KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1936 PART 2—TENTH ANNUAL REPORT

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THE LEGISLATIVE COUNCIL,
MEMBERS OF THE PRESS,
OTHER ORGANIZATIONS, and leading citizens generally throughout the state.

For the improvement of our Judicial System and its more efficient functioning.

FOREWORD

The Judicial Council is collecting reports from the probate courts throughout the state showing the business transacted in each of such courts for the year ending June 30, 1936, and the business pending therein on July 1, 1936. Summaries and tables from these reports will be published in a later BULLETIN. These will set out in a more forceful way than could otherwise be done the magnitude and importance of the business transacted in our probate courts. These courts are important units of our judicial system, and should be better equipped to perform their duties. Many of the probate judges of our state are grossly underpaid for the work they are required to do. Some of them have inadequate quarters, many of them have no clerical help, or such as is furnished is inadequate, and in many of the counties the records are cumbersome and antiquated, so that the compiling of data of the business of the office is a task in itself. The legislature should make it possible for probate judges to be compensated for making these reports in a manner similar to that provided for compensating clerks of the district courts for similar service. We will be glad to join with the judges of the probate court in urging the legislature to do so. We plan to make other recommendations for the improvement of these courts.

We are not collecting data this year from clerks of the district courts. Our plan of operation now is to collect such data every two years. We did so last year and plan to do so next year.

For some time there has been discussion as to the advisability in jury trials of having the jury return special verdicts respecting controverted issues rather than a general verdict in each case, as our statute now provides. Mr. C. L. Hunt, a member of the Council, has made an exhaustive study of this subject and has prepared an article, which we print in this issue, under the title of "Special Verdicts v. General Verdicts." He deals not only with the history of the question, but points out in a forceful way other advantages to be gained by having special verdicts only. Experienced trial lawyers and judges know that in practically every case tried to a jury the conflicting testimony centers around a comparatively few points, frequently not more than one or two. Certainly it would be less confusing to the jury, and more accurate results would be obtained, if, in the court's instructions, the jurors' attention were called only to their duties and prerogatives respecting the pivotal, controverted issues of the case. The subject is well worth considering as a question for the improvement of our judicial system and its functioning. We trust the attorneys and trial judges throughout the state will read the article carefully, and we would be glad to hear from them with a frank expression of their views.

For several years past there has been quite a little discussion in this state respecting a greater coördination or unification of the bar of the state. A few years ago there was introduced in the legislature an act for the incorporation of the bar similar to that which has been enacted in a number of the states with beneficial results. A lack of the full appreciation of its purposes caused it to fail to pass in the legislature. Nearly two years ago (page 41, October, 1934, BULLETIN) we called attention to the fact that in the state of Missouri the beneficial results of such an act were being brought about by rules promulgated by the supreme court. Time has demonstrated that much good has been accomplished under those rules in that state. Since that time in other states, particularly in Michigan and Kentucky, similar rules have been promulgated by the supreme court. Within the last year the bar association of the state of Kansas, under the leadership of its president, Mr. Albert Faulconer, has made a study of the question, with the result that at the last meeting of the association, held at Wichita in May, resolutions were adopted requesting the supreme court to promulgate similar rules in this state. The new president of the State Bar Association, Hon. John S. Dawson, has appointed a committee for the study of the subject and to prepare suggested rules for that purpose to be submitted to the supreme court for its promulgation.

Generally speaking, there are four purposes which are hoped to be accomplished by the better integration of the bar under rules of court. *First,* improved standards of admission to the bar and a more careful examination of applicants therefor. We have that problem very well worked out in this state. For many years a competent forward-looking board of law examiners, appointed by the supreme court and functioning under rules promulgated by it, has kept the standard of admission to the bar in this state to as high a level as that of any state in the Union. Hence, it is not contended that great improvement can be made respecting the admission of attorneys to practice law in this state over that which has been and will be accomplished under the present plan of procedure.

Second, the hearing of complaints against and the discipline of members of the bar. From time to time we hear complaints through the public press and elsewhere of what is said to be unprofessional conduct of attorneys. Of such complaints before the grievance committees of the state and local bar associations approximately seventy-five percent of them, upon investigation, are found to be without merit. This indicates that it would be advantageous to find some plan to discipline those who unjustly charge attorneys with unprofessional conduct; but that is a goal we can hardly hope to attain. Of those complaints not found to be without merit half or more of them prove to be omissions or irregularities promptly corrected as soon as the attorney's attention is called to it. The remainder of them are found to be more serious, some of them to justify or require disbarment. This field affords a ground for more systematic and effective work than we have heretofore been able to accomplish. It is a field in which work is needed, not only for the benefit of litigants, but for the benefit of the reputable members of the profession. Perhaps no one thing would give better standing to the legal profession than to strike from the roll of attorneys in this state the names of the comparatively few attorneys who, by their intentional misconduct, bring discredit upon themselves and their associates, and loss or injury to their clients. The present board of law examiners does much work each year investigating such com-

plaints and taking appropriate action thereon—much more, in fact, than the general public, or even attorneys generally, know about, for the preliminary inquiries into those matters necessarily are investigated as quietly as possible. It may be possible, however, that a better set-up for this purpose could be formulated. Certainly more funds should be made available for this work. The only funds now available come from fees paid by applicants for admission to the bar, and by far the larger part of that is consumed in the necessary investigation of such applicants and in conducting examinations. If under rules for the integration of the bar the active attorneys in the state were required to pay a small fee, perhaps $5 or $10 per year, into a fund for that purpose, this particular difficulty would be eliminated. This is a line of work in which great good can be accomplished by having an adequate set-up for investigating complaints, with sufficient funds to conduct investigations effectively, so that appropriate action thereon may be taken promptly.

Third, it is thought the ability of attorneys properly to represent their clients can be improved by an appropriate integration of the bar with local, district and state bar associations. Ordinarly one recently admitted to practice law has much to learn of human activity, the conduct of business, the functioning of governmental units, and the relation of legal principles thereto, in order to be of the greatest service to his clients. In a recent conference on this question, where a number of attorneys were present, one of them bluntly remarked: "Litigants suffer greater losses because of the inability of attorneys to know the best steps to be taken in their behalf than they do by any unprofessional conduct of attorneys." Those present immediately recognized the truth of the statement. The practice of law involves in a broad way the entire field of human endeavor, and every controverted question of importance arising among our people respecting their property rights, their domestic affairs, or their relations to government, may be presented to an attorney for his advice and action. It is important that he be in position to give good advice and to take appropriate action on such questions. He should have access to an adequate library and devote his best efforts to acquiring the information which will enable him to be of greatest value to his clients. Necessarily his life is one of continous study. It is thought much could be accomplished along this line by a proper integration of the bar under rules of court.

Fourth, the field of the unlawful practice of the law has received much attention in recent years, and is receiving more. If litigants sustain loss from acting upon inaccurate advice of attorneys, they certainly sustain a much greater loss from the inaccurate advice of laymen. It has been suggested that attorneys advocate limiting or doing away with the unlawful practice of the law for the selfish purpose that they desire to have a monopoly of the practice of law. This is incorrect. Attorneys frequently make more money out of complications which arise because someone has followed the blundering advice of a layman then they would have made if the person had sought the advice of the attorney in the first instance. Limiting or doing away with the unauthorized practice of the law is advocated in the interest of litigants and those seeking legal advice where litigation is not required. They will find it to their advantage to consult and take the advice of a competent attorney anxious to serve his clients as best he can.

We are glad to present in this issue an article by Robert C. Foulston, a

member of the Council, on the proposed integration of the Kansas bar in which the subject is treated in its larger aspects and from a practical viewpoint. The question is a live one, and within the next few months no doubt definite proposals will be formulated for the integration of the bar of this state, and the supreme court will be asked to promulgate a set of rules accomplishing that purpose. We are anxious to have the views of the lawyers of Kansas on this question. Letters on the question may be addressed to us or to the chairman or secretary of the State Bar Association. Naturally, the court would not care to promulgate rules and afterwards have the attorneys of the state say that they had not had an opportunity to express their views concerning them. They are invited to do so now.

ADDITIONAL RULES OF COURT

In our October, 1934, BULLETIN (page 41) we discussed and set out a suggested rule which might be promulgated by the supreme court with respect to the practice of law in this state by foreign attorneys. At the time it received much favorable comment. When the legislature of 1935 met a bill was introduced in the House which, with some amendments, became chapter 69, Laws of 1935. The statute was so limited in its operations that it proved inadequate, and as the matter is one which should be governed by rule of court rather than by statute, suggestions were made to us by many attorneys that we request the court to promulgate the suggested rule notwithstanding the statute. In order to get a full discussion of the matter we again treated the subject in our April, 1936, BULLETIN (page 21), at which time we set out again a suggested rule and asked for comments. We have received many of these, all of them favorable to its promulgation. In view of that, at the last meeting of our Council it was determined that we request the court to promulgate such a rule. Having given consideration to the matter the court, under date of July 1, 1936, but to be effective on September 1, 1936, has promulgated two additional rules of court applicable to all the state courts, to be numbered, respectively, 54 and 55, and to read as follows:

"No. 54. An attorney residing outside of this state, in good standing as an attorney at the place of his residence, may be recognized as an attorney by the courts of this state, for any action or proceeding in court, but only if he has associated with him as attorney of record in such action an attorney of this state residing within this state, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record."

"No. 55. Any pleading, or other paper, filed in any action or proceeding in any of the courts of the state shall have written or printed thereon the name and correct post-office address of the attorney (or litigant, if filed by the litigant) filing the same. Clerks and other court officials who file such papers shall refuse to receive them for filing if this rule is not complied with."

We are confident that the promulgation of these rules and the compliance with them will be of great advantage to our trial courts in the setting and disposition of cases, and will also operate greatly to the advantage of litigants in this state, enabling them or their counsel to get in touch with attorneys representing the other side of the litigation for the purpose of serving notices or pleadings, or taking up other matters connected with the litigation.

GENERAL VERDICT vs. SPECIAL VERDICT

By C. L. HUNT

"Gentlemen of the jury, you are the exclusive judges of the evidence and the facts established by it."

So intones a Kansas trial judge. Very good, your honor, but you do not stop there. You tell the same jury they are bound by your instructions as to the law, which means they must construe the law as you have written it. Again, you tell them they must apply the facts to the law as you have written it. Thus you have imposed three duties upon your jury; one, to determine facts; one to understand what you wrote, and then to apply such understanding to the facts.

The general verdict, therefore, becomes a composite of three distinct elements. They are so welded into a general verdict as to be utterly immune to dissection if one be curious enough to attempt to ascertain whether the jury failed to correctly ascertain the facts, or in its construction of the instructions, or the application of the one to the other.

Some ten years ago the members of the State Bar Association of Kansas were reminded that under English practice it might be left to the jury to return a general verdict, or to the court to make a general finding upon special questions answered by the jury. The remark then awakened no particular interest. Recently there has been much discussion of the question of eliminating the general verdict and requiring of the jury only a special verdict upon which the court can pronounce judgment.

Interest in the subject has been stimulated by the Fireside Chats department conducted by the Hon. Grover Pierpont, of Wichita, in the journal of the Bar Association of this state. At a recent meeting of the Northwest Kansas Bar Association at Goodland an interesting paper on the subject was read by Mr. James E. Taylor of Sharon Springs. Discussion of the subject has now become so widespread as to challenge serious consideration by the bench and bar of Kansas.

The special verdict possesses long and honorable lineage and is a juridicial tradition of English and American law. It has fallen into disuse in Kansas perhaps because of a legislative requirement of 1874 that in all cases where a jury is demandable a general verdict must be rendered. Curiously enough, it is still made use of in some equity cases where, indeed, it should be abolished altogether. In a few jurisdictions in Kansas, trial judges yield to the importunities of counsel, having the inflammatory side of a suit to contest a will, to render a special verdict in an advisory capacity. This practice, it is suggested, should be abandoned entirely, and the special verdict should be restored to its proper place in the decision of factual issues in law cases.

The Anglo Saxon jury is not comparable with the modern American jury, nor, indeed, with the jury as constituted shortly after the Norman conquest, and, therefore, will not be considered here. Only nine years after Hastings the function of the Anglo Saxon doomsmen came to an end. It was then for the first time in England that the jurors reported the facts and the judges made the judgment. The instance out of which this revolution in procedure grew is most interesting. It was a case between the King's sheriff and the Bishop of Rochester. The trial was presided over by the Bishop of Bayeux,

who chanced to be the King's younger brother, but from all accounts an upright and honest judge. He directed the calling of twelve men to confirm the facts and this is said to be the first instance in English history where twelve in number were assembled to make a conclusive statement of the facts upon which the court should render judgment. This was a complete change from the former inquest held by a like number of countrymen. Though the king's brother proved to be a model of impartiality, such was not true of the sheriff who brazenly intimidated the jurors, much in the same manner as Kansas prohibition sheriffs were wont to unduly influence the jury in an intoxicating-liquor case—all for the good of law and order. This early English jury yielded to the importunities of the King's sheriff and rendered a false verdict. Through sources not consequential here, the judge became apprised of the falsity of the verdict and upon being called into his presence some of the jurors confessed. The justice then called another jury of barons to determine whether the first jury had falsified their verdict. It was found that the first jury had returned a false verdict and thereupon another precedent was set in English law. The justice reversed the judgment of the first jury, entered a contrary judgment, and fined the members of the first jury three hundred pounds. So far as I have been able to discover this is the first exercise of the newly discovered power of attaint of jurors, although it was not so denominated for something like a hundred years. The practice had then become common to assemble a jury of twenty-four knights to determine the question whether the first jury had returned a false verdict. When so found the court pronounced judgment contrary to the verdict of the first jury. Apparently it did not occur to the judiciary until about 1650 that the court might set aside the verdict of a jury of twelve and grant a new trial.

Out of the practice of attaint was born the special verdict. Evidently some intelligent juror conceived the idea, or it was implanted in his mind by a not unfriendly judge, that a jury might escape the consequences of attaint by returning a special verdict finding only naked facts, and praying the aid of the court in the application of the law. This device by a jury of freeing itself from attaint was freely made use of after its discovery. True, the jurors of those days were in a sense witnesses rather than jurors as they were free to use their own knowledge and that which they might acquire through inquiry about the neighborhood without the calling of witnesses. Nevertheless, they performed the same ultimate function of either rendering a general verdict at their peril, or presenting to the court their conclusions as to the facts in the form of a special verdict.

In 1285 chapter 30 or the Statute of Westminster II was enacted, and provided as follows:

"The justices of assize shall not compel the jurors to say in so many words (praecise) whether it be disseisin or not, if they state the truth of the matter and pray the aid of the justices; but if, of their own accord, they will say it is disseisin, the verdict shall be received at their peril."

This statute, however, is said to have been only declaratory of the common law.

In Dowman's Case (9 Coke 7, 12, decided in 1586) it was said:

"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 in 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."

Coke disapproved of the general verdict in the following language:

"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 special matter is the safest way where the case is doubtfull."

It must have been more apparent to the early English judges than to us that the jury was not an instrument of precision in trials if directed, or permitted to find not only facts, but judge the law as well, and apply the one to the other.

Professor Edson R. Sunderland, after reviewing the historical aspects of the special verdict, said:

"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." (Yale Law Journal, Jan. 1920, 258).

He might have safely added that the jury have no vested right to render a general verdict as distinguished from a verdict finding naked facts only.

This common law of England came not only to America, but to Kansas, and was clearly recognized by the early law-making bodies of this state.

When we read section 60-2918, R. S. 1923, we are impressed with the view that the draftsman confused the special verdict with special findings of fact which frequently accompany a general verdict. This confusion of expression is evidently attributable to the revisors of the Code in 1909 merging into one section the law which had previously been stated in two. Nevertheless, the existence of a special verdict is expressly recognized in the 1923 revision by the retention of sections 60-3117 and 60-3118, which have remained unchanged in our statute law since, at least, 1862.

In the 1862 compilation the prototype of present R. S. 60-2918 is found in sections 286 and 287. In section 286 the distinction between a general verdict and a special verdict is clearly expressed, and, in fact, is largely retained in our present revision. However, in section 287 it was provided that in every action for the recovery of money only, or specific real property, the jury in their discretion might render a general or special verdict. In all other cases the court had power to direct the jury to find a special verdict in writing upon any or all of the issues, and might in all cases instruct the rendition of a general verdict, and to also find particular questions of fact.

It must be admitted, we think, that these two sections drew more unmistakable lines of demarcation between general verdicts, special verdicts, and special findings than does our present statute.

The general statutes of 1862 also provided (sec. 288) that if the special findings of fact be inconsistent with the general verdict, the findings controlled and the court might give judgment accordingly. This remains unchanged.

When our statutes were revised in 1868 these sections were given slightly different numbers, being 285, 286 and 287. Section 285 is precisely the same as section 286 in the 1862 revision. There was a slight change in the next sec-

tion, but in form only. Section 288 of the 1862 compilation became section 287 without change.

These sections were all a part of chapter 80, then the Code of Civil Procedure.

By section 7 of chapter 87 of the Laws of 1870, section 286 was amended to read as follows:

"In all cases the court, at the request of the parties, or either of them, shall direct the jury to find a special verdict, in writing, upon all or any of the issues in the case; and upon like request, to instruct the jury, if they shall render a general verdict, to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal."

This seems to have resulted in a mismating of the new section 286 and the old section 287, which was left unchanged, and yet the statute was silent as to the right of any party to demand a general verdict.

In 1874 section 286 was again amended by section 1 of chapter 91 of that session, and the amendment read:

"In all cases the jury shall render a general verdict, and the court shall in any case at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same."

This is apparently the first time the legislature required a general verdict in all cases where a jury was demandable and constitutes the first departure in Kansas from the common law of England with reference to the right of the jury to render either a special or general verdict. The reason for the change is not apparent. Possibly at that stage in the development of Kansas personal injury business had commenced to pick up.

As a result of these various amendments sections 285 and 286, General Statutes 1868, became paragraphs 5180 and 5181 of the 1905 compilation, the first section being devoted to the definition of general and special verdicts, the second having to do with the matter of special questions in addition to the general verdict; the requirement that a general verdict be returned in all cases being retained.

When the Code of Civil Procedure was revised in 1909 these two sections were merged, which led to apparent confusion of the terms "special verdict" and "special findings." This section was amended by chapter 239 of the Laws of 1913 by placing a discretional limit on the number of special questions. There was no change made in the Revision of 1923.

It is not difficult, therefore, to understand why special verdicts have fallen into disuse, especially after the 1909 code provision. The sharp legislative distinction between special verdicts and special findings, carefully preserved until 1909, was lost.

At least two things are readily apparent from this brief historical observation. Neither a common-law jury nor a Kansas jury, prior to 1874, had any inherent right to return a general verdict. A special verdict was as firmly fixed in judicial proceedings from the time of the case of the King's sheriff against the Bishop of Rochester until 1874 as the general verdict has been since that date.

Again it is to be remarked that lawmakers and judges mistrusted the ability

of jurors to determine the facts, construe the law contained in the instructions, and apply one to the other, until the Kansas legislature in 1874 made a general verdict mandatory. The special verdict is not new; the general verdict as a directory procedure remained dormant from the day remedy by attaint was discovered until 1874. It would, therefore, not be a startling innovation to restore the special verdict to its previous high standing in jurisprudence and to abrogate the general verdict, the remedy by attaint being a mediaeval relic and unthinkable as a modern method of testing the honesty of jurors or the accuracy of their work.

If the jury is to be retained for the purpose it was designed to serve, it can do its work better and more conscientiously through the medium of a special verdict. Jury trials are still in vogue because of the ancient presumption that the men composing it were more competent triers of fact than judges. What was once a presumption may now be a fiction, but if we are to recognize either it surely follows that the operation of the jury should be at least confined to the field in which it was presumed to be superior.

The general verdict is necessarily composed of three elements—a determination of the facts, a determination of what the trial court means by instructions, and a matching of one with the other. In its final form it is as inscrutable as the sphinx. Its inherent vice is the concealment of error. No judge or lawyer can take it apart and determine whether error was made in the construction of either of the three elements, or the blending of them into one. A cursory perusal of the many Kansas cases where the ability, or even the integrity, of the jury has been tested by special questions resulting in the general verdict being set aside and a new trial granted, or judgment rendered on the special findings, should prove to be a demonstration of the failure of the general verdict as a useful instrument in arriving at exact justice.

Assuming that jurors can competently find facts from contradictory evidence and that they will honestly do so, they are yet confronted with a task for which they are utterly untrained. They are presented by the trial judge with a long and perhaps intricate essay on the details of the law as applicable to the case on trial. The judge has spent many years in the study of the law. In preparation for this particular discourse he calls upon his reserve of general legal knowledge; he makes further search for law applicable to the particular issues joined; he has the assistance of counsel in writing instructions in the instant case, and it is submitted to twelve men with no legal training who are directed to assimilate within a few hours the law which the court and counsel have spent years in learning. The young law student finds abstract statements of law in textbooks and judicial decisions which to him appear to be in irreconciliable conflict. Naturally, the juror experiences a like mental distraction in an effort to understand the instructions of the court. Then he must accomplish the feat of correctly applying the facts which he has correctly determined, to the law which he may or may not understand, and accomplish justice by returning the right verdict.

It would seem that we have taken the juror out of his natural realm in jurisprudence and have transplanted him into fields of endeavor for which he has not been trained, and have assigned him to duties and responsibilities for which he finds himself entirely overreached.

If these observations be correct the conclusion is forced that the general

verdict is more of a handicap in judicial machinery than it is an instrument of assistance.

Some members of the profession may be unaware that five years after the supreme court of the United States was established it tried its first jury case. (*Georgia v. Brailsford,* 3 Dall. 1-4; 1 Law. Ed., 483.) Chief Justice Jay instructed the jury as to the law and admonished them to pay such respect to the instructions as were due to the opinion of the court. He stated that on one hand it is presumed that juries are the best judges of facts, and on the other hand presumably the courts are the best judges of the law, but observed that both objects were lawfully within the power of the jury to decide. This case remained unfollowed and as well unquestioned until 1894, when it was decided that the jury had no such right as was conferred upon them by Chief Justice Jay. There is no longer any doubt that the courts are the exclusive judges of the law, and if that power is exclusive it necessarily follows the jury has no right to meddle into such questions. Yet the general verdict compels them to do that very thing.

There being three separate elements entering into the composite general verdict, there result three opportunities for error where there should be but one. The jurors may not testify as to what considerations moved them in determining any one of the three elements, or how they were welded into a general verdict. The rule is salutary, as otherwise all stability of verdicts would vanish. If error occur in determining the facts it cannot be corrected because it is indistinguishable from error in comprehending the court's instructions, or the application of the facts to them. Error may thus merge into the general verdict, and necessarily the general verdict is altogether right, or altogether wrong, as depends upon whether an undiscernible or undiscoverable error may have intruded into the disposition by the jury of any one of these three elements. By the use of the special verdict the possibility of error on the part of the jury is limited to the factual field and the possibility of an erroneous final judgment is proportionately lessened.

In an effort to apply the law, as they construe the instructions to state it, the jury may misapply it. They may fail to apply it at all. No analysis of the general verdict can be made to disclose the nature of the jurors' error, if there be error, or in which of the three separate fields of mental operation it occurred.

Manifestly, the use of the general verdict increases three-fold the opportunity of the jury to commit error, or to conceal downright insincerity.

True it is that the accuracy of the jury in determining the facts and their integrity in rendering a general verdict may be checked upon to some extent by the use of special questions, yet we find some trial judges who deplore the use of this statutory provision. Whether this view originates from a conscientious belief in the superior wisdom of the jurors, or whether it is intended as a compliment to citizens of the district who may hold the balance of power at an ensuing election, is quite immaterial. Sound thinking compels the conclusion that special questions as now in use are a valuable aid in accomplishing justice, but they are by no means adequate, and if they fail to cover a controlling issue of fact the general verdict stands as a decision of that issue, and it may be entirely contrary to the special findings on other issues.

If we are to abolish the general verdict and submit issues of fact in civil cases to a jury for the return of a special verdict, a new burden will be cast both upon court and counsel. Special questions as now in use are frequently leading, suggestive, argumentative, and are so phrased as to invite or even encourage answers favorable to that side of the controversy which requests their submission. If we are to use the special verdict the questions submitted must be prepared by the court with the assistance of counsel. Extreme care must be taken to insure an exposition of facts. There must be nothing in the questions to indicate that it should or should not be answered in a certain manner. Above all else, there should be no intimation that this or that answer to that or this question will likely result in a certain judgment by the court. It may even be necessary to caution counsel that no argument be made that questions must be answered in a certain manner if the jury wish his clients to prevail, and for an infraction of this admonition proper reprimands may be in order.

The questions to be submitted to a jury for a special verdict are scarcely comparable with special questions which are now submitted to be returned with the general verdict; the former are to elicit facts upon which a court can pronounce judgment, and special questions are supposedly a test of the correctness of the general verdict.

The use of the special verdict will greatly minimize the work of the trial court in preparing instructions, and to the same degree will minimize the possibility of error. The court will be under no duty to write a thesis on the law in the abstract, or to give a concrete application of it to a conceded or hypothetical factual situation. The instructions may have the much-desired merit of brevity. Sometimes definitions make it necessary. The court may be called upon to give the legal definition of such terms as ordinary care, negligence, contributory negligence, proximate cause, or perhaps legal cause, competency of parties or witnesses, lawful consideration, actionable false representations, and so on, but without doubt instructions will be much less verbose, resulting in less opportunity for the jury to become confused. One Kansas judge was known to say after the instructions had been prepared that he thought he had then written enough to properly confuse the jury. Facetiously stated, of course, but the observation may many times be correct, though the instructions as a matter of law might pass the scrutiny of an appellate court.

Adoption of the special verdict should lead to an improvement in pleading. The careful lawyer in drawing his petition, answer, or reply will know that when his case is to be submitted to the jury it will not be for the rendition of a general verdict, but for the tender of specific and controlling issues of fact for determination. Having that future event in mind he will, or at least should be, most painstaking in stating what he conceives to be the issues of fact which will control the result of the suit.

If the plan is to even approach the ideal there must be better pleadings and extreme caution exercised in submitting the necessary questions to the jury.

Candor compels admission that the exclusive use of the special verdict is not free from objection. There is the ever-present danger of failing to submit to the jury one or more controlling issues of fact. Should even one be omitted the special verdict might prove to be an insufficient basis for judgment, and there being no general verdict to supply the omission a new trial might result

as a matter of right. Again, should the trial court and counsel hold different views than the supreme court as to what facts are controlling a reversal of judgment might result. It can be said in answer to this objection that while a little time and experience may be necessary for lawyers and judges to adjust themselves to the change, it should eventually, and soon, perhaps, be possible for the trial judge and counsel to avoid these hazards. At least the procedure seems less perilous than the present system.

There is ofttimes a very shadowy line between conclusions of law and findings of fact, and some difficulty may be experienced in the composition of questions confined to facts only without invading the province of the court to determine the law, a vice, however, which is now inherent in the general verdict.

It is possible, of course, that the special verdict may reveal evidentiary matter instead of ultimate facts, but this can hardly prove harmful if all of the ultimate and controlling facts are found. In any event all of these difficulties are now present, the difference being that they are inherent in the general verdict and escape detection. Surely, there can be no more opportunities for error by the use of the special verdict alone, and on the whole the chance of errors will be minimized and the opportunity of discovering and correcting them will be much more available.

A Kansas lawyer has inquired how the jury rendering a special verdict will determine the amount of recovery in a tort case. The answer does not seem to be difficult. Under our present practice special questions itemizing damages are usually so phrased to make the necessity for an answer contingent upon a general verdict for the plaintiff. This practice would necessarily be discontinued. An inquiry could be made as to the amount of damage suffered by the plaintiff by reason of a broken leg, and the amount allowable for a sprained wrist. The question of the injury and damage may be an admitted fact or one open to controversy, but in either event the jury could find the amount of damage, if any, regardless of other findings upon which delictual liability may depend. If a judgment for the plaintiff finds warrant in the findings the court can apply the measure of damages found by the jury. If the special verdict requires judgment for the defendant the amount of damage found by the jury will naturally be disregarded.

A cautious voice has been heard to question the constitutionality of a statute which would eliminate the general verdict and make the use of the special verdict exclusive, the question being, would such procedure be in violation of our constitutional guaranty of a jury trial. What has been said before probably answers this question, as at common law the jury had no inherent right to return a general verdict and its field of activity was confined to an ascertainment of facts only. So long as this prerogative is preserved, as it would be by a special verdict, there would seem to be no infringement of constitutional rights.

Under existing Kansas statutes a general verdict may be set aside and a contrary judgment entered if the special findings of fact destroy the right of action or defense of the prevailing party. If this can be done constitutionally, does it not necessarily follow that a special verdict is within the constitutional guaranty?

An argument was made under a territorial statute of New Mexico similar

to our present statute that where the special findings are returned and found to be in conflict with the general verdict the court could grant a new trial, but could not set aside the verdict and render judgment on the findings, as the statute so authorizing would be in conflict with the seventh amendment to the constitution of the United States. This contention was disposed of by Mr. Justice Brewer in *Walker v. New Mexico Southern Pacific Railroad Company,* 165 U. S. 593, 41 L. Ed. 837. In the course of the opinion Justice Brewer said:

"But why should the power of the court be thus limited? If the facts as specially found compel a judgment in one way, why should not the court be permitted to apply the law to the facts as thus found? It certainly does so when a special verdict is returned. When a general verdict is returned and the court determines that the jury have either misinterpreted or misapplied the law the only remedy is the award of a new trial, because the constitutional provision forbids it to find the facts. But when the facts are found and it is obvious from the inconsistency between the facts as found and the general verdict that, in the latter, the jury have misinterpreted or misapplied the law, what constitutional mandate requires that all should be set aside and a new inquiry made of another jury? Of what significance is a question as to a specific fact? Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law? Indeed, the very thought and value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial—to end the controversy so far as the trial court is concerned upon that single response from the jury.

"We are clearly of opinion that this territorial statute does not infringe any constitutional provision and that it is within the power of the legislature of a territory to provide that on a trial of a common-law action the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such judgment as the answers to the special questions compel."

The same conclusion was reached by the supreme court of Indiana in *Udell v. Citizens State Railroad Company,* 152 Ind. 507, 71 Am. St. Rep. 336. An act of March 11, 1895, which authorized the court to render judgment on the special findings if contrary to the general verdict was challenged as being in violation of the state constitution. It was said, however, that this practice in no way invaded the province of the jury or deprived the citizens of any common-law right connected with a trial by jury. The court further said:

"In civil actions, under the constitution of this state, the jury never possessed the right to decide questions of law. Their inquiries have always been confined to matters of fact. The scope of such inquiries is not abridged by the act of March 11, 1895."

Doubtless other authorities could be found to the same effect, but this is not a brief.

The proposal to abolish the general verdict may be expected to arouse the ire of that fringe of the legal profession which displayed emotional elation when the recent case of *Dunn v. Jones* was decided.

There is no pretense of exhausting the subject in this article. Much has been written upon it. Mr. Geo. B. Clementson of the Wisconsin bar wrote a book on the subject in 1905. Attention has already been directed to the article by Professor Sunderland in the *Yale Law Journal.* The subject of special verdicts was treated by Mr. Edmund B. Morgan in the April, 1923, number of the

Yale Law Journal. A valuable article on the same subject by Mr. Leon Green, associate professor of law, Yale University, was published in the December, 1927, *American Bar Association Journal.* "The Story of Law," by Mr. John M. Zane, is a highly valuable contribution.

From these writings I have drawn freely in the preparation of this article. If it be said the historical sketch of the subject has been included as a decorative feature, let the accusation stand.

The views herein expressed are advanced in the hope that interest in this absorbing question may be stimulated.

THE PROPOSED INTEGRATION OF THE KANSAS BAR

By ROBERT C. FOULSTON

Provoked by the barrage of lay invective leveled against it, aroused by the crystallization of adverse public opinion, the bar is making strenuous efforts to wipe the libelous stains from its escutcheon. The American bar has become self-conscious. State bar associations are phrenetically devising machinery whereby they can exorcise the evil element from their membership. Many lawyers throughout the country are incensed with the notion that "the bar must purge itself." Their obsession might be likened to that of the ancient orator who climaxed every public address with the admonition "Carthage must be destroyed."

Bar integration may seem, superficially, to be an admission, on the part of the bar, of the truth of the scurrilous accusations directed against it. Therefore, before endorsing the proposed bar integration movement, the writer desires to point out that the lay opinion which is causing such volcanic disturbances within the bar is neither new nor justified.

The "juris consulti" and "juris prudentes" were the forbears of modern lawyers. They constituted a group of men who made the law their special interest. These ancient lawyers, who practiced more than twenty centuries ago, originally received no compensation for their services, and expected none.

Somewhat later, the giving and acceptance of the "honorarium," a token given in gratitude for the services rendered, became the custom. Thus, the juris consultus and his honorarium became the forerunner of the lawyer and his fee.

The right to a fee soon became burdened with the oppressive easement of criticism. In an article appearing in the November, 1935, issue of the *American Bar Association Journal,* Mr. Donald F. Bond writes interestingly to the title, "The Laws and Lawyers in English Proverbs." From what is there said, one is impressed with the fact that as early as the seventeenth century the inability of the lawyer to live without his fees was proving disastrous to his previously exalted station. Note some of the proverbs discussed by Mr. Bond:

"A goose-quill is more dangerous than a lion's claws."

"No fee, no law."

"Hell and chancery are always open."

"Little money—little law."

"Lawyers houses are built on the heads of fools."

"Agree for the law is costly."

Whether the recurring cycle of criticism and calumny heaped upon the lawyer is more vicious now than in those early days is probably undeterminable—there were then no sound decibels, no contraptions for recording noise volume. Nevertheless, the fact remains that the bar was then, as now, under fire.

The modern means of dissemination of news and the increasing demand for articles to fill the pages of magazines and columns of newspapers, are contributing factors to the present situation. The story of thousands of lawyers who daily protect the interests of their clients, many times for inadequate and frequently for no compensation, and who faithfully serve a satisfied and appreciative clientele, is not considered newsworthy. Rather, the publishers ignore the magnitudinous legal grain and publicize what little chaff their ferrets are able to discover. Not the orderly civil trial, but the sordid criminal case is sensationalized in blatant headlines. As was observed by the technicians at a recent political convention, the "noes" have greater sound value than the "ayes." So it always is with the critic.

It is little wonder that moulded public opinion depicts the lawyers as a group of highly trained thieves, expert at robbing clients, and versed in thwarting the administration of justice in the courts. Who among you has seen a cinema in which a lawyer was portrayed as honestly conducting himself toward court and client? It is said that the filming of surgical operations is done under the supervision of technicians with such a degree of success that skilled surgeons can detect no material flaw in the completed picture. Not so with the movie lawsuit.

Books symbolizing the lawyer as a crook, a shyster and a villain are widely circulated and play their part in fanning the flames of criticism and contempt. One book in particular, entitled "Take the Witness," was enthusiastically received by the public; the extent of its contribution to false public appraisal of the bench and bar is unestimable. Most pointed is the laconic review of this book by Prof. E. M. Morgan of the Harvard Law School:

"If false, a most dangerous libel upon the dead; if true, the biography of an able, attractive, but thoroughly contemptible shyster; in either case an entirely unjustified waste of good, white paper."

The attitude of the laity toward law and the lawyer is hardly subject to wholesale condemnation, since lawyers themselves are often contributing factors. To the bar itself may properly be laid the charge of condoning and even coöperating in the whispering campaign which threatens to undermine the legal profession. (By "whispering," the writer has reference to that functional, harsh lack of stridence which follows too vigorous and too long-continued shouting.) Far too few members of the bar stand ready to defend their profession against unjust criticism. Far too many public admissions are made by lawyers as to the "degraded condition" of the bar. Too frequently lawyers seemingly feel that, to maintain their own professed spotlessness, they must confess a fear that conditions are truly very bad with the law and the lawyer.

With the utter lack of reason which characterizes most mob thinking, far too many attorneys have joined laymen in the ridiculous generalization "the bar is in a disgraceful condition." We say "ridiculous" advisedly. "Laywers are dishonest" is no less an absurdity than "all animals have trunks."

In the first place, the lawyer, more than any other professional (or non-

professional) man, is an individualist. He is called upon, daily, to consult with and advise clients from every walk of life. His problems are as diverse as his clients are numerous. During his student days, he tended to think like his classmates, but thereafter he has had to act, think and decide for himself. While most merchants use very similar merchandising methods and most barbers cut hair in a rather uniform manner, no two lawyers carry on their work in the same way. Perhaps the only thing which lawyers have in common, aside from resolutions of condolence at the passing of their fellows, is their license to practice law. They remain as individualistic as their finger prints despite all efforts to classify them.

In the second place, the particular traits which the laymen profess to see in all lawyers are traits which have no connection with the professional life of the man. Characteristics of honesty, integrity and morality are characteristics which exist (or not, as the case may be) in John Jones, *the man*. Mr. Jones may decide to be a salesman, an accountant, a merchant, an artisan or an attorney. His decision will not affect the presence (or absence) in him of those virtues. The underlying hypothesis of laymen that "when law comes in, honesty flies out" is ludicrously unsound. Any given number of attorneys will contain no more (and probably, were accurate figures available, will contain less) dishonest men than the same number of laymen.

Only an unexplainable twist of fate can account for the fact that the character of the few lawyers who have failed to live up to their oath of office is attributed to the bar en masse. It is submitted that the bar is not, never has been, and never will be in a "degraded condition."

In considering the necessity and expediency of integrating the Kansas bar, the peculiarities of the local situation must be examined. What may be the condition in other states, particularly those states having great cities with the incident concentration of population, does not necessarily control the question in our state.

The writer has enjoyed an acquaintanceship with the members of the Kansas bar for more than a quarter of a century, and fears no successful contradiction by laymen to the statement that no other group of men, of equal numbers, in the state of Kansas contains a higher proportion of honest men, upright citizens and amiable gentlemen than can be found among the practicing lawyers of Kansas. Certainly in this state there is no crying need for a wholesale renovation of the bar.

Moreover, the existing method of disciplining members of the Kansas bar has been quite successful. The administration of discipline, carried on under the supervision of five of the outstanding lawyers of the state, has been conducted without fear or favor, and a review of the actual disbarments by the supreme court of the state indicates that he who would exercise the high franchise to practice law in Kansas is held to a very rigid standard in order to retain his right to so earn his livelihood.

At long last, we come now to a discussion of the proposed integration of the Kansas bar. What we have heretofore said indicates that, in our opinion, such integration is not a necessity. Nevertheless, by adopting such a plan the bar might hope to appease the laymen and thus acquire the prestige which it deserves. In addition, bar discipline must be maintained and, successful though it has been, our present method is capable of improvement. The

writer concludes that an integrated bar in Kansas will be beneficial, to lawyer and layman alike, and will be an improvement upon our present system. We favor the experiment in Kansas, not as a method of remedying a deplorable condition, but purely as a means of improving an already commendable one.

The integration of the bar carries with it reciprocal benefits and duties. Some of these may be thus noted:

(*a*) The means for the fulfillment of the obligation of the court and the bar to the discipline of members of the bar.

(*b*) Freeing the bar of suspicion, whether justified or not.

(*c*) Protection of the younger lawyers, who are the first and greatest sufferers from encroachment by lay and other agencies.

(*d*) Presenting before the courts an advocacy which coincides with set standards of conduct.

(*e*) Providing an assurance to the public of nonabuse by the members of the bar of the privileges and functions of the lawyer.

(*f*) Protection of the bar from unskilled and unauthorized invasion of the practice of the law.

(*g*) Setting up of machinery by which disputes between attorneys and clients may be amicably adjusted, and litigation over fees, which frequently results in much public calumny against the bar, can be eliminated.

(*h*) The promotion of a better understanding and fraternity among the members of the bar.

(*i*) The fostering of public confidence in the bar and respect for the courts.

The plan is not without its dangers and objections. It must be remembered that the legislature has never acceded to the repeated request made upon it to authorize the incorporation of the bar as an independent body. The well-known objections expressed by some members of the legislature in rejecting the requests of the bar are not without some merit; but where just and equitable administration of the integration program has been executed in other states, the public has accepted the benefits as fully compensatory for any objection which otherwise might be thought to obtain, and press comment has been most favorable.

The chief argument against integration of the bar is to be found in the hated word, "regimentation." In seeking to answer this objection, one finds the greatest solace and answer, if there be one, in the fact that the relationship of the bar to the public and the courts is at least quasi public, and that the practice of the law is affected with a public interest.

The means of effecting an integration of the bar has been the subject of much review. This article will not be expanded by a discussion of the many judicial decisions upon the question of the power of the court to provide for integration of the bar by rule of court. In passing, it may be helpful to note a few decisions of our own supreme court.

In 1909, in the matter of the disbarment of Anthony P. Wilson *et al.*, 79 Kan. 450, 100 Pac. 75, our court used the following language:

"It is said that the courts are not the curators of the morals of the bar, and it is probably true that the courts should not take cognizance of a solitary immoral act of a member of the bar, not amounting to crime and unconnected with his duties in court. It is, however, one of the requisites for admission to the practice that the candidate should present evidence to the court that he is

a person of good moral character, and it would be a great stigma upon an honorable profession if the members of it were powerless to purge it of any who have been improvidently received into its fold and whose after life is offensively corrupt or whose business transactions, even outside of the courts are characterized by dishonesty; in short that the profession is compelled to harbor all persons, who gained admission to it and are fortunate enough to keep out of jail or the penitentiary.

"This court, at least, is not prepared to say that persons of such a character have a legal right to officiate as advocates of rights in our courts, which ought to be, and generally are, temples of justice. This ground of disbarment may not be included in any of the causes therefore specified by the statute, *but the court has inherent power to require of its officers at least common honesty and decency.*"

The severity with which our supreme court, without relying upon the necessity of statutory edict, has exercised its inherent power over the discipline of attorneys, is well illustrated by the case of *The State of Kansas v. Roy Bieber,* 121 Kan. 536, 247 Pac. 875 (1926).

In the matter of the inherent power of the court over the unlawful practice of the law, our court has already expressed itself at some length in the case of *Depew v. The Wichita Credit Association,* 141 Kan. 481, 42 P. 2d 214 (1935). The following excerpt from this decision, contained in the specially concurring decision of Mister Justice Burch, with the concurrence of Justices Harvey and Dawson, is pertinent and enlightening:

"My view, however, is that in essence and substance this is not an action at all. Under the fiction and form of an action between adverse parties, it is a special proceeding relating to the subject of the unlawful practice of the law.

"It would have been just as well if Mr. Depew had risen in court some morning and had asked leave to file written charges that the credit association was practicing law without a license. Leave to file being granted, the court would have caused a citation to be issued and served, and would have fixed the time to plead. If, after a hearing, the court should find the charges to be true, an order to desist would follow."

In the mention of these decisions there has been no effort to exhaust the decisions of our own court upon the question of the power, inherent in the court, to control the matters affecting the practice of the law, or the discipline of the attorneys. The power of the court to make rules relating to procedure, not only for the supreme court, but also for the inferior courts, seemingly cannot be questioned. The numerous cases cited by Mr. Henry M. Dowling, of the Indianapolis bar, in an article entitled, "The Inherent Power of the Judiciary," appearing in the *"American Bar Association Journal,"* October, 1935, abundantly support the author's conclusions, in which we fully concur:

"It is said that there is enough latent atomic energy in a single glass of water, if released, to generate 200 horsepower for a whole year. There is enough inherent power in a mass of earth the size of my fist to lift the German navy from the bottom of the ocean to the highest hill in England. There is enough power in the material of a copper penny to drive the *Leviathian* from New York to Liverpool.

"So it may be said there is enough latent judicial energy in the courts of this state to generate the power which will purge and dignify the legal profession not for one year only, but for all time; enough unused potency which, if released, can drive the profession forward from a defensive attitude to one of aggressive and positive action for the public good; enough 'inherent judicial power' to raise the profession from the place of public criticism to which it

has been consigned, to that high and honorable place in public esteem which is its natural and historic birthright."

At a meeting in May, 1936, the Kansas State Bar Association unanimously adopted a resolution requesting the supreme court to formulate suitable rules for the integration of the bar; similar resolutions were passed by local associations. The Judicial Council approved the program and recommended favorably. (Justice W. W. Harvey, being a member of the supreme court, as well as chairman of the Judicial Council, did not participate in the "Conclusion Reached by The Council.")

Bar integration has proved highly successful in other states, and a fair trial of the program will undoubtedly result in much accomplishment. To quote the Poet Lowell:

"New occasions teach new duties,
Time makes ancient good uncouth;
He must upward then and onward,
Who would keep abreast of truth."

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