



1958

Trial Juries and the New Rules--Right to Trial by Jury

James R. Richardson
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Civil Procedure Commons](#)

Click here to let us know how access to this document benefits you.

Recommended Citation

Richardson, James R. (1958) "Trial Juries and the New Rules--Right to Trial by Jury," *Kentucky Law Journal*: Vol. 47 : Iss. 2 , Article 3.
Available at: <https://uknowledge.uky.edu/klj/vol47/iss2/3>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Trial Juries and the New Rules—Right to Trial by Jury

By JAMES R. RICHARDSON*

Trial by jury is an uniquely treasured institution in America in criminal prosecutions, and it is somewhat surprising when we consider how firmly entrenched the trial jury system is in civil actions in this country. The right to trial by jury in civil cases is guaranteed by most state constitutions and the right is freely exercised, particularly in accident litigation. In securing civil jury trials these state constitutions usually provide that "the right to trial by jury shall remain inviolate," "the right to trial by jury shall be held sacred," or "trial by jury as hitherto enjoyed shall be preserved." Kentucky, for its part, provides for jury trials in all criminal prosecutions;¹ guarantees trial by jury as at the common law in eminent domain proceedings;² and then provides for jury trials in civil actions in these words, "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."³

The phraseology of these constitutional provisions, including that of Kentucky, is ambiguous in that the right as secured is not defined and requires constructive clarification. In so clarifying, we may say that, though not expressly so stating, the phrases are generally held by the courts to refer to the right of trial by jury as it existed under the practice in the particular state or territory prior to the adoption of its first constitution.⁴ And, as a general

* Professor of Law, University of Kentucky.

¹ Ky. Const. sec. 11.

² Ky. Const. sec. 242.

³ Ky. Const. sec. 7. The "ancient mode of trial by jury" means trial by jury according to the common law. *Branham v. Comm.*, 209 Ky. 734, 273 S.W. 489 (1925). The essentials of such mode are that one be tried in a court presided over by a judge, and a jury of twelve of the vicinage, all of whom must agree on the verdict. *Jackson v. Comm.*, 221 Ky. 823, 299 S.W. 983 (1927).

⁴ *Tillery v. Commercial Nat. Bank, etc.*, 241 Ala. 653, 4 So. 2d 125 (1941); *Stephens v. Kasten*, 383 Ill. 127, 48 N.E. 2d 508 (1943); *Echlin v. Superior Court, etc.*, 13 Cal. 2d 368, 90 P. 2d 63 (1939). Note: Kentucky holds the

rule adducible from the cases, it may be concluded that the right of jury trial encompassed all of the usual or ordinary common law actions, as well as actions to establish title to real and personal property or to recover possession of such property, but not to actions in equity traditionally triable by the court.⁵ It is interesting to note that at common law the right to trial by jury was not granted to the state or to municipal corporations. Consequently, it is held that, in the absence of legislative authorization or constitutional provision, such governmental agencies, whether in the role of plaintiff or defendant, are not entitled to trial by jury as a matter of right.⁶

With reference to the requirement of jury trials in actions at law and non-jury trials in equity cases, it would be futile to attempt rationalization in the face of ancient and arbitrary tradition. It can only be observed that due to the origin and nature of equity jurisdiction, issues of both law and fact have always been determinable by the chancellor.⁷ So, in the absence of constitutional or legislative mandate it is almost universally held that cases cognizable in equity are not subject to the right of trial by jury.⁸

Evaluating the Right

We have briefly mentioned the separate common law and equity jurisdictions, each providing different remedies through different fact-finding techniques—the jury at law and the chancellor in equity. And, even the most severe critics of the trial jury must concede that the courts of chancery did not develop because of real or imaginary defects in juries as fact-finders. Rather, courts of chancery came into being through failure of the law

“ancient mode” of jury trial to be as at the common law, but the practical result is the same as in other common law jurisdictions.

⁵ Jackson v. Jackson, 255 App. Div. 812, 7 N.Y.S. 2d 407 (1938); Grantham v. Nunn, 188 N.C. 239, 124 S.E. 309 (1924). In cases of purely equitable cognizance jury trial is not a matter of right. Rieger v. Schultz, 151 Ky. 129, 151 S.W. 395 (1912).

⁶ Albright v. Douglas County, 108 Kan. 184, 194 P. 913 (1921); In re Potter, 94 Misc. 12, 158 N.Y.S. 1001 (1916).

⁷ This well known rule was subject to two exceptions at the early common law, i.e. (1) where suit was brought to divest an heir of a freehold estate of which his ancestor died seized, and (2) where questions arose as to the claimed right of the rector of a parish to tithes. The reason for the existence of these exceptions is found in the fact that the rights existed before they became cognizable by the courts of chancery and, hence, were triable by jury. Re Ordinances of Henry II, Pollock and Maitland, History of English Law (2d ed.), Vol. 1, p. 146.

⁸ Respass v. Comm. ex rel. Atty. Gen., 131 Ky. 807, 115 S.W. 1181, 21 L.R.A. (N.S.) 836 (1909).

courts to provide a remedy, or adequate remedy, in cases of need and merit—such as specific performance, injunctions and mortgage enforcement.

As has been intimated the trial jury has been both lauded as a bastion of liberty and criticized as capricious and inept. Blackstone wrote of the right to trial by jury at the common law in ecstatic phrases which have been echoed and reechoed by such noted commentators on the law as Holdsworth and Justice Story.⁹ And, certainly, the trial jury is not without noted protagonists of more recent date. In holding the trial court procedure of additur unconstitutional, Mr. Justice Sutherland made the following observation in the course of the opinion:

With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.¹⁰

These, and other, proponents of the trial jury see a competent number of sensible and upright jurymen, chosen by lot from those of the middle rank, as the best investigators of truth and the surest guardians of public justice. Further, such proponents argue the most powerful individual in the state will be cautious of committing any flagrant invasion of another's rights, when he knows that the fact of such oppression must be examined and decided by twelve indifferent men, not appointed till the hour of the trial; and that, when once the fact is ascertained, the law must of course redress it. Therefore, it is said, this procedure preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. And, every new tribunal, erected for the decision of facts, without the intervention of a jury, is a step toward establishing aristocracy, the most oppressive of absolute governments.

⁹ Wigmore, *A Program for the Trial of Jury Trial*, 12 *Am. Jud. Soc.* 166; Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12.

¹⁰ *Dimick v. Schiedt*, 293 U.S. 474, 485-486, 55 S. Ct. 296, 79 L. Ed. 603, 95 A.L.R. 1150 (1935).

Blackstone delivered just such a eulogy on the trial jury.¹¹ However, Holdsworth, who at times had lauded the trial jury, was led to write of it in these words:

They are twelve ordinary men, a group just large enough to destroy even the appearance of individual responsibility. They give no reason for their verdict, and it is apt, in times of political excitement, to reflect the popular prejudices of the day. Experience shows that they are capable of intimidation. It is said that they are always biased when a pretty woman or a railway company happen to be litigants. Though a good special jury is admitted to be a very competent tribunal, the common jury may be composed of persons who have neither the desire nor the capacity to weigh the evidence, or to arrive at a conclusion upon the facts in issue.¹²

Holdsworth, however, while attempting to point out the defects in the trial jury, was of the opinion that as a fact-finding agency it was superior to trial judges. He enumerated the following as strong points in the jury system:

1. Jurors bring common sense to bear on the facts of a case.
2. Juries set no precedents by decisions, and thus can decide cases equitably without making law.
3. Litigants are usually satisfied with jury justice.
4. Juries preserve the dignity of the bench by relieving the judge of the burden of deciding cases on his opinion alone.
5. Jurors themselves are educated by participation in the administration of justice.
6. Juries make law intelligible by applying common sense to rules of law.¹³

On the other hand, the trial jury finds its ablest and severest critic in the person of the late Judge Jerome Frank. This eminent jurist and writer makes a detailed critical analysis of the jury and, in brief, poses three theories as to how juries function, as follows:

1. *The Official Theory*. This is also described as the naive theory according to which judge and jury constitute nicely divided tribunals, neither encroaching upon the other's domain. The jury, under this theory, finds the facts and faithfully applies the law as given by the court.

¹¹ III Blackstone's Commentaries, 380.

¹² Holdsworth, A History of English Law (6th ed.) 347.

¹³ *Ibid.*, 348-350.

2. *The More Sophisticated Theory.* Herein, the jury engages in legal reasoning in applying law to facts to reach the general verdict, which is a composite of both law and fact—law which the jury thoroughly understands and intelligently applies.

3. *The Realistic Theory.* This theory is based upon what anyone can discover by questioning the average juror. Usually juries are neither able to, nor do they attempt to, apply the instructions of the court. Rather, juries are more brutally direct. They decide that they want John Jones to collect \$5,000 from the railroad company, or that they do not want pretty Nellie Brown to go to jail for killing her husband, and they bring in their general verdict accordingly. Ordinarily, to all practical intents and purposes, the judge's views on the law might just as well have never been expressed.¹⁴

Judge Frank, it will be seen from the foregoing, did not believe that the trial jury could be justified, at least in civil litigation. And, if the results do not bear him out in all cases, certainly in theory his criticism is sound. Can attorneys, trained in the intricacies of the law, justify a procedure which permits a composite body of diversified background, untrained in the law and unskilled in fact-finding, to determine complex legal rules and apply them to facts? Hardly.

Jury Problem in Uniting Law and Equity

The Kentucky Civil Rules provide that there shall be one form of action to be known as "civil action" and thus bring about a union of law and equity for procedural purposes.¹⁵ This rule uses the exact language of the Federal Rules of Civil Procedure, and Professor Moore points out some interesting possibilities with reference to this fusion of law and equity.¹⁶ As he suggests, the rule maker or legislator, subject to no restrictions, could extend the right of jury trial to all types of civil actions, or he could eliminate the jury entirely and make the judge the sole trier of the facts. He could, conceivably, abolish all equitable remedies and let suffice the legal remedies of damages and possessory judgments, such as judgments for the recovery of land and personal property. Or, the rule maker could go to the other extreme

¹⁴ Frank, *Courts on Trial*, 110-111.

¹⁵ Ky. C.R. 2.

¹⁶ Moore's *Federal Practice*, Vol. 5, p. 19.

and make equitable remedies available in any civil action. Thus, a party in breach could be made to specifically perform his contract to sell and deliver the old gray mare, or a mandatory injunction might issue for return of an ordinary rocking chair wrongfully withheld, although today, as in the past, damages is considered an adequate remedy.

That such drastic procedural reform, as suggested above, has not been accomplished indicates that the demand does not exist—at least it has not become articulate. A need and demand for reform, through simplification of pleadings and a greater utilization of pre-trial procedures, has been met. But, seemingly there was no demand or effort to restrict or enlarge the use of the jury, or to abolish or extend established equitable remedies. To the contrary, though there has been very effective criticism of the trial jury, constitutional prohibitions and general sentiment has led to the maintenance of the status quo of the jury under the new rules—this despite the union of law and equity.

Leaving the province of the jury untouched in civil actions lends credence to the prior observation that law and equity are joined for procedural purposes only. This joinder of law and equity, however, has been of real practical benefit. Different rules of practice and procedure for the two classes of action have been eliminated. And, as the Kentucky Civil Rules are modeled after the Federal Rules, the Kentucky attorney no longer has to practice under three separate and distinct sets of rules. But, as Commissioner Clay has stated, the merging of legal and equitable procedures does not obliterate the substantive distinctions between legal and equitable rights, nor fuse the differing applicable principles, nor enlarge or lessen the right to relief.¹⁷ Basically, then, the distinction between law and equity has procedural relevancy, under the new rules, only when the issue of the right to trial by jury is raised by timely demand made by one of the litigants.

Utilizing the Right

Having briefly considered the right to jury trials in civil actions and something of the nature of the right, we now propose to look directly at the provisions of the new civil rules with respect to the *status* of trial juries.

¹⁷ Clay, Kentucky Civil Rules, p. 6, sec. 2.

The rules provide that the right of trial by jury as declared by the Constitution of Kentucky or as given by a statute of Kentucky shall be preserved to the parties inviolate.¹⁸ This provision is an outright adoption of the Federal rule with the necessary substitutions of the Constitution of Kentucky and statute of Kentucky for Seventh Amendment to the Constitution and statute of the United States respectively.¹⁹ It is clear that the rule cited does not purport to either enlarge or limit the right to trial by jury as it existed prior to the adoption of the Rules.²⁰ Rather, the general purpose of the Rules was to establish a single unified practice with careful regard to the existing rights of the parties to civil jury trials. Rules 38 and 39 were designed to effectuate this purpose and, without the impairment of any substantive rights, provide an expeditious procedure whereby the mode of trial by jury or court, may be determined shortly after the issues are formulated, if not before. These rules implement constitutional guarantees with explicit provisions. Jury trial, where proper, may be had upon timely demand made, else it is waived,²¹ but, notwithstanding failure of the parties to demand a jury trial in an action where such a demand might have been made, the court may in its discretion order a jury trial of any or all issues.²² Further, in actions not triable by a jury, the court may, on its own initiative, try an issue by a jury in an advisory capacity only.²³ But, generally, equitable issues are properly for the court,²⁴ and legal issues are for the jury,²⁵ while both equitable and legal issues may appear in one action, as where equitable and legal claims are joined.²⁶

¹⁸ Ky. C.R. 38.01.

¹⁹ F.R.C.P. 38(a).

²⁰ *Bynum v. Prudential Life Ins. Co.*, E.D. S.C. (1947), 10 F.R. Serv. 38a5, 7 F.R.D. 585, 586. Issues formerly triable by a jury as of right are still so triable, and issues formerly triable by the court are still triable by the court. A litigant is entitled to a jury trial only upon those common law matters as to which a jury trial existed in 1791. C.R. 2, 39.01, 43.04; *Johnson v. Holbrook*, 302 S.W. 2d 608 (Ky. 1957).

²¹ Ky. C.R. 38.02, 38.04.

²² Ky. C.R. 39.02.

²³ Ky. C.R. 39.03. Estoppel is an equitable defense triable by the court, but the chancellor may exercise discretion in calling on the services of an advisory jury. *McDonald v. Burke*, 288 S.W. 2d 363 (Ky. 1956).

²⁴ Ky. C.R. 39.02.

²⁵ Ky. C.R. 39.01.

²⁶ Causes of action which are historically legal are triable by a jury, and causes of action historically equitable are triable by the court, notwithstanding the Kentucky Rules of Civil Procedure, and if both legal and equitable issues are joined in a single cause of action, the appropriate mode of trial must be followed as to each and in that sequence which will promote efficient administration without curtailing the substantive rights of the respective parties. Ky. C.R. 2, 39.01, 43.04; *Johnson v. Holbrook*, 302 S.W. 2d 608 (Ky. 1957).

Civil Rule 38, as has been mentioned, is based upon FRCP 38(a) and constitutes a bare declaration of policy relating to jury trials. As to the Federal Rules, neither the Advisory Committee in formulating nor the Court in promulgating, made any evaluation of the worth of the jury with a view to enlarging or restricting its use.²⁷ Rather emphasis was placed upon preserving the rights of the parties to jury trials as they then existed. It is perhaps sound to indulge in the assumption that such was the approach employed by the Committee in revising and drafting the Kentucky Civil Rules. Without being critical of a fine and conscientious effort, which has resulted in a much needed simplification and unification of the rules of civil practice and procedure, we express an opinion only in observing that it is unfortunate that the Rules Committee did not undertake an evaluation of the trial jury's function in particular areas. For instance, it seems a real travesty to permit juries to act in will contest cases, and, surely, trial juries leave much to be desired in accident litigation. Admittedly, we hasten to add, these observations come from one who views the trial jury in civil actions with a very skeptical attitude.

While the new rules do not enlarge or restrict the use of the trial jury, this is not to say that constructive progress was not made. Rule 38 not only safeguards the right to trial by jury, but it requires an affirmative demand for a jury seasonably made, else it is waived.²⁸ If one party makes a timely demand, the adversary party may rely thereon and need make no demand for a jury on any issues included within the demand. But in the absence of a written demand for a jury by one party the action is a "court action" unless the court in its discretion gives relief from the automatic waiver.²⁹ This provision for exercise of discretion by the court is a desirable must since law and equity are united under the rules with multiple issues, both legal and equitable, likely to arise in one and the same action. Further, the objective of sound judicial administration is furthered by settling the method of trial, court or jury, well in advance of the actual trial.

Problems, it can be seen, can be expected to arise with reference to determining the right to trial by jury under the rules.

²⁷ Moore's Federal Practice, Vol. 5, p. 39.

²⁸ Ky. C.R. 38.04.

²⁹ Ky. C.R. 39.02.

However, no problem arises where all the parties agree to trial by jury and it is so ordered by the court, in which event the verdict has the same effect as if trial by jury had been a matter of right.³⁰ Likewise, no problem arises as to the right to trial by jury when the adverse attorneys file a written stipulation in open court waiving the right and consenting to trial by the court.³¹ Furthermore, no problem involving the right will arise where a demand has been made for jury trial of all or some of the issues and no objection is made by the adverse party or the court. In such situation the issues asserted for a jury trial are so triable though there is an absence of statutory or constitutional right thereto.³² And no problem arises where no demand for a jury is made, though the issues are triable as a matter of right by a jury. Under the rules, the issues may be tried by the court in this situation though there is a constitutional or statutory right to trial by jury.³³

A problem concerning the right to trial by jury *does* arise, however, when a demand therefor has been made pursuant to Rule 38 and thereafter "the court upon motion or of its own initiative finds that because the action involves complicated accounts or a great detail of facts, it is impracticable for a jury intelligently to try the case," or "the court upon motion or of its own initiative finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or statutes of Kentucky."³⁴ Likewise, a question on the right is possible where, although no demand for a jury has been made, a motion is made to try the action or certain issues to a jury on the ground that the action is one in which a demand might have been made as of right, and the court, therefore has discretion in ordering a jury trial.³⁵ This section gives to our trial courts the power to relieve against the consequences of a waiver of a constitutional or statutory right to trial by jury, upon motion of a party. Action by the court under this rule calls for an exercise of wise discretion where the issues tendered by the pleadings are purely legal, and the

³⁰ Ky. C.R. 39.03.

³¹ Ky. C.R. 39.01.

³² Kelly v. Shamrock Oil & Gas Corp., 171 F. 2d 909 (5th Cir. 1949).

³³ Groome v. Steward, 142 F. 2d 756 (App. D.C. 1944).

³⁴ Ky. C.R. 39.01.

³⁵ Ky. C.R. 39.02.

court may, if it so elects, treat the jury's verdict as merely advisory without committing reversible error.³⁶

The determination by a trial court as to the method of trial, by judge or jury that is, involves constitutional or statutory rights, and is clearly reviewable on appeal from a *final judgment* by a party deeming himself prejudiced by the court's decision.³⁷ And, thus, the problems we have mentioned as likely to arise may eventually require determination by the appellate court. But, is an *order* granting or denying trial by jury a final and appealable order, or is it only an interlocutory order from which an appeal is not justified? This presents an interesting and troublesome problem. In a case in point the defendant interposed an equitable defense to the plaintiff's action at law, and moved the court to try the issues presented by its answer without a jury, and in advance of the trial by jury of any legal issues. From an order granting the motion the plaintiff appealed, and the Supreme Court held that the order was appealable to the circuit court of appeals on the theory that it was tantamount to an order granting a preliminary injunction against the law action.³⁸ For the sake of consistency, had the lower court ordered the issues to be tried by a jury, its order would have been equally appealable under the same theory to an order denying a preliminary injunction. Despite the Supreme Court's firm position on the issue, it seems quite clear that an order determining the mode of trial, by jury or court, does no more than regulate the order and sequence of trial and, hence, is an unappealable interlocutory order. It will be interesting to see the rule adopted by our own Court of Appeals when the same problem is presented to it.

We have in a very brief space presented some of the problems that can and will arise in regard to jury trials under the civil rules. Of course, in a majority of cases no such problem will arise, since it will be quite clear whether the action was one formerly cognizable in law or equity. But, the basic legal or equitable nature of an issue is not invariably clear and with broad provisions for

³⁶ Hargrove v. American Central Ins. Co., 125 F. 2d 225, 228 (10th Cir. 1942).

³⁷ Hurevitz v. Hurevitz, 136 F. 2d 796 (App. D.C. 1943).

³⁸ Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S. Ct. 310, 70 L. Ed. 440 (1935). The Court has reaffirmed its position taken in Enelow in the case of Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 63 S. Ct. 163, 87 L. Ed. 176 (1942).

joinder under the rules, difficult problems can arise where there is a demand for trial by jury of some or all of the issues.

The Trial Jurors

The new rules contain certain specific provisions in regard to the number of jurors, examination and argument before, their verdicts, alternate jurors, and instructions to juries.

The parties may stipulate that the jury shall consist of any number less than provided by law, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.³⁹ This rule does not conflict with the constitutional right to trial by jury since its invocation is purely optional with the parties. The fact to be regretted is that rarely do the attorneys in civil litigation see fit to take advantage of this money and time saving procedural device. Trial attorneys are either too steeped in the fanciful magic of the traditional common law jury of twelve, or else feel that a lesser number will more quickly agree on the weaknesses of their case, to take a chance with such an innovation. Yet, in jurisdictions where a jury of six is a statutory fixture in civil actions, trial attorneys would give little consideration to a return to the more cumbersome jury of twelve.

The provision in the rules for one or two alternate jurors in addition to the regular panel is sound administratively and should be employed in any trial expected to extend beyond one day.⁴⁰ It is interesting to note that the Civil Code did not make provision for alternate jurors through the Criminal Code does so provide.⁴¹

The civil rules provide for voir dire examination of prospective jurors by the court and counsel, something that was not a part of the Code, but which does conform to accepted methods of practice.⁴² This rule authorizes the voir dire examination of jurors by court and counsel or exclusively by counsel in the court's discretion. The rule is ambiguous in respect to exclusive examination by the court but apparently authorizes this procedure. Since it

³⁹ Ky. C.R. 48. KRS 29.020(1) authorizes parties to agree to a jury of less than twelve. KRS 29.330 authorizes a verdict by three-fourths or more of a civil jury concurring.

⁴⁰ Ky. C.R. 47.02.

⁴¹ Ky. Crim. Code, sec. 191.

⁴² Ky. C.R. 47.01.

provides that if the court conducts the examination it *shall* permit the parties to ask such additional questions as it deems proper, presumably the court in its discretion could deem no additional questions proper under a strict interpretation of the rule. However, it is doubtful that our Court of Appeals would deny a party, through his attorney, the right to examine jurors in regard to their qualifications, since this would be an unwarranted restriction on trial by jury and tend to render the juror challenge process meaningless. In substantiation of this view, it is worthy of note that this voir dire examination rule is taken verbatim from the Federal rules,⁴³ and the Federal courts have recognized the right of counsel to ascertain the qualifications of jurors through interrogation.⁴⁴

The civil rules have introduced interesting innovations into Kentucky practice through provision for special verdicts or general verdicts with answers to interrogatories.⁴⁵ A special verdict is one wherein the jury finds the facts particularly and submits them to the court to determine the questions of law arising thereon. Special verdicts were well known to the common law and favored by jurors, since by rendering such a verdict they avoided the perils of attainr for rendering a false decision under the general verdict.⁴⁶ The special verdict could become a very useful procedural device and one more accurate than the general verdict, the great procedural opiate, which has been denounced often by eminent critics and said to be "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."⁴⁷ Nevertheless, trial attorneys, accustomed to the soothing panacea-like verdict, will not take kindly to the special verdict which in some respects limits the right to trial by jury. As for trial judges, they will not favor the special verdict since an increased burden of decision-making is thereby cast upon their often over-burdened shoulders. But let us consider Sunderland, the above quoted critic on general verdicts:

The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury really has done. . . . The general verdict

⁴³ F.R.C.P. 47(a).

⁴⁴ Bass v. Dehner, 108 F. 2d 28 (10th Cir. 1939.)

⁴⁵ Ky. C.R. 49.

⁴⁶ Busch, Law and Tactics in Jury Trials, p. 836, sec. 534.

⁴⁷ Sunderland, Verdicts, General and Special, 29 Yale L.J. 253, 258.

is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial.⁴⁸

All benefit inherent in Rule 49 is not lost, however, by refusal to use the special verdict. Much of the good which Mr. Sunderland saw in the special verdict can be attained through use of the general verdict with written interrogatories. This procedure is being used in the practice in Kentucky, and through it jury caprice as well as careless error can be discovered and corrected by the trial court sending the jury back to the jury room to cause its verdict to conform to its answers to interrogatories.

⁴⁸ Sunderland, *op. cit. supra* at 259.