

A BRIEF HISTORY OF SPECIAL VERDICTS AND SPECIAL INTERROGATORIES

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I

SPECIAL VERDICTS

When battle and inquest were introduced into England by the Normans as modes of proof, they took their places beside the Anglo-Saxon ordeal and wager of law as methods of determining disputes between litigants. The functions of the court with reference to the inquest were identical with its functions with respect to the ordeal or battle, namely, to decide whether it was a permitted means of proof and to supervise its performance. The issues submitted to the older forms of trial frequently, if not usually, involved mixed conclusions of law and fact. Naturally the inquiries put to the inquest were of a similar character.¹ There was no thought of separating questions of law from questions of fact. Thus, the grand assize in a writ of right was asked to say whether the demandant or the tenant had the greater right in the land, services, or other thing involved. In the assize of novel disseisin, the jurors who formed the petty assize were called upon to determine whether A had disseised B unjustly and without judgment. In the assize of mort d'ancestor, they were required to tell whether A was seised of certain land on the day of his death and whether B was his next heir. The answer given by ordeal, battle, or wager of law was final, for it was dictated by the supernatural. While there seems to have been a tendency at first to accord the same finality to the answer given by the inquest,² yet it was early perceived that, as the work of mere man, it was liable to error, and that it should be subject to correction.

¹ In this connection it must be remembered that among the Anglo-Saxons as well as among the other Germanic peoples, the court consisted of the body of suitors. It had a presiding officer, but he was not a judge. From the body of suitors there were frequently chosen certain of the best men to represent them in determining upon the judgment. They were not judges in the sense that they were skilled in the law, nor did they perform the functions of our modern judges, though they were called *judices*. Neither were they jurors. The royal officers of the Norman period, who pronounce judgment upon the verdict of the inquest, are called *justicii* or *justiciarii*, not *judices*. See Laughlin, *Anglo-Saxon Legal Procedure*, in *Essays in Anglo-Saxon Law* (1876) 183, 289.

² Holdsworth, *History of English Law* (1909) 474; Thayer, *Preliminary Treatise on Evidence* (1898) 141.

The means of correction was the attaint.³ The false verdict was undone and the jurors were severely punished for rendering it. Nor did it excuse them that their mistake was based upon a misconception of a nice point of law. For example, in the assize of novel disseisin brought by Martin de Bella Fago against Hugo de Rikingehale and Roger de Burs,⁴ it appeared that Martin was the surviving second husband of Gyla and Hugo was her son by her first husband. When the justices who held the assize were ordered to make a record of the proceeding,⁵ they reported that they had duly held the assize, that the jurors had said in so many words that Hugo and Roger had not disseised Martin of any free tenement of his, and that it was therefore adjudged that Hugo and Roger go quit and Martin be in mercy. The report of the case continues:

"And upon this comes Martin and fully admits that record but says that the jurors swore falsely because said Martin held all that tenement with Gyla his wife, mother of said Hugo, as the inheritance of said Gyla, and that she had sons by him, and, therefore, according to the custom of the realm, he ought to have that land during his whole life; and hence he says they swore falsely. And Hugo and Roger fully acknowledge that Martin and Gyla had sons just as Martin says. And all the jurors come and fully concede what has been recorded, and, therefore, all the jurors are convicted of a false oath, because Martin, according to the custom of the realm ought to hold those tenements during his whole life. And it is adjudged that Martin recover his seisin of that tenement in the condition in which it was on the day on which the assize was taken. And Hugo and Roger be in mercy and let them answer to Martin for his damages, and the jurors are committed to jail."

Afterwards the jurors settled with the King by paying fifty marks, a penalty for not knowing that a second husband was entitled to curtesy

³ For a history of attaint, see Thayer, *op. cit. supra* note 2, 140 *et seq.* Its origin is obscure. It seems that provision was made for punishing those who rendered a false verdict or false judgment before it was conceived that the verdict or judgment could be set aside. Thus, there was no attaint of a grand assize and its finding was final, but the jurors were punishable for a false finding. The usual method of attainting a jury was by verdict of another jury of greater number whose members were of higher rank than the original jurors. This was not, however, the only means, for they might be attainted upon their own answers upon a later examination. *Robert Waspail v. William Hamoson* (1231) Bracton's Note Book (Maitland's ed. 1887. All references to Bracton's Note Book, in this article, are to this edition.) case 530; *Lambert Lambertson v. Joelanus de Bradehus* (1236) *ibid.* case 1209; *Richard de Bulteldesdon v. John de Wllemers* (1256) Northumberland Assize Rolls (in 88 Publications of Surtees Society, 1890. References to the Northumberland Assize Rolls in this article are to this publication.) 21. Or upon confession by the party in whose favor they found, that the verdict was false. *Margaret de Gernesmue v. Osbert de Herlinge feuld* (1227) Bracton's Note Book, case 1895.

⁴ (1224) Bracton's Note Book, case 917.

⁵ This was a method of review. The justices, the jurors and the winning party were required to appear.

in his deceased wife's estate inherited from her husband, a point upon which Segrave and Bracton differed and which Maitland says was in doubt.⁶ It is not to be wondered that the jurors should seek to avoid such a result. The facts they would usually know: of the legal consequences of such facts they might well be totally ignorant. The responsibility for determining the legal relations created by the facts in a particular case they frequently attempted to avoid. Besides direct answers to the questions submitted, at least five forms of verdict are found at the end of the twelfth and during most of the thirteenth century.

(1) Direct answers followed by a statement of the facts as reasons for the answers. Thus, they say that Alice is not the next heir because she has an older sister;⁷ or that said Richard did not unjustly disseise the aforesaid Richard of common of pasture because after said William sold the wood where the cultivated land now lies, neither he nor the last mentioned Richard ever exercised common in it.⁸

(2) A statement of the facts followed by direct answers to the questions as conclusions from the statement. So, in an assize of mort d'ancestor,⁹ the jurors were asked whether Gerard le Parker was seised of certain land in demesne as of fee on the day on which he died.

They reply that Gerard gave that land to Warin and Robert, his bastard sons, to be held of Richard le Parker, and at Gerard's request, said Richard received their homage. Gerard later repented of his act and had Richard remit their homage to him, after which he granted the land again to them to be held of him and his heirs. He took their homage and put them in seisin. Later they went to serve Nicholas de Kenet and left the land in custody of Gerard, who held it in such custody until he died. After his death Warin and Robert returned and put themselves on the land so that said Richard le Parker took their homage and they have performed their services to him to the present time. "Wherefore they say that the said Gerard did not die seised as of fee but as of custody."

In like manner in an assize of novel disseisin,¹⁰ the question submitted

⁶ 2 Bracton's Note Book 705, note 3.

⁷ (1198) 1 Palgrave, *Rotuli Curiae Regis* (1835) 192.

⁸ *Richard de Keneboll v. Richard de Rybef* (1256) Northumberland Assize Rolls, 12. See also *John de Ridel v. Robert de Nevill* (1256) *ibid.* 14; *Thomas Gunnildson v. Isabella de Muschaump* (1269) *ibid.* 146; *William Ramulfson v. Albrie de Bello Campo*; (1199) 1 Palgrave, *Rotuli Curiae Regis* 403; *Henry de Pirie v. Wido de Hamstud* (1199) Staffordshire Assize Roll, in 3 Collections for History of Staffordshire (Wm. Salt Archæological Society 1882) 112; *William de Wastineis v. John Mareschall* (1227) Staffordshire Assize Roll, in 4 *ibid.* (1883) 56. Glanville in chapter 18 of book 2 recognizes the practise of the grand assize to return a special verdict on occasion.

⁹ *Richard le Parker v. Warin Gerardson* (1224) Bracton's Note Book, case 984.

¹⁰ *Adam de Bedingfeuld v. Robert le Enweise* (1230) Bracton's Note Book, case 428. See also similar cases in the thirteenth century reported in the following. 4 Collections for History of Staffordshire, *op. cit. supra* note 8, at p. 21; Bracton's

was whether Robert le Enveise and others unjustly and without judgment disseised Adam de Bedingefeuld of his free tenement.

The jurors say that Adam de Bedingefeuld, father of Adam the plaintiff, on a certain day after dinner gave that land to his son Adam in the presence of Gregory the chief lord, and said Gregory took the homage of said Adam, the son, for one outergarment which the said Adam his father gave to him, so that said Adam, the son, rendered to said Gregory one penny for arrearage of services which Adam, the father, owed to him, but the aforesaid Adam, the father, was always in seisin of that land, until he gave it to the said Robert le Enveise and to one of his (Adam's) daughters whom said Robert has in marriage, "so that said Adam (the son) never had seisin of it."

(3) A statement of facts followed by the conclusion that they cannot answer the question put. In this way the jury in an assize of mort d'ancestor¹¹ is asked whether William the father of Ranulf was seised of a certain virgate of land on the day of his death and whether Ranulf was his next heir.

• They answer that W. was so seised, but they do not know whether Ranulf is his next heir or not, because the said William had three sons and three daughters by his first wife and said Ranulf by his second wife.

Likewise, in an assize utrum,¹² the jury were required to determine whether certain land was free alms pertaining to the church of Thotintona or lay fee of William de Mortuo Mari.

They say that Sampson, who was the first parson of that church, lived full twenty-four years and held that land by the said services (that is, as alleged by William de Mortuo Mari), and Osbert, the second parson, lived full forty years and held the land by the said services, and they do not know whether or not William le Brun, the third parson, who held that land for twenty-two years, did any other service, because said William was a seneschall and kin of said John L'Estrange; and because the said church was seised of said land for so long a time and did such service to the lord, etc., the jurors do not know how to decide whether it be lay fee of said William or free alms pertaining to said church.

Again, in an assize of novel disseisin,¹³ the question was whether Wil-

Note Book, cases 318, 469, 825, 985, 1653, 1797; Northumberland Assize Rolls, 135, 175, 224; Somersetshire Pleas in 11 Somerset Record Society (1897) cases 469, 552, 569, 1433. For a similar verdict returned by an attain jury of twenty-four, see Bracton's Note Book, case 151.

¹¹ *Ranulf Williamson v. Walter Belebuche* (1194) 1 Palgrave, *Rotuli Curiae Regis*, 53.

¹² *Prioress de Campese v. William de Mortuo Mari* (1219) Bracton's Note Book, case 21.

¹³ *Richard Thurstanson v. William Luciason* (1222) Bracton's Note Book, case 1792. See also (1222) 4 Collections for History of Staffordshire, *op. cit. supra* note 8, at p. 21.

liam, son of Lucia, and Mabel his wife, and others had disseised Richard, son of Thurstan, of his free tenement in Hulmo.

The jurors say that Ranulf, the father of the aforesaid Mabel, held six acres of land *in maritagium* with his wife, and gave to the aforesaid William *in maritagium* with said Mabel one and one-half acres of land and promised them the residue after his death. But afterwards said Ranulf remained in seisin of four and a half acres of the land and held with it his daughter Ivetta, sister of the aforesaid Mabel. And at length the aforesaid Richard came and married her at the desire of said Ranulf and was with him during Ranulf's whole lifetime. When Ranulf died, the aforesaid William came and made such arrangement with the chief lord that he granted to him the aforesaid four and one half acres of land; and this was in the summer. Afterwards Richard came with his force in autumn and caused the crop to be harvested. And William with his force removed it to other land and another fee. And Richard either by night or by day carried away the grain. But afterwards at the time of sowing William came and plowed and sowed that land, and afterwards Richard came and replowed and resowed the land; and in autumn both came, and each took of the grain as much as he could; and in the third year William came and sowed all the land and carried away all the grain and the fourth year likewise; whence they say that they do not know which of them was in seisin as of free tenement, but they say positively that Ranulf died seised as of fee.

(4) A statement of facts without any reference to a direct answer to the questions submitted, as illustrated in the following: John, the son of Hugo complained that Alan, his brother, had unjustly disseised him.¹⁴ The question submitted to the jury was whether the father Hugo died seised.

The jurors said that in truth during the lifetime of Hugo a certain agreement was made between John and Alan whereby John gave to Alan twenty-eight shillings for remitting his (Alan's) right to him, and later said Hugo came and in the court of the chief lord withdrew himself from that land, so that he caused him to understand that Alan remitted his right to John, and the chief lord took homage of John and by way of relief forty shillings; and afterwards Hugo went away and was travelling through the country for two months. Later he returned home and was there for a year and more, and there he died; and they say positively that the agreement had been made between the brothers for five years before Hugo withdrew in the manner aforesaid. And questioned if Alan was present (that is, at the court of the chief lord) they say that they do not know.

Assize of mort d'ancestor.¹⁵ The jurors were asked whether William the brother of Alexander, son of Alfred, was seised in demesne as of fee on the day on which he died.

They answered that Alfred the father of said William was once seised of that land as of fee and on account of his poverty relinquished

¹⁴ (1227) Bracton's Note Book, case 1924.

¹⁵ *William Bulwinc v. Richard de la Launde* (1229) Bracton's Note Book, case 370.

it, so that Ralph de Arches, the chief lord of that fee, took it into his hands on account of failure of services. Consequently after the death of said Alfred, said William came and by the concession of the said Alexander, his elder brother, made such an arrangement with said Ralph that for three marks, which he gave him, said Ralph granted that land to him; and because the said William did not have wherewith he could pay that money, said William granted that land to a certain Osbert, one of the jurors, and to two others for the term of three years by an arrangement whereby they paid his dues of said three marks to said Ralph; and before said three years had elapsed, said William died; but always during his life said William defended and acquitted that land of the services which pertained to the chief lords from that land.

Assize of novel disseisin.¹⁶ The issue was whether William, the son of Alan, unjustly disseised John.

The jurors say that the aforesaid John, while stricken with severe illness, really gave that messuage to said William, and took his homage to this effect, that said William should find a man to go to the holy land for him, and should give him twenty marks. And when said William saw that John was approaching convalescence, he removed him from that place to another place on his (William's) own land, and when he (John) had completely recovered, he returned to his land, to wit, to said messuage, and there established himself for a long time until said William ejected him. They say, moreover, that they believe and know that it was agreed between them that if the aforesaid John should recover, he should have that messuage in peace, otherwise that the gift should be valid. And questioned if said William paid him said twenty marks, they say, no. And questioned what sort of seisin said William had, they say, none except that the gift had been made to him, and he (John) took his homage without seisin.

(5) A statement of facts with the request that the judges draw therefrom the conclusions which should constitute answers to the questions put. In an assize of novel disseisin,¹⁷ the jurors were asked to determine whether William Rainkill unjustly and without judgment disseised Ralph Francigena and his wife Matilda of certain property.

They respond that they will speak the truth of the matter, and when the truth has been spoken, let the justices decide. They then go on and tell how William had brought a writ of right against Ralph and Matilda, how they vouched Matilda's son to warranty, how he warranted to her and immediately afterwards sold the land to William for a mark of silver in the presence of Ralph and Matilda, who forbade the transaction and asserted the land to be the inheritance of Matilda and not of her son. In answer to a question, they also say the land was Matilda's and not her son's.

The same procedure was followed in the case of William de Ros against Robert de Ros,¹⁸ as is shown by the report of the proceedings

¹⁶ *John de Clenehewatona v. William Alanson* (1238) Bracton's Note Book, case 1251.

¹⁷ *Ralph Francigena v. William Rainkill* (inc. temp. reign of John) Select Civil Pleas, 3 Selden Society Publications (1889) case 179.

¹⁸ (1279) Northumberland Assize Rolls, 239.

in attain. It was alleged that the jurors had falsely sworn that said William had not been disseised because he had never been in seisin. When questioned, they declare that they said

"that a certain Robert de Ros, father of the aforesaid William on a certain Friday about the third hour, by a certain seneschal of his, John de Herlawe, put said William in seisin thereof, and said Robert at the hour of firelight on the same day died. And they said that said William peaceably retained that seisin for nine days following, until the escheators of the Lord King seised those tenements into the hand of the Lord King. And the escheators afterwards, for four marks, which the friends of said William gave them, returned back their seisin of said tenements to William, but whether said William was disseised or not, they left to the judgment of the aforesaid justices."

In criminal cases as well, the jurors frequently returned special findings, particularly where the act alleged had actually occurred, but without criminality upon the part of the accused. Thus, when Lucy of Morwinstow brought an appeal of robbery against Robert de Scaccis and others,¹⁹ in which she charged them with robbing her of a cloak, the jury say that the accused did not rob her, but that she was a hireling and was lying with a man in a garden, and the boys came and jeered her so that she left her cloak, and the boys took it and pawned it for two gallons of wine. In the appeal of murder brought against John, the son of Gudred, and others,²⁰ the jury find that the accused were not guilty of decedent's death but that he fell out of a boat by misadventure and was drowned. Again when Walter Saunc appealed Simon Oldierde for maiming and robbing him, the jurors relate in detail how Simon struck Walter, when the latter tried to kill Simon while he was preventing Walter from ravishing a certain maidservant.²¹

¹⁹ (1201) Select Pleas of Crown, 1 Selden Society Publications (1888) case 16.

²⁰ (*Inc. temp.* reign of John) *ibid.* case 81.

²¹ (1225) Bracton's Note Book, case 1084. The jurors leave no room for doubt as to the compromising position in which Walter was found: "Venit Simon cum aliis et invenit eundem Walterum super feminam illam braccis dimissis circa pedes et ipse voluit levare eum et Walterus extraxit cniplum suum et voluit occidere ipsum Simonem, et Simon cum candelabro ad defendendum se percussit eum, aliter enim mortuus esset."

The same procedure is found in numerous other criminal cases in the thirteenth and fourteenth centuries and later. See, for example, *Robert de Ferrers v. Ranulf of Batesworth* (1203) Select Pleas of Crown, *op. cit. supra* note 20, case 64 (Staffordshire Eyre. Appeal of assault and robbery); *Re Leonin and Jacob* (1221) *ibid.* case 133 (Worcestershire Eyre. For murder of John of Middleton); *Margery daughter of Aelfrie v. Reginald Aunfreyson* (1221) *ibid.* case 166 (Warwickshire Eyre. Appeal of rape); *Rex v. William Odozon and Henry Hare* (1221) *ibid.* case 170 (Shropshire Eyre. Larceny); *Geoffrey of Cooling's Case* (1313) Y. B. 6 & 7 Edw. II, in 24 Selden Society Publications (1910) 83 (Eyre of Kent. Compounding a felony); *John of S's Case* (1313) *ibid.* 150 (Eyre of Kent. Justifiable homicide. "John is remitted to gaol to await the King's grace. And afterwards he had a charter of pardon from the King."); *Queen v. Salisbury* (1553, Sessions at Salop) 1 Plow. 100; *Richard Punter's Case*

Manifestly if the jurors used any one of the last three forms above mentioned, and truthfully related the facts, they had nothing to fear.²² But if they used either of the first two forms, they ran the risk of drawing the wrong legal conclusion from a correct narrative of the facts. And this was a real risk, for if they committed such a fault, their verdict was fatuous, though not false. If they discovered their mistake before judgment, they might amend without penalty. If, however, judgment was entered upon their fatuous verdict, they were penalized for perjury, although the punishment was less severe than in the usual case.²³

When they used any one of these five forms, they cast upon the justices an added burden. This carried with it real responsibilities, for whenever the latter rendered an erroneous judgment, they were subject to penalty, as appears from the following cases.

The sheriff was ordered to cause to come before the justices, Roger the son of Osbert, Ralph de Muncy, Robert de Coleville and Michael de Bavent justiciars appointed for taking an assize mort d'ancestor between Oliver de Gladen petitionner and William Prior of Lees tenant,²⁴ concerning a half carucate of land with appurtenances in Capetona and concerning forty shillings rent with appurtenances in Capetona and Beletona, for the making of a record of that assize as it was taken before them, and on account of which said Prior complains that that assize was taken unjustly and contrary to the custom of the realm of England, and that he have the aforesaid Oliver to hear that record and the bodies of the jurors of that assize to certify, etc.

And Roger and all the other justiciars come and record that the assize of mort d'ancestor came before them to determine if Roger Gernun, brother of Oliver was seised in his demesne as of fee of a half carucate of land in Capetona and of forty shillings rent with appurtenances in Capetona and in Beletona on the day, etc., and if, etc., which land and which rent the Prior of Lees held, and he (Prior) came and vouched to warranty Ralph Gernun, eldest brother of the aforesaid Roger and Oliver, and a day was given to him for having his warranty; and they took that assize by default, and the jurors said that the aforesaid Roger died seised of said land and rent as of fee and after the term, and that the aforesaid Oliver was his next heir, and therefore it was adjudged that Oliver recover his seisin and the Prior in mercy.

(1555, K. B.) Ben. & Dal. 47; *King v. Morgan* (1610, K. B.) 1 Bulst. 84, 87; *Rex v. MacKalley* (1611, All the Judges of England and Barons of the Exchequer) 9 Coke, 65a, 69a; Ann Davis' Case (1664, Newgate Gaol Delivery) Kel. J. 32; *John Grey's Case* (1666, Old Bailey Gaol Delivery) *ibid.* 64; *Rex v. Messenger* (1668, Old Bailey Sessions) *ibid.* 70, 72; *Rex v. Plummer* (1701, Kent Assizes) *ibid.* 109; *Reg. v. Mawbridge* (1706, Q. B.) *ibid.* 119; *Rex v. M'Daniel* (1755, Old Bailey Sessions) Foster, 121.

²² Of course, if they stated the facts incorrectly, they were subject to attain. See Bracton's Note Book, case 1941, which is a proceeding in attain upon the special verdict returned in *ibid.* case 1911.

²³ Bracton, *De Legibus et Consuetudinibus Angliae* (inc. temp. probably about 1256) ff. 289b, 290.

²⁴ (1231) Bracton's Note Book, case 564.

And the jurors, questioned whether such is the record, say that in truth that assize came to determine as has been said, but because the aforesaid Oliver had a certain elder brother, Ralph by name, who was still alive, they doubted whether or not said Oliver was the next heir, because they said that at one time before the itinerant justices said Ralph arramed the assize of mort d'ancestor concerning the death of the aforesaid Roger with regard to the aforesaid land and rent against the said Prior, who concerning said land and rent vouched to warranty Osbert de Gladefen, father of the aforesaid Ralph, who when summoned to warrant, before he had warranted betook himself to the religious life, and afterward the assize was taken at Westminster, and there said Prior showed how said Osbert betook himself to religion and said that Ralph, son and heir of said Osbert, who had arramed said assize against him, ought to warrant that land to him through the charter of his father, so that through the response of said Ralph it was adjudged at Westminster that said Ralph ought to warrant to him, and so the assize remained; wherefore and for these reasons said jurors hesitated to say whether said Oliver was next heir of said Roger or not. And Oliver, questioned whether this was so, did not deny it.

And the said justiciars at first denied this and afterwards admitted that the said jurors had said that the said Oliver had a certain elder brother.

And the Prior says that such is the record except that when he had vouched the aforesaid Ralph to warranty and had sought aid of the court and for having aid of the court had offered five marks, he was unable to get (aid) or to be heard. And the justiciars deny this and say that Ralph Gernun offered the Lord King one hawk for postponing judgment of that assize.

And because the justiciars admit that the jurors said that the aforesaid Oliver had a certain elder brother, Ralph by name, and in this acquitted the said jurors and said justiciars gave judgment that Oliver was the next heir because said Ralph could not be lord and heir, and this, to wit, being both lord and heir, looks to the right and not to possession or assize of mort d'ancestor, it is adjudged that the said justiciars erred in making that judgment and made a false judgment, and therefore the justiciars are in mercy and the jurors go without day, and Oliver is in mercy, and the Prior has recovered his seisin.²⁵

The itinerant justices were ordered to make a record in what manner and for what cause, Peter de Aurre and John his son were hanged; wherefore the heirs of said Peter and John have complained that they

²⁵ The commentator (probably Bracton) has this marginal comment:

"Note that an assize mort d'ancestor does not lie between a younger brother, as petitioner concerning the death of his brother, and some other party when he who is lord was an older brother, although it is not possible to be lord and heir, because this pertains to the right and not to seisin, because the primer seisin pertains to the elder and therefore the assize does not lie. But when the elder has seisin, then the younger will be able to seek his seisin from the elder by the aforesaid reason, because the elder is always the next heir but the right ejects him."

Maitland explains this note thus: "Suppose a man has three sons, *A*, *B*, *C*, enfeoffs *B* and dies; the seignory descends to *A*; then *B* dies without issue; *C*, not *A*, has the best right to the land. *A*, it is true, is *propinquior heres* and so *C* cannot bring the mort d'ancestor against him or against a stranger, for here the question will be merely who is *propinquior heres*; but *A* cannot keep both the seignory and the inheritance, so *C* can recover from him in a writ of right. The justices are amerced for not understanding this." 2 Bracton's Note Book, 437.

were hanged unjustly and contrary to the custom of the realm.²⁶ And John de Briwes, and Osbert, son of William, record that a certain merchant was robbed in the County of Somerset of a certain bundle of cloth, and the merchant pursued to Southampton and there, with a serjeant of the lord King, hunted to such an extent that he found four ells of his cloth, which he positively recognized, in the house of a certain burgess. That burgess then vouched to warranty a certain tailor, who well warranted that he had delivered that cloth to him and called to warrant Ralph de Aurre, son of the aforesaid Peter, so that they went to the house of said Peter and found said Ralph; and the merchant complained against him and said that he knew no other malefactor concerning his cloth except said Ralph, and the sergeant of the Lord King took said Ralph and committed him to the custody of said Peter and John that they should stand responsible for him. Afterwards indeed said Peter and John came to Exeter and brought with them said Ralph, who, when he ought to appear before the justices, escaped to the church and kept himself there, and before the Knights sent to him by the justices he confessed that robbery, and said that he had no receiver except his father and his brother John, and said that he was unwilling to go out but wished rather to make the assize of the realm, and so he abjured the realm. And Peter and John, questioned before the justices if they had received said Ralph with the stolen goods, said Peter replied that he received him as his son. Said John said that he received him as his brother. But they did not admit receiving him feloniously nor did they positively deny it. And because twelve jurors from that hundred

In the laws of the Anglo-Saxons and other Germanic peoples, penalties are prescribed for erroneous judgments by the *judices*. On proof that the error was due to ignorance, the penalty was usually remitted. See 1 Ferd. Walter, *Corpus Juris Germanici Antiqui* (1824): at pp. 254, 255, *Legis Baiuvariorum*, tit. 2. caps. 18, 19; at p. 345, *Legis Burgundionum Additamentum Primum*, tit. 3, par. 2; at p. 434, *Legis Wisigothorum*, lib. 2, tit. 1, cap. 20. See also 1 Thorpe, *Ancient Laws and Institutes of England* (1840); at p. 267, *Laws of King Edgar*, II, 3; at p. 385, *Laws of King Cnut*, secular 15; at p. 483, *Laws of William I*, 39; at pp. 524, 536, *Leges Henrici Primi*, 13, par. 4, 34, secs. 1, 2, 3. Cf. Bracton, *op. cit. supra* note 23, f. 289: "But if he (the justiciar) has done this from ignorance or from inexperience, he shall be responsible for a kind of malice, but he shall be treated more mildly as regards the punishment on account of his inexperience."

In the wholly unreliable *Mirror of Justices* [probably written between 1285 and 1290, published in 7 Selden Society Publications (1895)] the author complains, at p. 166 *et seq.*:

"It is an abuse that justices and their officers who slay folk by false judgments are not destroyed like other homicides. And King Alfred in one year had forty-four judges hanged as homicides for their false judgments. . . .

"And as he rendered mortal rewards to criminal judges for their wrongful mortal judgments, so in the same manner for wrongful venial judgments he rendered imprisonment, and like for like as regards other punishments."

He relates in detail the instances in which the punishments were inflicted and tells how smaller penalties were inflicted for less grievous errors. Maitland demonstrates that the specifications are unblushing lies. (Introduction, p. XXVI.) But may the author's lament be taken as the basis for an inference that justices were no longer punishable for error in judicial proceedings? See 2 Pollock and Maitland, *History of English Law* (2d ed. 1899) 668, to the effect that the practice of punishing justices for such errors practically ceased during the reign of Edward I.

²⁶ (1219) Bracton's Note Book, case 67.

had witnessed that said Peter and John were of bad repute, and besides they had heard it said that the stolen property was divided on the farm of said Peter, and they did not admit receiving him feloniously or deny it, and positively confessed that they received said Ralph, as the son of Peter and the brother of John, the assembly adjudged that they should be hanged, and they were hanged accordingly.

And because it seems to the council of the King and to the justices of the bench that they were wrongfully and unjustly hanged because they were not taken with any theft or robbery, and they did not confess any robbery, and they could not rightly be condemned by the finding of the jurors, it is adjudged that their heirs be not disherisoned, and so the sheriff is ordered that he cause them to have their land, etc., and the justices in mercy. The Lord of Bath was not present when that judgment was made because at that time he was not in parts of Devon as the aforesaid know, and let the assembly be summoned, etc.

When the jurors stated the facts correctly and drew no conclusion therefrom, the entire responsibility for a proper judgment was upon the justices.²⁷ When the jurors stated the facts correctly and drew a

²⁷ It might well happen that both jurors and justices were at fault, in which event both were subject to amercement, as in *Robert Waspail v. William Hamoson* (1231) Bracton's Note Book, case 530. A translation follows:

Thomas Maudut and other justices assigned for taking the assize of novel disseisin which Robert Waspail arraigned against William, son of Hamo, and others concerning a tenement in Smalebroke, summoned to make a record of that assize, come and record that the assize came before them to determine whether Walter de Pavilly, William son of Hamo, and all the above mentioned, unjustly and without judgment disseised the aforesaid Robert of his free tenement in Smalebroke after the term, etc., and Robert Maudut and the other jurors said that the aforesaid Walter and William and all the others except Robert de Stane unjustly and without judgment disseised said Robert, and therefore it was adjudged that said Robert has recovered his seisin, and all the disseisors except the aforesaid Robert de la Stane be in mercy, and Robert Waspail in mercy for his false claim against Robert de la Stane. And the justices questioned whether they had inquired from the disseisors whether they desired to say anything against the assize said that they said nothing nor desired to say anything. And upon this comes Henry Waspail and says that the aforesaid Robert Waspail impleaded him concerning that land before the justices of the bench and that he had gone into Ireland as a messenger of the Lord King and by order of the Lord King, so that the Lord King commanded that the action between him and the aforesaid Robert be postponed for so long as he should be in his (the King's) service; and upon this the aforesaid Robert Waspail came with his force and with his armed band and ejected the men and servants of said Henry and all whom he found on that land and put himself on the land and kept himself there with his force, so that William, the son of Hamo, bailiff of said Henry, went to the justices of the bench and complained to them concerning that trespass, with the result that they ordered Walter de Ruines, then sheriff, that he go there in person and remove that force, and the sheriff sent a clerk, his deputy sheriff and several others with him, and moreover caused to be convoked four neighboring hundreds who removed that force and ejected the said Robert and restored possession to said Henry; and afterwards said Robert Waspail went to the court and secured a writ of novel disseisin, and on their oath said jurors thus gave to him seisin of that land.

And the jurors questioned whether they had thus given seisin to said Robert said they had; and questioned as to what sort of seisin he had therein said that he was

wrong conclusion therefrom, the justices were not at liberty to disregard the facts and to give judgment upon the conclusion. It was their duty to give such judgment as the facts required, and for a failure to do so they were subject to amercement.²⁸

Under these circumstances, there was little temptation on the part of the justices to encroach upon the province of the jurors. On the contrary, the evidence is clear that the contest between the justices and the jurors was not one for the enlargement of jurisdiction but for the evasion of responsibility. The efforts of the justices to compel the jurors to answer the questions submitted in so many words are manifest in the following.

in seisin as of right and of his inheritance, because a certain Osbert Waspail, predecessor of said Robert, was seised of it as of fee and right, and after him a certain Osbert his son which Osbert had a certain daughter Cecilia by name, who was under age and in wardship of Robert Waspail, chief lord and while in his wardship and under age she died; wherefore that land ought to descend to said Robert and said Robert then went to the aforesaid Robert (that is, chief lord) and offered him homage and whatever he ought of right to do to him as lord of that land, and he refused to receive his homage so that said Robert finally went over to Brittany and there secured from the justiciar orders to the sheriff that he should maintain and protect him in his lands and tenements; and when he returned to England, he came and put himself upon that land as his own right and kept himself there for eight days and took esplees and disposed of the things found thereon as his own; and therefore the jurors say that he had seisin as they adjudged it to him. And questioned whether the sheriff was present when the assize was taken, they say he was and that he said nothing about having a precept for removing said Robert and his force, nor did they know anything about it.

And because the jurors narrated of the mere right of property of said Robert and were unable to deny that said Henry had been impleaded in the court of the Lord King and that it had been ordered that he should have peace as long as he was in the service of the Lord King and that he had been ejected as related above, it is adjudged that they have sworn falsely and that Henry have his seisin and Robert Waspail be in mercy. And to judgment against justices and jurors.

And let the sheriff inquire what damages said Henry had by that disseisin and let him cause Henry to have his damages from the chattels of said Robert.

The note of the annotator (Maitland calls him "the occasional annotator") follows:

"Justly so far as the right is concerned, but unjustly because without judgment; the jurors, however, regarded the right and not the possession, and therefore they were convicted of perjury and the judges of false judgment because the oath false and the judgment false." Cf. *Reginald Fitz Sagar v. Walter de Hetfeld* (1199) 1 Palgrave, *Rotuli Curiae Regis*, 447.

²⁸ Bracton, *op. cit. supra* note 23, 290b: "But if the jurors have narrated the fact as the truth was and have afterwards concluded according to their narrative and have erred in their conclusion, their conclusion will rather have been fatuous than false when they believe such a judgment to follow such a fact. And if the justiciars have pronounced judgment according to their (that is, the jurors') finding, they make a false pronouncement, and therefore they ought not to follow their finding but would be bound to amend it by diligent examination of it. But if they know now how to judge between them, they must have recourse to a greater council." (The word translated "conclusion" is the word for "judgment.") See also *Britton* (circa 1300) bk. 4, ch. 11.

(1) In many cases the jurors relate the facts and conclude with a direct answer in so many words (*discunt praecise*).²⁹ It seems fair to assume that the record would not be so careful to note that the jurors had answered the question put *praecise* or *expresse*, unless the justices had attached considerable importance to it.

(2) Chapter 30 of the statute of Westminster II, enacted in 1285, specifically provides that "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."³⁰

(3) After the passage of the statute, the justices refused to receive any but direct answers in cases not covered by the statute. Thus, in *Adam v. B*³¹ in 1292, in a writ of entry an inquest was taken in the form of an assize. The jurors tendered special findings but, said Kave, J.: "You shall tell us if he had good and sufficient seisin or not." The assize: "Sir, we cannot of our knowledge say anything else; we pray your direction." The record continues: "And they were afterwards commanded to say if he had good seisin or not. And at last they said on their oath, that he had." Similarly in *Bishop of Carlisle v. Abbot of Dorchester*,³² the jury desired to return special findings, but Scharshulle, J. said: "You are in a *Praecipe quod reddat*, in which there ought to be an express verdict upon the mise: wherefore, does it seem to you that when he entered after the year, it was no longer his time for entering, and does it seem to you that the abbot's predecessor reouest him in such manner that he was disseised?" The jury answered, No. Again, in an anonymous case³³ in 1342, in a writ of formedon on frankmarriage, the gift was traversed, and the jury returned a special verdict to the effect that the land had been given by

²⁹ *Diana de Folkt v. Simon de Lucre* (1256) Northumberland Assize Rolls, 9; *Margery de Milburn v. Thomas de Milburn* (1269) *ibid.* 135; *William de Douglas v. Gilbert de Humframwill* (1269) *ibid.* 147; *Alan le Eyr de Houtton v. Philip de Craweden* (1279) *ibid.* 224 (*expresse* in place of *praecise*). See also the case referred to in note 4 *supra*; 2 Pollock and Maitland *op. cit. supra* note 25, 628; Tidd, *Practice* (2d Am. ed. 1807) 805.

³⁰ Britton does not refer to this statutory procedure, but *Fleta* (circa 1291) bk. 4, ch. 9, sec. 4, says: "But if difficulty or obscurity should arise, then they have necessarily to declare the truth of the matter, or a detailed narrative, and in such case if the jurors should be ignorant whether it was a manifest disseisin or not, they ought not to be compelled further, but they ought to seek the advice of the justices." The cases also show the effect of the statute, for they frequently record that the jurors prayed the aid of the justices—an expression which does not occur in the earlier reports. See, for example, *Pykerel v. De La Le* (1308-1309) Y. B. 1 & 2 Edw. II, in 17 Selden Society Publications (1903) 92; *Somery v. Buster* (1308-1309) *ibid.* 125.

³¹ (1292) Y. B. 20 & 21 Edw. I (Rolls Series) 8.

³² (1339) Y. B. 13 & 14 Edw. III (Rolls Series) 12.

³³ (1342) Y. B. 16 Edw. III (Rolls Series) II, 440.

a charter, which was shown in evidence, and that the charter asserted that the gift was made in frankmarriage to have and to hold to the donees and their heirs forever with warranty in fee simple. The court thought the verdict insufficient. The following colloquy occurred between court and counsel:

Hillary, J.: "We will not take upon ourselves to give judgment if the inquest has not given a verdict expressly on the mise."

Greene: "The justice could not obtain any other verdict."

Sharshulle, J.: "He ought to have compelled them; therefore, let inquiry be made again."

In like manner in the case of *John de B. v. T. de R.*,³⁴ the jury in an action of trespass brought in a special verdict with a prayer for aid under the statute. Hankford, J., refused to receive it and told the jury that they were not in an assize but were charged merely to say who was tenant of the freehold at the time of the alleged trespass. And Brooke³⁵ notes that as late as 1531 the Common Bench will not permit a verdict at large in a writ of entry in the nature of an assize, because it is a *praecipe quod reddat*.

Brooke expresses his astonishment at this last decision, for it is contrary to his impression that the jury was at liberty to return a special verdict upon the general issue in any case. Certainly in the latter part of the sixteenth century the only question seriously debated was whether a special verdict must be received upon a special issue; it was generally conceded that it must be received upon the general issue. Although a few cases held a special verdict improper upon a special issue,³⁶ the great weight of authority was to the contrary. In *Panel v. Moor*³⁷ and in *Dowman's Case*,³⁸ the question was thoroughly considered, and it finally became established that the jury might return a special verdict upon any issue in any case.³⁹

It seems clear, therefore, that the special verdict had its origin in the desire of the jury to avoid the responsibility of determining questions of law. In a small class of cases the right to return such a verdict was established by statute. It was extended by judicial decision to

³⁴ (1406) Y. B. 7 Henry IV, (ed. 1679) p. 11, pl. 3.

³⁵ (1531) Brooke's New Cases, par. 41, March's Translation, 187.

³⁶ *Tervillian v. Parkins* (1556, K. B.) 2 Dyer, 114a (special issue in trespass); *Jones v. Weaver* (1556, K. B.) 2 Dyer, 117b (special issue in replevin); *Fleyer v. Church* (1569, K. B.) 3 Dyer 283b (special issue in assize); Anonymous (1573, C. P.) 3 Leon. 48 ("But some serjeants at the Bar did doubt of it."); Anonymous (1555, C. P.) Ben. & Dal. 37. See also 1 Anderson, 57, CXXXIII; *ibid.* 37, XCIV; *ibid.* 128, CLXXIV.

³⁷ (1553, London Guildhall Hustings) 1 Plow. 91.

³⁸ (1586, C. P.) 9 Coke, 7b.

³⁹ In *Needler v. Bishop of Winchester* (1615, C. P.) Hob. 220, 227, reference is made to the "antient errorr that a special verdict could not be found, but upon a general issue." By this time, of course, judges were no longer personally responsible for erroneous judgments. See note 25 *supra*.

every class of case both civil and criminal. Of course, it does not follow, because the jury had a right to return a special verdict, that the judges had no right to insist upon it. The only necessary conclusion is that they had no right to compel a general verdict.

Could the court coerce the jury to return a special verdict? As might be expected, the early evidence upon this point seems meagre and indecisive. The fact that a particular justice demanded a special verdict and the jury complied with the demand would not be conclusive that he could have forced them had they declined. Nor can the demand by a particular justice followed by the refusal of the jury, demonstrate that the justice was obliged to be content with the general verdict, although in the particular case he did not press the demand. In an anonymous case⁴⁰ in 1310, in a writ of entry *sur disseisin*, the jury at first reported that they could not agree. Stanton, J., ordered them confined without food or drink until Monday. Toward evening of the same day, they reached a verdict, and Stanton gave them leave to eat. "Then on Monday the inquest came and wanted to give a verdict in gross. And Stanton, J., said that he wanted the story told. So the inquest told the story."

On the other hand, it can be safely asserted that in the twelfth and thirteenth centuries, at any rate, it was most unusual for the justices to attempt to compel a special verdict. In this connection it must be borne in mind that the latter part of chapter 30 of the statute of Westminster II provides that the jury may at their peril return a general verdict in an assize. Moreover, Littleton accepts this as the law in his *Tenures*,⁴¹ and Coke⁴² in his *Commentaries on Littleton* regards it as applicable to all cases, not confining it to the petty assizes. On the other hand, there is convincing evidence that in the fourteenth century and later the courts did insist upon special verdicts in cases of homicide where the accused was to be freed on account of self defense or misadventure. In the *Liber Assisarum* of 43 Edward III⁴³ is noted a case where the jury returned a verdict that the accused killed a man *se defendendo*; and the justices inquired in what manner. The jury then said that the decedent pursued the accused and struck him and that accused struck back and killed decedent, but they also said that the accused could have escaped by fleeing, had he wished to do so. The court adjudged the accused guilty of a felony. Staunford, writing in the middle of the sixteenth century, says specifically that it is not a sufficient verdict to say that the prisoner killed decedent *se defendendo*, but the jury must show specially how.⁴⁴ Hale a century later also states

⁴⁰ (1310) Y. B. 3 & 4 Edw. II, in 22 Selden Society Publications (1907) 188.

⁴¹ Littleton, *Tenures* (1474-1480) sec. 368.

⁴² Coke, *Littleton* (1628) sec. 368. See also Hargrave's edition (1787) 155b, note 5.

⁴³ (1369) *Liber Assisarum* 40-50 Edw. III, 274; Fitzh. Corone, 226.

⁴⁴ Staunford, *Les Pleees del Coron* (1560) bk. 1, ch. 7, f. 15a; bk. 3, ch. 9, f. 165a.

that where an accused is indicted for murder the jury may find "that he killed him *se defendendo* or *per infortunium*; but *nota* in these cases it is not sufficient generally to find it done *se defendendo* or *per infortunium*, but the special matter must be set down how it was done."⁴⁵ He also asserts that where the coroner's inquest finds murder or manslaughter and the accused is arraigned upon it and pleads not guilty, if the evidence shows that the accused did the killing in such manner as not to amount to a felony, the jury cannot find a general verdict of not guilty, but must find that the prisoner did the act and the manner of it, as in the case of a verdict *se defendendo*.⁴⁶ Mr. Justice Foster,⁴⁷ in 1762, agrees that this was the proper ancient practice in all cases of justifiable homicide, yet he asserts that by the more modern view the court may receive a general verdict of acquittal where the act does not constitute a felony, and where forfeiture of goods does not follow without a pardon. He admits that the then current practice required a special verdict in homicide by misadventure, but argues that the court might well receive a general verdict as in cases of justifiable homicide. Both Hale and Foster give reasons for requiring special verdicts, which were peculiar to the law of homicide. The killer, while not punishable for a justifiable homicide, was still guilty of the death, and must get a pardon from the King. Further, where a coroner's inquest had found murder or manslaughter, the jury acquitting the accused must name the real culprit, or in case they did not know, then some fictitious person. Obviously they could not find defendant not guilty and also name him as the slayer. Consequently, no general deduction as to the court's right to reject a general verdict can be made from these cases. At the trial of *Rex. v. Shipley*,⁴⁸ Mr. Bearcroft for the prosecution, Lord Erskine for the defense and Mr. Justice Buller, all seemed to agree that in all criminal cases the jury had the right to return a general verdict. In the debate in both houses over Fox's Libel Act⁴⁹ a deal of oratory was expended upon the right of the jury in a criminal case to determine both facts and law, but the real question argued was the right of the jury to return a general verdict in a case of criminal libel. It seemed to be agreed by all speakers, including the law lords, that the jury had such right. Chitty,

⁴⁵ 2 Hale, *Pleas of the Crown* (Wilson's ed. Dublin 1778) 302. This work was probably written prior to 1671. Gilbert Burnet, *Life and Death of Sir Matthew Hale* (ed. of 1803) 30, 54. An edition of a summary or outline of it was published in 1678. The first edition of the complete work from Lord Hale's manuscripts was published in 1736. Williams, *Memoirs of the Life, Character and Writings of Sir Matthew Hale* (1835) 267, 282.

⁴⁶ *Ibid.* 304.

⁴⁷ Foster, *Discourse on Homicide* (1762) Introd. sec. 2, and ch. IV in Foster, *Crown Cases and Discourses upon a Few Branches of the Crown Law*. (2d ed. 1776) 255, 279 *et seq.*

⁴⁸ (1783-4, Wrexham Session, Shrewsbury Assizes, and K. B.) 21 How. St. Trials 847, 935, 963.

⁴⁹ (1792) 32 Geo. III, c. 60.

writing in 1816, declares that the jury are always at liberty to return a general verdict in a criminal case; he explains that the ancient practice was to require a special verdict where a justifiable killing *prima facie* subjected the killer to forfeiture of goods, but that "now, from the humane suggestion of Mr. Justice Foster, that judges ought not to seek after forfeitures, where the mind is free from guilt . . . , it is the practise to direct the jury to acquit the prisoner."⁵⁰ And since that time it seems never to have been doubted, that the jury in a criminal case is privileged to return a general verdict.⁵¹ It, therefore, seems safe to assert that at common law the jury almost from the beginning had the right to return a general verdict in all civil cases and in most criminal cases, and that by the close of the eighteenth century it had acquired this right in all criminal cases.

II

SPECIAL INTERROGATORIES

Upon the right of the justices to require the jurors to answer questions in addition to the verdict, the early authorities are very meagre. It was common for them to interrogate jurors who tendered a special verdict and for such jurors to answer.⁵² This was frequently necessary to furnish sufficient facts upon which to base a judgment, and it would seem obvious that in such case the court could compel an answer. Naturally it was much less common to put queries to a jury which had returned a general verdict, but it was occasionally done.⁵³ However, it is by no means clear that answers could be coerced. In one case, the court seems to have acquiesced in the jury's refusal to reply. In an assize of mort d'ancestor,⁵⁴ when the jury returned the direct answer that the ancestor did not die seised, the justice said: 'Now tell us why.' The assize responded: "We were not charged further." And the report shows: "And they said no more. Therefore, to judgment." On the other hand, a striking example of the refusal of the court to be satisfied with a general verdict is found in an anonymous case of the year 1293.⁵⁵ The record is in part as follows:

⁵⁰ 1 Chitty, *Criminal Law* (1816) 637, 642, 643.

⁵¹ See 9 Hals. Laws Eng. 373; *Reg. v. Allday* (1837, Gloucester Assizes) 8 Car. & Payne 136, 140.

⁵² 2 Pollock and Maitland *op. cit. supra* note 25, 631; *Cecilia de Seton v. Roger Williamson et al.* (1279) Northumberland Assize Rolls 252, 254; *William de Polhamford v. William de Riparius* (1251) Somersetshire Pleas, *op. cit. supra* note 10, case 1427; *Alice v. Adam and Joan* (1293) Y. B. 20 & 21 Edw. I (Rolls Series) 380; *Henry de Bodreugam v. Thomas le Arcedekne* (1302) Y. B. 30 & 31 Edw. I (Rolls Series) 106; *Adam de Elerdeby v. Galfridus Maucovenant* (1304) Y. B. 32 & 33 Edw. I (Rolls Series) 505.

⁵³ *Adam de Novo Mercato v. William Comes Warenne* (1225) Bracton's Note Book, case 1685; *Alan son of Alexander de Edelyngham v. Brother Roger Bande et al.* (1279) Northumberland Assize Rolls, 263.

⁵⁴ *Fulk de Lucy's Case* (1292) Y. B. 20 & 21 Edw. I (Rolls Series) 22.

⁵⁵ (1293) Y. B. 21 & 22 Edw. I (Rolls Series) 268, 272.

"And as to D and E, they (the jurors) said that William entered as eldest son and heir of Morice and that he entered as next heir. ROUBURY, J.: 'How do you say that he was next heir?' THE ASSIZE: 'For the reason that he was born and begotten of the same father and mother, and that his father on his death-bed acknowledged him to be his son and heir.' ROUBURY, J.: 'You shall tell us in another way how he was next heir, or you shall remain shut up without eating or drinking until tomorrow morning.' And then the assize said that he was born before the solemnization of the marriage, but after the betrothal."

Roubury indicated his intention of entering judgment upon this answer rather than upon the general verdict by requiring the jury to assess the damages caused by William's entry.

Certainly no general deduction can be made from so meagre authority, for illegal control of the jury's findings by the justices was not unknown.⁵⁶ But there can be little doubt that the practise of quizzing the jury as to the grounds of its verdict persisted, though usually with a view to having the jury correct its own finding. Thus in *Bushell's Case*,⁵⁷ Mr. Chief Justice Vaughan said:

"And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the Judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they found for the plaintiff, or *è contrario*, and thereupon they rectifie their verdict."

The later English cases seem to accept without argument the view that the judge may examine the jury to ascertain the basis of its general verdict but may not without the consent of the parties and the jury charge the jury to return answers to special questions with the general verdict.⁵⁸

In the United States the submission of special interrogatories, answers to which are to accompany the general verdict, is generally recognized as proper at common law.⁵⁹ The genesis of the practice is found in the custom of the judges, adopted from England, to catechise a jury as to its reasons for an unanticipated verdict.⁶⁰ The matter is now usually governed by statute.⁶¹

⁵⁶ For a case where the itinerant justices coerced the jury into giving a false verdict, see (1228) Bracton's Note Book, case 285.

⁵⁷ (1670, C. P.) Vaughan, 135, 144. See also *Regina v. Meaney* (1862, Crown Cases Reserved) Leigh & Cave, 213, 216. "He (the judge) is not bound to receive their verdict unless they insist upon his doing so; and where they reconsider their verdict, and alter it, the second, and not the first, is really the verdict of the jury."

⁵⁸ See *Mayor v. Clark* (1835, K. B.) 3 Ad. & E. 506; *Walton v. Potter* (1841, C. P.) 3 Man. & G. 411, 433, 444.

⁵⁹ For a collection of cases see 15 Ann. Cas. 469, note.

⁶⁰ See *Walker v. New Mexico and Southern Pacific Ry.* (1897) 165 U. S. 593, 17 Sup. Ct. 421.

⁶¹ It is hoped to consider some of the modern problems touching special verdicts and special interrogatories in a later paper.