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Special Verdicts and Interrogatories to Jury

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tained in the first action before dismissal by notice of the second operates as an adjudication on the merits. This is within the general philosophy of Rule 41 (a). If service had never been obtained, the defendant would have suffered no harassment nor have been put to any expense. The insertion of this qualification in the Wyoming adaptation of the federal rule indicates that the framers were desirous of making improvements where they were necessary, expanding or limiting the effect of the rule as was thought best. The addition of this phrase strengthens the view that Rule 41 (a) (1) should make any second dismissal by notice prejudicial no matter by what method the first was accomplished. If the committee had thought that the rule was not definite enough in this respect, it seems reasonable to assume that they would have rephrased this part while they were in the process of redrafting and improving upon the rule. The addition of the requirement that service must have been obtained in the first action is the only addition made, however, and so indicates that it is the only requirement not stated in the federal rule that need be satisfied in order that a second dismissal by notice operate as an adjudication on the merits.¹⁶

The Rules of Civil Procedure severely limit what was formerly a plaintiff's unqualified right to dismiss an action without prejudice at any time before the cause was finally submitted to the court or jury.¹⁷ The plaintiff's right to dismiss without court order or stipulation is now restricted by Rule 41 (a) (1) to the short time before the defendant answers or moves for summary judgment. Unless the defendant will stipulate to voluntary dismissal, the plaintiff can dismiss without prejudice only once. Dismissal of an action for the second time should operate as an adjudication on the merits regardless of whether the first dismissal was by notice or by stipulation, and without regard to whether the defendants were the same in both actions. Rule 41 will prevent plaintiffs from harassing defendants and causing them undue expense in the preparation and trial of actions that, under the code, could have been dismissed before they were decided.

PETER J. MULVANEY

SPECIAL VERDICTS AND INTERROGATORIES TO JURY

Practice and procedure under Rule 49, Federal Rules of Civil Procedure, from which the corresponding Wyoming rule was taken, has been well established since its adoption in 1938. This note is therefore restricted to a brief historical discussion of Federal Rule 49 and practice under the

16. If the committee had wanted to make the rule applicable to actions against the same defendant only, it could have phrased it thus: A notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action *against the same defendant* in which service was obtained, based on including the same claim.
17. Wyo. Comp. Stat. § 3-3505 (1945): An action may be dismissed without prejudice to future action: (1) By the plaintiff, before the final submission of the cause. . . . For a comparison of the new procedural rule and the superseded statute, see note, 6 Wyo. L.J. 296 (1952).

former Wyoming statutes, with emphasis on the procedural changes in Wyoming which the adoption of Rule 49 is expected to effect.

There is a clear distinction between the practice of requiring the jury to render a special verdict under Rule 49 (a) and that of submitting the case to the jury for a general verdict accompanied by written interrogatories, under Rule 49 (b). A special verdict is in lieu of a general verdict, and grew out of the common law practice of having juries state the bare facts in cases involving difficult matters of law. The advice of the court was then sought and the court decided the whole matter for one party or the other by applying the law to the jury's factual determinations.¹ A general verdict accompanied by special interrogatories, on the other hand, is a check on the accuracy of the jury's application of the law in arriving at a general verdict. This practice grew out of the common law custom of requiring the jury to account to the judge for its reasons in reaching an unexpected verdict.²

Some legal writers praise the practice codified in the rule, while others severely condemn it. Strong advocates of curbing the jury's arbitrary power to render a general verdict based on personal prejudice or sympathy would adhere to the strict practice of requiring special verdicts only in all civil cases,³ while the more temperate view favors the general verdict accompanied by answers to special interrogatories as a check on the legal accuracy of the jury.⁴ Those who favor the general verdict assert that the special verdict hinders the rendition of substantial justice because it defeats the jury's power to temper the often harsh rules of law.⁵ They have criticized interrogatories as devices to confuse the jury and frustrate the general verdict, since interrogatories are often phrased in such a fashion as to increase the probability of fatal inconsistencies.

Prior to the adoption of Rule 49 (a) in Wyoming, seeking a special verdict under the statute⁶ might have proven a dangerous practice because of the general rule that a special verdict must contain a finding on all material issues necessary to support judgment. If any issue essential to the cause of action or defense were omitted, the verdict would be defective, and judgment could not be entered. The reasoning of the general rule formerly followed in Wyoming⁷ was that if all material issues were not determined by the jury, then the right to jury trial would be abridged, whether the omitted issue had been disputed in court or not.⁸

Rule 49 (a) effectively disposes of the precarious result formerly reached by providing that if the court omits in its written questions any

1. Blackstone, as quoted in Stanton, *The Special Verdict as an Aid to the Jury in Civil Cases*, 16 A.B.A. Jour. 192 (1930).
2. Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 Yale L.J. 296 (1926).
3. Lipscomb, *Special Verdicts Under the Federal Rules*, 25 Wash. U.L.Q. 185 (1940).
4. Moore's *Federal Rules and Official Forms* 232 (1956).
5. 2 Barron & Holtzoff, *Federal Practice and Procedure*, Rules Edition 737 (1950 ed.).
6. Wyo. Comp. Stat. §§ 3-2418 and 3-2419 (1945).
7. *Chicago, B.&Q.R.R. v. Tolman*, 31 Wyo. 175, 224 Pac. 671 (1924).
8. *Hodges v. Easton*, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169 (1882).

issue of fact, each party waives jury trial on that issue unless a timely demand is made for its inclusion. The court may then make a finding on the omitted issue, or if it fails to do so, it is conclusively presumed that a finding has been made which supports the judgment rendered.

Since the wording of Rule 49(a) is permissive,⁹ a special verdict has not been granted as a matter of right in the federal courts¹⁰ nor in Wyoming under the former statute.¹¹ There is considerable authority in this state supporting the wide latitude of the judge in declining such requests¹² or in modifying those offered by counsel¹³ under the then existing statute. The reason for not permitting special verdicts as a matter of right appears to be that the trial judge's decision to grant or deny such requests is based on his unique reaction to oral testimony and impressions of the evidence which cannot be feasibly reviewed on appeal.¹⁴

Rule 49(b) concerns the practice of submitting special questions on vital issues of the case to accompany a charge for a general verdict. This has been the favored practice in Wyoming under the former statute.¹⁵ The questions submitted to the jury need not be all inclusive because the general verdict presupposes a finding on all facts necessary to the cause of action. Speaking of special interrogatories, Chief Justice Potter in the case of *Wallace v. Skinner* stated:

The object of the practice permitted by the statute is not that the court may ascertain whether the jury has correctly found any fact or facts to exist, for a determination of the facts is within the sole province of the jury, nor is it the purpose of the statute that the jury may, by submission of interrogatories, be cross-examined respecting their conclusions upon any particular fact arising in the case. But as above suggested, the manifest design is, in general, that it may be ascertained from the special findings, whether the jury, by its verdict has correctly applied the law to the facts found, and render judgment accordingly, whenever the special finding of fact is found to be inconsistent with the general verdict.¹⁶

Under the wording of the former statute,¹⁷ if answers to interrogatories were consistent with each other but one or more were inconsistent with the general verdict, a motion could be made, apparently as a matter of right, to enter judgment on the special findings, notwithstanding the general verdict,¹⁸ although under certain circumstances a new trial might

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9. "The court may require the jury to return only a special verdict. . . ."
10. *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54 (2d Cir. 1948).
11. *Wyo. Comp. Stat. § 3-2419* (1945).
12. *Equitable Life Assur. Soc. v. Bratiot*, 45 Wyo. 1, 14 P.2d 438 (1932); *Optiz v. Newcastle*, 35 Wyo. 358, 249 Pac. 799 (1926); *Wyoming Cent. Irr. Co. v. Laporte*, 26 Wyo. 249, 182 Pac. 485 (1919); *Wallace v. Skinner*, 15 Wyo. 233, 88 Pac. 221 (1906).
13. *Northwest States Utilities Co. v. Brouillette*, 51 Wyo. 132, 65 P.2d 223 (1937).
14. *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54 (2d Cir. 1948).
15. *Wyo. Comp. Stat. § 3-2419* (1945).
16. 15 Wyo. 233, 257, 88 Pac. 221, 227 (1907).
17. *Wyo. Comp. Stat. § 3-2420* (1945).
18. *Chicago B.&Q.R.R. v. Morris*, 16 Wyo. 308, 320, 93 Pac. 664, 667 (1908): "The right to a judgment upon the special finding of facts . . . is limited to those cases where there is an inconsistency between the special finding and the general verdict." *Cramer v. Munkers*, 14 Wyo. 234, 244, 83 Pac. 374, 376 (1905): "A special finding will control as against a general finding when they are in conflict. . . ."

be granted.¹⁹ In federal courts prior to the promulgation of Rule 49 (b) the conflict was resolved in favor of the special answers.²⁰ Rule 49 (b) has enlarged on this practice for the court may “. . . return the jury for further consideration of its answers and verdict or may order a new trial.” This is a significant change, for the court is not obliged to enter judgment on the special answer if it feels that the jury has misapprehended the legal interpretation of their answers or made a mistake in expression.

If the answers are inconsistent with each other, one supporting the general verdict and the other contrary to it, a different result can be expected under Rule 49 (b) than was reached by applying the former statute²¹ under similar circumstances. In Wyoming, the case of *Cramer v. Munkrez*²² interpreted that statute as meaning that if two or more answers conflict with each other, the one which supported the general verdict must control. Rule 49 (b), however, states that:

When 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.

Judge Frank has questioned the value of jury trial in the case of *Skidmore v. Baltimore & O.R.R.*²³ While recognizing that the trial judge has “full and uncontrolled discretion” to grant or deny special verdicts and general verdicts accompanied by interrogatories, he has intimated that Rule 49 should be amended to make these procedures mandatory in civil cases. James W. Moore, on the other hand, approves of the trial court’s uncontrolled discretion, stating:

Nor do we believe that trial judges are well advised to take special verdicts in many jury cases. The motion that issues of “fact” are easily framed is unsound. . . . And the jury is not, nor should not become, a scientific fact finding body . . . if there is sufficient evidence to get by a motion for directed verdict, then the problem is usually best solved by an overall, common judgment of jurors. . . .”²⁴

It is the opinion of the writer that special verdicts and general verdicts accompanied by answers to interrogatories are useful devices, the former in complex and technical cases, the latter when the trial judge feels that the reasoning process of the jury should be checked against its general finding, as, for example, where emotional or sentimental appeal has been exploited at the trial. As long as the trial judge has unrestricted discretion in the matter, neither procedure is likely to become a means of deliberately misleading or confusing the jury, for it is felt that the trial judge recognizes the limitation of jurors’ knowledge in matters of law, thereby denying or modifying submitted instructions accordingly. **ROBERT A. HUFSMITH**

19. *Wyo. Coal Mining Co. v. Stanko*, 22 Wyo. 110, 127, 135 Pac. 1090, 1093 (1913): “On a consideration of the entire record, we are of the opinion that the motion was properly denied, but that the court should have set aside the verdict, and granted a new trial.”

20. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934).

21. *Wyo. Comp. Stat.* § 3-2420 (1945).

22. 14 Wyo. 234, 83 Pac. 374 (1905).

23. 167 F.2d 54 (2d Cir. 1948).

24. *Moore’s Federal Rules and Official Forms* 232 (1956).