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Special Verdicts

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curbing and forceful nature and resort to more enlightenment of the individual. If we cannot prove the superiority of our government over that for which the radical strives, except by force, we are admitting a weakness of our government. Let us not wait until this radicalism becomes a severe menace. To spread knowledge of our traditions, ideals and customs would appear to be the duty of every true American. Anyone can hurl vituperations and epithets, everyone can laud an effect, but it takes a real big, broad, high-minded American to eliminate the cause which underlies the effect. What are you doing? Where do you stand?

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SPECIAL VERDICTS.

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It is the settled rule of law in this State, that "it is reversible error for the trial Court by instruction to the jury to inform the jury expressly or by necessary implication of the effect of an answer or answers to a question or questions of a special verdict upon the ultimate right of either party litigant to recover, or upon the ultimate liability of either party litigant." *Banderob vs. Wis. Cent. R. Co.,* 133 Wis. 249.

The purpose of this article is to inquire into the soundness of this rule.

It will be admitted that the purpose of the trial of a case is to ascertain the truth, to the end that justice may prevail. Is the information given by the court to the jury of the effect of an answer or answers to a question or questions of a special verdict, upon the ultimate right of either party litigant to recover, inimical to justice? If it is, then it is due either to the fact that such information is bad in itself, or to the fact that the jury is less honest than the court. If such knowledge is bad in itself, it follows that the source of the knowledge is immaterial. Whether the jury possessed the knowledge before they were impaneled, or acquired it during trial from an intelligent juror, or from the attorneys, or from the court, will make no difference in the result. In other words, the answers of the jury to the questions will not be different because of the source of their information. If the knowl-

edge of the effect of their answers upon the ultimate liability of either party litigant to recover is repugnant to justice, then the desideratum is a jury so ignorant that they cannot comprehend the effect of their answers upon the final result.

Dismissing from consideration the possibility of getting, in this day and age, such a jury, the aim, at least, should be to procure such a jury if possible. It follows, that on the voire dire, the jury should be interrogated both as to their education and judgment, as well as to their prejudices and bias. Only the ignorant and unprejudiced should be permitted to serve.

Again, if knowledge of the effect of their answers upon the right of either party litigant to recover is intrinsically bad, why is not such knowledge on the part of the judge equally bad in a case tried by the court? The court, trying a case involving questions of fact, uses the same processes of reasoning and deduction that a layman does. So far as is generally known, the Lord has not endowed him with additional faculties.

Supporters of this theory reply: "It has often been demonstrated in the trial of causes, that the non-expert juryman is more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias, or prejudice." *Ryan v. Rockford Insurance Co.*, 77 Wis. 611. This brings us to the consideration of the second phase of the inquiry, namely: Is the jury less honest than the court?

The court's saying that the non-expert juryman is more liable than the judge to be led away from the material issues by sympathy, bias, or prejudice, smacks of one of the parties acting as judge in his own case, and has no greater force than the jury's saying that the court is more liable than the jury to be influenced by sympathy, prejudice or bias. Neither the court nor the jury is competent or authorized to determine who is the more susceptible, and the declaration of either to be binding, requires legislative enactment. No honest judge will contend that he is without sympathies, prejudices, or biases. Like the Pharisee of old, he may flatter himself that he is not like the layman and is able to rise above them; but if "flattery corrupts both the receiver and the giver," as Edmund Burke says, he is doubly corrupted and no one is deceived. His sympathies, prejudices, and biases may not be the same as the non-expert juryman's, but he possesses them just the same. The non-expert juryman may be prejudiced

against corporations and the court may be prejudiced in their favor, or the reverse may be true. There is a way provided for ascertaining the jury's predilections, but not the court's. If the non-expert juryman, on his voire dire, swears that he is not so prejudiced, it is with poor taste and without legal authority, as a reference to the constitution and statutes will disclose, for the court to discount his statement for any purpose of the trial. What is really meant is that the jury are not as honest as the court, and for that reason, the court is justified in putting blinders on the jury for fear they might see what is going on on the side. By the court, deprived of their full vision on the one hand and denied the light necessary to visualize the end of their labors on the other hand, the jury is expected to return a consistent verdict. If they do not, the defendant winks the eye nearest his "experienced lawyer," while Justice weeps and walks out of her own temple.

With the statement: "The non-expert juryman is more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance," I take no issue. The non-expert juryman is more liable to be led away from the material issues of fact by collateral circumstances of little or no signifiance, but it is not because of his sympathy, prejudice, or bias, but because of his ignorance. If he possessed the knowledge of the experienced lawyer or judge he would be no different than either, and the remedy is not to keep information from him, but to enlighten him to the fullest extent possible; not to curtail his vision, but to extend it; not to make him fearful to take a step, but to be a lamp to his feet—in a word, to treat him as a co-laborer in the temple of justice. This cannot be done by assuming him to be an inferior and unworthy of full confidence. Nor can it be done by commenting on the facts or by couching information in language intended to conceal from the jury the effect of their answers upon the final result. It is because the jury are non-expert and not because they are more prone than the court to sympathy, prejudice, or bias that the issues are split up into simple questions.

What is more, if knowledge of the effect of the jury's answers upon the final result is repugnant to justice, how can the instruction to the jury on a general verdict, as now given, be justified? In the case of a general verdict it is held not only to be proper,

but necessary to charge, that "the plaintiff cannot recover unless the defendant has been guilty of negligence (defining it) which was the proximate cause (defining it) of the injury to the plaintiff; nor unless the plaintiff has been free from contributory negligence." Such a charge does expressly inform the jury how to decide in case they wish their sympathy, prejudice, or bias to determine their judgment. *Banderob vs. Wis. Cent. R. Co.,* 133 Wis. 249.

Who has decided that the layman is more liable than the experienced lawyer or judge to be influenced by his sympathy, prejudice, or bias? This is a government of the people. Have the people so decided? If so, let someone tell when and where. Did their representatives? Examine the statutes pertaining to special verdicts. (Statutes 1856, chapter 120, section 171, R. S.; 1858, chapter 132, section II; 1874, chapter 194, section I; 1875, chapter 21; 1878, section 2858; 1899, chapter 2858; 1898, section 2858; 1903, chapter 390, section I; supplement 1906, section 2858; 1907, chapter 118; 1917, chapter 128, section 2858.)

None of these enactments are subject to that interpretation. In the case of *Ryan vs. The Rockford Insurance Company,* 77 Wis. 611, which Justice Timlin, in the case of *Banderob vs. Wis. Cent. R. Co.,* 133 Wis. 249, designates "the earliest case," the court correctly says: "The purpose of submitting particular controverted questions of fact is to secure a direct answer free from any bias or prejudice in favor or against either party. It is a wise provision in certain cases when properly administered." Then the court proceeds to say, that "it has often been demonstrated in the trial of causes that the non-expert juryman is more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias, or prejudice," without disclosing who determined the same, or who passed upon the success of the demonstration, or who authorized and empowered the court to read into the special verdict statute a statement that the sympathies, prejudices, and biases of the layman are more inimical to justice than the court's, or that the jury are less honest than the court.

Why one possessing a knowledge of the technicalities of the law, is held to be more free from prejudices, sympathies, or biases or to be more honest than one educated in any other profession or calling, in the light of the statement of Chief Justice

Winslow, that "we have enough and to spare of lawyers who regard the practice of law merely as a business and who are striving simply to circumvent the law in the interest of the client," is not explained. Neither is it explained how the appointment by the Governor, or the election by the people, to the bench, of the self-seeking aspirant for judicial honors, is able to miraculously change over night one, who in practice strove "to circumvent the law in the interest of the client" into such a paragon of perfection, that he would burst with pent up virtue if he did not, like a frog on his pedestal in the swamp, belch forth that sublime American principle, that the layman, regardless of his ability, education, or moral training, is more liable than the "experienced lawyer or judge" to do injustice to his fellow man. Nor is it explained why Justice Lyon, in the case of *Haley vs. Jump River L. Co.,* 81 Wis., 412, was warranted in saying, that "the trial court should see to it that the right to a special verdict is not used to entrap the jury into error, as it sometimes is by defendants in desperate or doubtful cases." The development of one faculty does not necessarily imply the development of any other, but often the weakening of the others. Honesty is inherent in man and is strengthened and developed by use and by moral training, not by the development of the other faculties.

There is not a lawyer in the state whose trial work has extended over a number of years who cannot recount numbers of instances where justice has miscarried because of the judicial emasculation of the special verdict statute. I desire to give one which is typical of hundreds. A bank in a certain city in this state, in the course of its construction of a new building, placed its building materials on the sidewalk so as to completely obstruct passage and so high that a pedestrian could not see over it. Just as the plaintiff, an old man, stepped off the walk into the street to go around the obstruction, he was struck by an approaching automobile, breaking his leg and otherwise severely injuring him. The usual questions were submitted and the usual charge given. In a short time the jury agreed on their verdict, finding the defendant guilty of negligence and the plaintiff free from contributory negligence, and awarding plaintiff substantial damages. Just as they were about to return their verdict into court, one of the jurors suggested that inasmuch as finding the defendant guilty of negligence might injure the standing of the defendant in the community and thus hurt his business, they ought to apportion

the negligence. Thereupon they changed the answer to the question of contributory negligence, finding the plaintiff guilty thereof. While it is true it was sympathy that determined that action, it is also true that had the jury been informed that if they found the plaintiff guilty of contributory negligence, no liability would attach to the defendant, they would not have changed their answer and plaintiff would have recovered. Denied by the court of what he was entitled to, is it any wonder that the plaintiff, his friends and many persons familiar with the facts now feel that the function of the court is to safeguard property regardless of the rights of the individual, especially if he be poor? Is it any wonder that many of the toilers of our nation are suspicious of our courts and are directing their efforts to the securing of soviet government for their protection?

The special verdict statute, as enacted by the legislature, was not intended to control either the sympathies, prejudices, or biases of the jury or of the court. Neither was it enacted to abridge, in a trial where special questions are submitted, the prerogatives exercised by the jury in a trial of a case on general verdict. It was enacted for the sole purpose of splitting up the issues into simple questions so as to simplify the work of the jury.

Judicial interpretation and construction are responsible for the present rule of law and its concomitant miscarriages of justice. Inasmuch as our courts persist in adhering to said rule, legislative enactment is necessary to effect a change.