury.

These general verdict statutes have a long history in Missouri. They have stood in this exact form for almost ninety years, with the exception

2. Section 1120. General Verdict, when rendered—In every issue for the recovery of money only, or specific real or personal property, the jury shall render a general verdict.

Section 1121. Special when.—In all other cases, if at any time during the progress of any cause, it shall, in the opinion of the court, become necessary to determine any fact in controversy by the verdict of a jury, the court may direct an issue or issues to be made.

Mo. Rev. Stat. (1939) § 1119, which defines the terms used in §§ 1120-1121, is also pertinent:

Section 1119. Verdicts, general and special.—The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court.

4. Mo. Rev. Stat. (1939) § 1099: "An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered as hereinafter provided."
5. Mo. Rev. Stat. (1939) § 1100: "Every other issue must be tried by the court, which, however, may take the opinion of a jury upon any specific question of fact involved therein for that purpose, or may refer it, as hereinafter provided."
of a brief period from 1885 to 1887, when they were temporarily supplanted by a special interrogatory statute. While Missouri has adhered steadfastly to general verdict practice, it has been subjected to a steady barrage of criticism by persons interested in the reform of judicial procedure, especially in the last twenty years.

Sunderland has characterized the general verdict as "inscrutable and as essentially mysterious as the judgment which issued from the ancient oracle of Delphi." "No one but the jurors can tell what was put in it," he says, "and the jurors will not be heard to say." He points out that while the function of the jury is properly that of finding the facts, the general verdict is composed of three elements: (a) the facts, (b) the law, and (c) the application of the law to the facts. Hence, the general verdict, he says,

"... is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial re-agents exist for either a qualitative or a quantitative analysis. The law supplies the means neither for determining what facts were found, nor what principles of law were applied, nor how the application was made."

7. Mo. Laws 1885, p. 213, repealed §§ 3629-3630 of Mo. Rev. Stat. (1879) and substituted the following:

"Section 3629—In all actions the jury shall, upon the issues made up and submitted to them by the court, return a general verdict, and the court, upon the request of either party, shall direct the jury, under proper instructions, to find a special verdict upon all or any of the issues submitted to them, which submissions shall be in writing, distinctly specifying each issue on which the jury are to find, and such special finding shall be recorded with the verdict. Whenever the special finding of fact is inconsistent with the general verdict, the former shall control the latter, and the court must give judgment accordingly.

"Section 3630—The verdict of the jury, as well as any special finding, shall be reduced to writing, and signed and returned into court by the foreman."

Although this practice was sometimes spoken of as the "special verdict" by the Missouri courts, that term is a misnomer. The statute clearly called for a general verdict, but allowed special interrogatories, and hence is more closely comparable with section (b) of the proposed rule, than with section (a).

Mo. Laws 1887, p. 229, repealed the Act of 1885 and reinstated the repealed sections in their original form.


10. Ibid.
To take a concrete case, let us suppose that Jones Construction Company has built a house for John Smith and the transaction has ended in a lawsuit. Smith files his petition, alleging that the defendant company agreed to build a house for him according to certain specifications for $3100. He says that the defendant used inferior lumber in the flooring, second-hand brick in the foundation, and failed to finish the interior. He alleges payment and asserts that he has been damaged to the amount of $1000. The defendant denies generally the allegations of the petition. At the trial defendant introduces evidence showing that the lumber used was first-grade, that Smith had agreed to the change in foundation brick, that the interior had been finished according to the custom of the trade, and that Smith had paid only $2700. The case is finally submitted by the court to the jury with several pages of instructions, correctly stating the law on all the possible hypotheses of fact. The jury returns a verdict of $100 for the plaintiff.

What does this verdict of $100 for Smith mean? Did the jury find that Smith had paid the company $2700, or $3100? Was the lumber first-grade or inferior, and if the latter, what damages? Had the parties agreed to change the specifications on foundation brick or not, and, if not, what damages? Was the interior properly finished according to the custom of the trade, and what was the custom, and what damages?

Having found the facts, did the jury understand the law? Did it comprehend the law of contracts on specifications, waivers, and alteration? Did the jury understand the effect that law gives to custom? Did it take into account where the law placed the burden of proof? And having found the facts, if it did, and having understood the law, if it did, did the jury apply the law to the facts correctly? Or was the jury confused on the facts and confounded by the instructions, so that it returned a verdict on the basis of its general feeling, or on the basis of a compromise among the varying attitudes of its members?

To be sure, the general verdict has its merits. It is definite and, if evidence can be found to support it, it is conclusive, provided, of course, no error was made in the pleading, evidence, instructions, and other procedure leading up to it. Its advocates claim another advantage for it in that it exerts a humanizing influence on the law. To a certain extent it is within the jury’s power to alleviate the rigors of the law, where its literal application would work a hardship on a party. This function of the jury has been called "pop-
ular equity” by its proponents, and “government by jury instead of law” by its opponents.

While writers may join in criticizing the general verdict, they do not always agree upon what should be done to improve it. In general, two suggestions have been tried and each has its supporters. One suggested improvement is the special verdict, and the other is the use of special interrogatories along with the general verdict. Section 15 proposes that either may be used in the discretion of the court. They are quite different, both in history and practice, and require separate consideration, although today their general purpose is the same.

**Special Verdicts**

Although the origin of the special verdict has been traced back to the perils of attainder at the early common law, its first appearance in Missouri seems to be in the Code of 1849, when it was provided that

“In every action for the recovery of money only, or specific real or personal property, the jury in their discretion may render a general or a special verdict. In all other cases, the court may direct the jury to find a special verdict, in writing, upon all or any of the issues...”

Little use was made of the procedure, however, and in the Code of 1855, the statute was amended to require the jury to return a general verdict in issues for the recovery of money only, or specific real and personal property. The adoption of the special verdict in 1849 was no doubt part of the general movement among the states to adopt the New York Code of 1848, and

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11. Ibid; Green, A New Development in Jury Trial (1927) 13 A.B.A.J. 715; Lipscomb, Special Verdicts Under the Federal Rules (1940) 25 Wash. U. L. Q. 185. 12. Wicker, Trials and New Trials (1938) 15 Tenn. L. Rev. 570; Wicker, Special Interrogatories to Juries in Civil Cases (1926) 35 Yale L. J. 296. 13. See Morgan, A Brief History of Special Verdicts and Special Interrogatories (1923) 32 Yale L. J. 575. Although the modern special verdict is usually in the form of short answers to specific questions, at the common law the jury often “told the facts.” For a comparable fact recital by a jury see Spalding v. Mayhall, 27 Mo. 377 (1858). 14. Mo. Laws 1849, p. 89, Art. XIV. It should be noticed that choice of general or special verdict was left to the discretion of the jury. 15. Mo. Rev. Stat. (1855) p. 1263. 16. New York Code 1848, § 216 provided: “The court may direct the jury to find a special verdict in writing upon all or any of the issues; or may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon.”
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many states thereafter provided for special verdicts. Interpreted against a common-law background, however, the special verdict soon became so hedged about by restrictions and technicalities as to become almost useless as a method of procedure. For instance, special verdicts might be overturned because they found conclusions of law instead of facts, but on the other hand, it was improper to require the jury to find "evidentiary" facts instead of "ultimate" facts. In special verdict practice a question could not be put to the jury in a form that was "leading," in the same sense as a question on direct examination might be "leading," or in a way that informed the jury of the legal effect of its answer. It might be held on appeal that the questions on which the special verdict was found were uncertain or misleading, or that the answers to them were inconsistent.

The greatest single difficulty, however, arose from the rule that the special verdict had to be "complete," on the principle that a party is entitled to a trial by jury on every material issue. If the jury failed to find any material fact necessary for the recovery of a party, his case failed. The court had no power to supplement the jury's findings, and if judgment were given for a party on a special verdict which omitted a material fact, it could be reversed, even though the evidence on the point was clear and convincing. Failure to find on all facts was equivalent to a finding against the party having the burden of proof. The United States Supreme Court even held that where facts "conceded or not disputed at the trial" were omitted, the court could not presume that trial by jury on the omitted findings had been waived; and hence if the findings were material the judgment could not

17. For a list of states having special verdict statutes see Note (1940) 34 Ill. L. Rev. 96. Several states have since adopted the Federal Rules completely or in modified form.

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Because of this hazard, the special verdict met with little use despite statutes permitting it in almost half the states.

In *Silliman v. Gano*, Chief Justice Gaines, of the Texas Supreme Court, reluctantly applied the strict rule that omitted facts could not be presumed, but said:

"Probably the Legislature could pass no measure better calculated to promote a prompt and proper disposition of causes than to provide that, when a case is submitted upon special issues, the submission of all issues not requested by a party to a suit shall, upon appeal, be deemed to have been waived, and such issue shall be presumed to have been determined in such manner as to support the judgment of the court."^27

This intelligent dictum marks the beginning of modern special verdict practice. The suggestion was immediately incorporated into law by the Texas legislature,^28 and Wisconsin shortly followed suit. In both of these states the modified special verdict practice was widely used and this no doubt paved the way for the adoption of Federal Rule 49.

This rule has been adopted for the federal courts in the following language:

"... If in so doing [i.e. in submitting the case for special verdict] the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on a special verdict."^29

This provision puts the burden of securing a "complete" jury verdict squarely on the parties, on whom it reasonably should belong, and if either the jury or the court inadvertently fails to make findings of all essential

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27. 90 Tex. 637, 39 S. W. 559 (1897).
30. The question of denial of right of trial by jury may be suggested, but since jury trial may be had on any issue submitted, the provisions for waiver and implied findings would seem to be a reasonable limitation. Cf. Proposed Rules, Art. 9, § 9(4). The laws of the Louisiana Territory and early laws of the state of Missouri, provided trial by the court unless the party should "require" a jury. See Geyer's Digest (1818) 256; Mo. Rev. Laws 1825, p. 630.
facts, the defect may be supplied from the judgment. Liberal construction of this remedial statute is essential for the workability of the special verdict. The Texas Supreme Court unfortunately narrowed its concept of fact issues which might be presumed in support of a judgment until it ultimately reached the position that it would not presume the finding of an ultimate fact issue even though the particular issue is auxiliary to other issues actually submitted and found. There seems to be no reason for such a limitation of the scope of presumed findings, and both the language and purpose of the Federal Rule 49 justify the broadest construction.

Another difficulty of the special verdict is the question of what is an issue of fact. Federal Rule 49(a) provides:

"The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact."

In submitting "issues of fact" to the jury, the court must tread a precarious path between "evidentiary facts" on the one hand and "conclusions of law" on the other. It was on this point that the Wisconsin and North Carolina practice differed most widely from that of Texas.

Although there were decisions which interpreted the statute as requiring a finding only of "ultimate facts" and not "evidentiary facts," this injunction was more honored in the breach than in the observance, and the general trend of the Texas decisions was toward a progressive multiplication of issues. Thus, in Fox v. Dallas Hotel Co. where the defendant alleged that the plaintiff was guilty of five separate acts of contributory negligence, it was held reversible error for the court to ask the jury whether the plaintiff was in general "guilty of contributory negligence in his conduct."

31. See Lipscomb, supra, n. 8, p. 208, 209.
32. The first case involving presumed finding under Rule 49 was Hinshaw v. New England Mutual Life Ins. Co., 104 F. (2d) 45 (C.C.A. 8th, 1939). In an action by the insurance company for a declaratory judgment on certain annuity policies, the defendant claimed they were fraudulently procured. The case was submitted for special verdict and the jury found for plaintiff on all questions except the last, where they said that the agent had made false statement. The court gave judgment for the plaintiff. The defendant appealed, alleging the evidence showed fraud, since it must be presumed that the false statement was relied on. The court held, however, that the finding of the trial court for the plaintiff was presumably a finding that there was no reliance, hence no fraud, and since the defendant had not submitted the question to the jury it had waived jury trial on the omitted issue.
33. 111 Tex. 461, 240 S. W. 517 (1922).
34. See: Gourley v. St. Louis & S. F. Ry., 25 Mo. App. 144 (1887). The action was for negligence against the railroad for killing plaintiff's cows. Court submitted question 4, "Were the cows of plaintiff injured through any careless or negligent act of the defendant, its agents or employees," but refused to submit
The Texas court, on occasion, likewise adopted a very strict position in regard to conclusions of law or "mixed questions of law and fact." Thus, it was held error to inquire whether defendant was indebted to plaintiff, or whether the plaintiff had suffered a total loss, although the court held it proper to inquire whether defendant had adverse possession or whether defendant had acted as agent of the plaintiff.

The result of the Texas practice was to burden the jury with a multitude of questions, and as Green says, "some ridiculous monstrosities were perpetrated." It is recorded that one case was submitted on two hundred issues.

Wisconsin did not entirely escape this difficulty, although its supreme court made a consistent effort to restrict the questions in special verdicts to ultimate fact issues. One of its best statements is that in Baxter v. Chicago & N. W. Ry. The action was for negligence in maintaining a locomotive boiler in an unsafe condition so that it exploded and injured the plaintiff. The court submitted the question of whether the defendant could have discovered the defect "by reasonable and proper care, tests and inspection" accompanying the question with an instruction on the meaning of question 5, "If you answer the above in the affirmative, then state in what did such carelessness, or negligence, consist?" Held: Reversed for failure to submit question 5. The plaintiff had alleged that the defendant was negligent in failing to whistle at the crossing, although as a matter of law this was not negligence. The court assumed that the jury's answer for the plaintiff on question 4 was based on the jury's erroneous belief that defendant's failure to whistle was negligence, and pointed out: "Had question 5 been submitted, this possible mischief could easily have been prevented or corrected."

But cf. Holden v. Mo. R. R., 108 Mo. App. 665 (1904). Plaintiff alleged defendant was guilty of three separate acts of negligence. Defendant asked court to instruct jury that unless 9 of the 12 jurors could agree that defendant was guilty of one or more of the alleged acts, they must find for defendant. The instruction was refused. Held: Affirmed.

"The action was based on negligence, not on the way in which it was committed. The specifications were for defendant's benefit to notify it of the bounds in which plaintiff would confine his evidence. When the evidence was in it was the province of the jury to determine whether or not the principal fact—negligence within the bounds of the petition—had been established, not within one boundary line, or a particular boundary line, but within all of them, generally, not specifically."

39. Green, supra, n. 8, p. 717.
41. 104 Wis. 307, 80 N. W. 644 (1899).
of "reasonable care" and "reasonable tests and inspection." Appealing from a judgment for the plaintiff, the defendant asserted that this question called for the jury's finding a conclusion of law rather than the facts.

The court affirmed the decision, saying:

"The degree of care with which defendant was chargeable was strictly a legal question. Whether that degree of care was exercised in the instance under consideration was strictly a question of fact. The instruction properly laid down the law for the guidance of the jury, and the question called for an answer as to whether the defendant came up to the legal standard in the particular instance. The jury was thus called upon to find the fact, not the evidence of the fact, leaving it to the court to apply the proper legal principles."42

Speaking generally of the special verdict, the court said:

"It is a finding upon all of the material issues of fact raised by the pleadings. A failure to distinguish between such facts and the numerous evidentiary circumstances which may be the subjects of controversy on the evidence and are relied upon to establish the ultimate facts upon which the case turns, often leads to unjust criticism of the special verdict. A conclusion is not one of law because it is reached by a process of reasoning from many primary circumstances. While such circumstances may be in dispute, the real question is, do they lead with reasonable certainty to, and establish the fact alleged by the pleading upon the one side and denied by the pleading upon the other? If the subject of the allegation in the complaint be one of law, or of mere evidence, it has no proper place in the pleading and hence no necessary place in the special verdict."43

To refer to the pleadings for a determination of what constitutes the "issues of fact" in an action is no help if the pleadings are loosely drawn, and evidence and conclusions of law are pleaded. The suggestion of the Wisconsin court merely refers us to a different stage of the judicial proceeding for determination of the issues. However, if the pleadings were made the basis of the issues of the special verdict, Sunderland suggests, there would be opportunity for careful preparation, sifting of cases and segregation of issues.44 We would avoid the difficulties of special verdicts hastily framed

42. Id. at pp. 313, 647.
43. Id. at pp. 312, 646.
44. Sunderland, supra, n. 8, p. 263, et seq.
on the evidence, and at the same time insure improvement in pleadings. After all there should be some place in the trial of every case for analysis and determination of the issues, although under our present system of vague and verbose pleadings, followed by a general verdict, a case may easily go to judgment without there being any clean-cut delineation of the issues by the parties or the court, or understanding of them by the jury.

As Lipscomb says:

"The price for laxity must be paid at some point in the procedure; if the pleadings are loosely drawn, the trial judge and the attorney must work the harder to present simple and precise issues to the jury."45

North Carolina follows most nearly the practice proposed by Sunderland. The court and counsel determine in advance of trial the issues to be submitted, and these issues govern evidence to be submitted and argument of counsel. While it is called general verdict practice, the jury does not give the blanket common-law general verdict for plaintiff or defendant, but answers a few questions submitted by the court, each issue being submitted by an appropriate question.46

With the questions submitted to the jury the North Carolina courts use the general charge with all its fullness, complexity and pitfalls.47 In Wisconsin the general charge was formerly used, although the supreme court has called it "bad practice,"48 and now instruction is limited to "general rules of law appropriate to the particular question of the special verdict."49 In Texas, with its multiplicity of fact questions, there was little place for general instructions. Adhering most closely to the common-law practice, the jury was supposed to find pure facts and the law was to be applied to its verdict by the court. It was considered error to let the jury know the legal effect of its findings.50

Thus, it will be readily apparent that however much we wish to reduce the number of fact issues and to simplify the complexity of instructions, there is an inverse ratio at work. In a negligence case, for instance, we may require the jury to decide separately numerous disputed fact questions and

45. Lipscomb, supra, n. 8, p. 203.
46. Note (1940) 34 Ill. L. Rev. 96.
47. Green, supra, n. 8, p. 719.
48. Byington v. City of Merrill, 88 N. W. 26 (Wis. 1901).
49. Banderob v. Wisconsin Ry., 113 N. W. 738 (Wis. 1907).
allow the court to apply the law, or we may consider negligence itself to be an "issue of fact" to be determined by the jury from all the evidentiary facts under proper instructions on the law without requiring them to find these facts. We cannot completely avoid instructing the jury on the law, unless we wish to burden the jury with answering a great number of questions on facts. Properly used, however, the special verdict avoids both extremes with simple instructions on segregated issues of ultimate fact.

It is hoped that this review of the varying practices of Texas, Wisconsin, and North Carolina will demonstrate that the proposed special verdict statute is no magic talisman to improve Missouri procedure. To insure its workability will require the understanding, sympathy, and intelligent cooperation of bench and bar.

Construed too strictly and artificially, as was done in Texas, we become hopelessly bogged down in requiring our jury to find innumerable facts, with the danger that it will be confused and misled. On the other hand, if the issues of fact are construed too broadly, we are in effect left with the general verdict in question and answer form. Between these two extremes there is a broad area where the special verdict can function to permit the court to require the parties to segregate issues, to try only matters really in dispute, and to submit separate issues to the jury in simple language accompanied by minimal instructions, instead of by the confusing general charge.

**General Verdict with Special Interrogatories**

The use of special interrogatories with the general verdict has its origin in the present-day purpose of the special verdict, namely, in an attempt to limit the powers of the jury to return a verdict for one party or the other in disregard of law, under the impenetrable cloak of the general verdict. Although there are instances of its use in this country in the early common law, we find its first use in the New England states where the court, if it were "surprised" by the jury's general verdict, might quiz the jury on the verdict. This practice was later extended to permit special questions to be submitted, for answer along with the general verdict. New York sanctioned the practice prior to the Code of 1848, and the Code allowed con-

52. Hix v. Drury, 5 Pick. 296 (Mass. 1827); See Wicker, *Special Interrogatories to the Jury in Civil Cases* (1926) 35 YALE L. J. 296.
continuance of the practice. Over half the states have copied these provisions, and a few went even further and made submission of special interrogatories mandatory on request of the parties. Missouri adopted a mandatory special interrogatory statute in 1885, but repealed it two years later.

The chief advantage claimed for special interrogatories is that they require the jury to give detailed consideration to the issues, which they must do in order to answer the questions propounded. It is also asserted that answers to special interrogatories may reveal that some alleged errors were not prejudicial and offer a basis for curing others and hence avoid the necessity of a new trial.

The likelihood of new trials would seem to be increased under special interrogatories, however. It is provided that if there is any inconsistency between the general verdict and the answers to the special interrogatories, the court may order a new trial; and if the answers are inconsistent with each other and also with the general verdict, the court is obliged to order a new trial, except that in both cases he may return the jury for further consideration of its answers and verdict.

Special interrogatories are subject to many of the same hazards that exist in special verdict practice. Counsel may put their questions in a form to mislead the jury, with the purpose of securing a new trial. Special interrogatories may also be used to cross-examine the jury on the evidence.

55. Wicker, supra, n. 52.
56. See n. 7, supra.
57. Wicker, supra, n. 52.
58. Federal Rules, 49b.
59. See Flannery v. Kansas City, St. J. & C. B. Ry., 23 Mo. App. 120 (1886) where Phillips, P. J. said:

"As the statute authorizing the submission of certain facts for the special finding of the jury is new in this state, we deem it well to say at the outset, that this statute is not to be made a move to entrap and mislead the jury, nor an instrument in the hands of the practitioner for cross-examining the jury on minor and unimportant details. The questions submitted should be strictly limited to the material issues made in the pleadings, and the facts essential to support the verdict one way or the other. They should be as few in number as will attain the ends of justice, so as to avoid confusing the jury and leading them into unprofitable wrangling over non-essentials. And especially should the questions to be answered be intelligible to the apprehension of the average juror and be in such form as to admit of categorical answer under the evidence."

In Jackson v. German Ins. Co., 27 Mo. App. 62 (1887), the plaintiff alleged waiver of prompt payment of premium. The court refused the defendant's request
Cases may be found in the Kansas reports in which over a hundred special interrogatories were submitted to the jury.\textsuperscript{60} Obviously the only reason for submitting such a number of interrogatories is the hope that the jury may return an inexact answer unsupported by the evidence, or answers inconsistent with the other answers or with each other. Just as in the case of special verdict, a special interrogatory may be objected to because it informs the jury of the legal effect of its answer.

In addition, the special interrogatory practice has its own unique problems. Unlike the special verdict, the special interrogatories are not necessarily supposed to include every issue in the case. Hence, while the answer to a special interrogatory may be inconsistent with the general verdict, there may, nevertheless, be no basis for awarding judgment notwithstanding the verdict,\textsuperscript{61} and a new trial inevitably results. While a few jurisdictions have held that each interrogatory should be tested to determine if an answer favorable to the party submitting it would be inconsistent with a general verdict for his adversary, the general rule required only that the questions submitted on an issue, taken together, should meet this test. Obviously, if favorable answers to every interrogatory would not affect a general verdict for the other party, they are immaterial.\textsuperscript{62}

for the following question: "5. If verbally, what was said, and who said it, and when and where?" Said the appellate court:

"The last interrogatory was properly refused. It is not contemplated by the statute authorizing these special verdicts that the jury should be required to report the evidence by which they reach their conclusion. It is a special verdict, and not a report of the evidence by which they reach their verdict." See also Turner v. Kansas City, St. J. & C. B. Ry., 23 Mo. App. 12 (1886).

But cf. Benton v. St. Louis & S. F. Ry., 25 Mo. App. 155 (1887), where the court held it was error to refuse defendants' question 8: "How far from the place of collision was the train when the cow started toward the track?" Said the court:

"Similar statutes have been in force in many of the western states for some time. Their object, unquestionably, is to enable the court, and the parties, respectively, to ascertain how the jury has found upon such independent controlling facts as are requisite to justify legally their general finding for one party or another."


61. See Benton v. St. Louis & S. F. Ry., 25 Mo. App. 155 (1887): "As the statute contemplates that the court may give judgment according to the special findings, regardless of the jury's special verdict, the issues thus submitted as a whole must be such that the court may legally construct a verdict upon the answers of the jury to such questions, for or against one of the parties."

62. Tetherow v. The St. Joseph R. R., 98 Mo. 74, 11 S. W. 310 (1888): "When the proposed question might be answered affirmatively or negatively with-
Since submission of special interrogatories under the proposed section is
discretionary with the court, refusal to submit a question will no longer be
a fertile ground for reversal.\(^6\) Whenever special interrogatories are used,
however, the problem of what effect is to be given to them remains. Courts
have labored mightily to distinguish situations in which an answer to a
special interrogatory is "inconsistent" or "unharmonious" with another
answer or with the general verdict, and when an answer to a special in-
terrogatory "controls" the general verdict and permits judgment to be en-
tered notwithstanding the verdict.\(^6\) It has been held that special findings
would not justify setting aside of a general verdict unless they were in irrecon-
cilable conflict with the general verdict, and before declaring a conflict the
trial court has the duty of making an effort to reconcile apparent inconsis-
tency.\(^6\) The effort to effect reconciliations sometimes demands quite a
flight of the judicial imagination.\(^6\)

The main advantage claimed for the special interrogatory practice was
that the general verdict accompanying the answers to the special interroga-
tories was an assurance that there would be no failure to find on all material
issues. Since this defect in the special verdict is remedied under the pro-
posed rule by the provision for implied findings, it is difficult to see that this
is any longer any real advantage in the special interrogatory practice. There
remains the great disadvantage in special interrogatories that their principal
use is to nullify the general verdict by securing answers inconsistent with
it. The whole emphasis of special interrogatory practice is on obtaining a
negative result, i.e., a re-trial.

Just as in the case of special verdicts, the whole utility of special in-
terrogatories depends upon the attitude of the bench and bar. There are

Questions refused because they were "confusing" and were "covered by the general
charge."

\(^6\) Smith v. Atchison, T. & S. F. Ry., 19 N. M. 247, 142 Pac. 150 (1914);
\(^6\) HUGHES, FEDERAL PRACTICE, § 24324.
situations in which it might prove convenient to submit a case on a general verdict, with special interrogatories to bring before the jury more clearly a critical and confusing point. If the courts permit counsel to submit interrogatories uncontrolled, however, the practice will hamper, rather than improve, judicial procedure.

**Conclusion**

Enough has been said to illustrate the belief that the proposed Rule 15 is no panacea for the curing of all our procedural ills. Cooperation of the bar, with liberal construction and close supervision by the courts, can make it a useful tool in freeing the jury from its task of rendering a single verdict upon a mass of evidence and in the face of an abstract and complicated general charge, and in controlling possible abuse by the jury of its power. But so long as we consider a lawsuit as merely a game in which the judge is referee and the award goes to the cleverest player, there is danger that the special verdict and special interrogatory will be just another weapon in the hands of the more skillful practitioner, rather than an instrument for obtaining, with more certainty, justice under law.