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Propositions of Law in Trials Without a Jury in Federal Courts

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COMMENT ON RECENT CASES

FEDERAL PRACTICE—PROPOSITIONS OF LAW IN TRIALS WITHOUT A JURY.—[Federal] In Illinois[1] and a number of the other states there are statutes regulating the trial of actions at law without jury which provide in substance that the parties may submit propositions of law to the court, and that exceptions may be taken to the rulings on such propositions. By means of exceptions to such rulings the losing party may preserve for appellate review the same questions of law that would arise on exceptions to similar propositions of law embodied in instructions to a jury, or on exceptions to a refusal to give similar instructions to a jury.

In some of the states, the statutes require the judge to state his conclusions of law to which exceptions may be taken.[2] The federal statute[3] on this subject is silent on propositions of law and conclusions of law, and merely provides that where a jury is waived by written stipulation, rulings in the progress of the trial may be reviewed, if excepted to, and when the finding is special the review may extend to the sufficiency of the facts found to support the judgment.

Ever since the passage of this statute in 1865, there has apparently been more or less confusion and uncertainty as to whether the state practice of submitting propositions of law may be used to obtain appellate review of the questions of law involved.

The statute does not require the federal judge to make special findings, and hence no exception can be taken to his refusal to find the facts specially.[4] That is a matter entirely in his discretion. If he finds generally, there is no way of preserving questions of law for review unless the state practice, or some similar procedure is available. That is, the case would be in the same situation as a case tried by jury and brought up on a record showing a general verdict, but without a bill of exceptions preserving the instructions. In that event the appellate court could not know what specific questions of fact had been submitted to the jury, nor how, and hence would assume that all matters in issue under the pleadings had been properly submitted. If special findings are made, then under the statute they are equivalent to a special verdict and present the same questions as a special verdict, namely, what judgment should be entered as a necessary legal consequence. But many questions of law involved in a case do not appear on a special verdict. For example, whether there was any evidence to support a given finding, or whether a fact not found was conclusively proved, or which side had the burden of establishing a given proposition, are all questions that

1. Ill. Prac. Act Sec. 61.
2. (1909) Mo. R. S. Sec. 1972.
3. R. S. Sec. 700.
4. (1873) *Ins. Co.* v. *Folsom* 18 Wall. 237.

could only be preserved by exceptions to rulings prior to the special verdict or special finding.

Hence, special findings alone do not afford appellate review of many important questions of law.

If the state practice is available, all such questions may be raised by propositions of law, and may be preserved by exceptions to rulings thereon as "rulings in the progress of the trial."

But if the state practice is unavailable, and exceptions can not be taken to rulings on propositions of law, the losing party would be unable to obtain adequate appellate review, whether the findings were general or special.

In what is apparently the first case[5] in which the statute was considered, an ejectment suit was tried in the United States circuit court for the Northern district of Illinois without a jury and resulted in a general finding and judgment for defendant. The plaintiff brought the case up on writ of error.

The judgment was affirmed because no error of law was preserved for review.

Mr. Justice Miller, who delivered the opinion, formulated the following propositions for the guidance of attorneys in such cases:

"We condense here the results of an examination of that statute.[6]

1. If the verdict be a general verdict, only such rulings of the court, *in the progress of the trial,* can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

2. In such cases, a bill of exceptions can not be used to bring up the whole testimony for review any more than in a trial by jury.

3. That if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, *or they must present to the court their propositions of law, and require the court to rule on them.*

4. That objections to the admission or exclusion of evidence, *or to such ruling on the propositions of law as the party may ask,* must appear by bill of exceptions."

This dictum has been referred to with approval in several later cases[7] both in the Supreme Court and in the Circuit court of appeals.

In the latest case[8] on the point, which was an action on a contractor's bond to the United States, a jury was waived by stipulation and the issue submitted to the court. No special findings were made and no propositions of law were submitted. The trial judge filed a written opinion setting forth his views of the law and the facts, and in accordance therewith entered judgment for the plaintiff. The Circuit court of appeals affirmed the judgment, and the defendant below brought the case up on writ of error.

The opinion by Mr. Justice Sanford points out in accordance with a long list of previous cases that the written opinion of the

5. (1869) *Morris* v. *Jackson* 9 Wall. 125.
6. Act of March 3, 1865, now R. S. Secs. 649, 700.
7. (1884) *Martinton* v. *Fairbanks* 112 U. S. 670; (1912) *Seep* v. *Ferris* 201 Fed. 893.
8. (1926) *Fleischman Const. Co.* v. *U. S.* 46 Sup. Ct. Rep. 284.

trial judge was not a special finding within the meaning of the statute, and therefore the various questions of law involved were not open to review, and adds:

"To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, *or present the propositions of law to the court and obtain a ruling on them.*"

A considered dictum by the Supreme Court of the United States commands attention, especially when it involves a point of its own appellate practice, and after such repeated approvals from 1869 to 1926 might well be thought to settle the question, but for the fact that the two or three decisions on the point are squarely the other way.[9]

The *Folsom* case, in which there was an attempt to use propositions of law, was a suit on an insurance policy. In the trial without a jury the defendant requested the court to rule that the evidence was insufficient to entitle the plaintiff to a verdict, which was refused. The defendant also requested the court to adopt certain conclusions of law corresponding to instructions, all of which were refused.

The Supreme Court held, though with considerable hesitation, that the request to the trial court to rule as a matter of law that the evidence was insufficient should be regarded in the same light as a motion to direct the verdict in a trial by jury, and accordingly that the ruling might be reviewed, but that the rulings on the propositions of law submitted were not the sort of rulings to which exceptions might be taken and hence were not reviewable. On this point the language of the opinion is clear.

"Requests that the court would adopt certain conclusions of law were also presented by the defendants, in the nature of prayers for instructions, as in cases where the issues of fact are tried by a jury, which were refused by the Circuit court, and the defendants also excepted to such refusals.

"None of these exceptions have respect to the rulings of the court in admitting or rejecting evidence, nor to any other ruling of the Circuit court which can properly be denominated a ruling in the progress of the trial, as everyone of the refusals excepted to appertains to some request made to effect or control the final conclusion of the court as to the plaintiff's right to recover. *Such requests or prayers for instruction, in the opinion of the court, are not the proper subjects of exception in cases where a jury is waived and the issues of fact are submitted to the determination of the court.*"

The holding in the *Folsom* case that the ruling on a request to hold that the evidence was insufficient to support a recovery was subject to exception and review was followed in one later case,[10]

9. (1873) *Ins. Co.* v. *Folsom* 8 Wall. 237; (1901) *Consol. Coal Co.* v. *Ice Co.* 106 Fed. 798; (1904) *Streeter* v. *Sanitary Dist.* 133 Fed. 124; (1906) *Franklin* v. *Farry* 144 Fed. 663; (1925) *Law* v. *U. S.* 266 U. S. 494, semble.

10. (1893) *St. Louis* v. *Western Union Telegraph Co.* 148 U. S. 92.

but was apparently repudiated when the same case[11] came before the court after a retrial.

The last ruling in the *St. Louis* case might possibly be explained on the theory that the court regarded the motion or request as an attempt to bring before the court a question of fact as to the proper verdict under all the evidence, rather than the question of law as the sufficiency of the evidence to warrant the verdict.

To say the least, that case made it extremely doubtful whether a ruling on a motion to direct the verdict in a trial without a jury was subject to review. That doubt seems to be settled against review by the last case[12] on the point.

The *Law* case was a suit on a war risk insurance policy, in which there was a trial without a jury. The government requested a peremptory instruction on the theory that the plaintiff had failed to prove a disability within the meaning of the policy, which was refused.

The opinion thus disposes of the point:

"The Court of appeals held that the motion should have been granted. Its judgment must be reversed and that of the District Court must stand, because the case was tried without a jury and there was only the general finding for the plaintiff. Neither the evidence, nor the questions of law presented by it, were reviewable by the Court of appeals. To inquire into the facts and the conclusions of law on which the judgment of the lower court rests was not permissible."

It might be urged that since the *Folsom* case was tried before the adoption of the Conformity Act,[13] it merely means that the Act of 1865 did not per se provide for such rulings on the general analogy to instructions to a jury, and that the *Law* case was not aided by the Conformity Act, because the code of Montana, where the case was tried, did not provide for propositions of law, but for special findings. It was, of course, well settled prior to the Conformity Act that the practice under state statutes was not applicable to a federal court sitting in such state.[14] It remains to consider then whether the Conformity Act affects trials in a federal court without a jury so as to enable exceptions to be taken to rulings on propositions of law when that is authorized by the local statute.

The state statutes requiring special findings clearly can not be invoked in the federal courts because inconsistent with the federal statute, which leaves the federal judge free to find generally or specially, as he thinks proper.

But the state practice of submitting propositions of law might be regarded as supplementing the federal practice.

Prior to the Act of 1865, a jury was sometimes waived in the federal courts, but the rulings were uniform that there could be no appellate review of the trial because it was extra legal, or an arbi-

11. (1897) *St. Louis* v. *Western Union Telegraph Co.* 166 U. S. 338.
12. (1925) *Law* v. *United States* 266 U. S. 494.
13. Act of June 1, 1872, now R. S. Sec. 914.
14. (1858) *Kelsey* v. *Forsyth* 21 Howard, 85.

tration rather than a trial.[15] Congress had provided for appellate review of a common law trial, but not for a variant mode adopted by consent.

The Act of 1865 therefore is the sole basis for a legal trial without a jury in a federal court and for appellate review in such cases.

Evidence serves the same purpose in a trial without jury as in a trial by jury, and hence all the cases assume that rulings on evidence are "rulings in the progress of the trial" to which exceptions may be taken under Sec. 700. In a trial by jury the primary purpose of a motion to direct the verdict was to withdraw a question of fact from the jury, and hence a ruling on such a motion was reviewable on exception at common law.[16]

Without a jury, so far as the trial is concerned, such a motion serves no more purpose than it would in an equity case.

Its sole object in a law case without a jury is to lay the foundation for appellate review.

In a trial by jury the primary purpose of instruction is to give the jury the necessary information to enable them to discharge their function. That is obviously not the purpose when the judge determines both law and fact, and is asked to instruct himself, or declare his view of the law. The object is not to enlighten the trial judge, but to preserve a question for the appellate court. Such a procedure was unknown to the common law and such rulings are not the subject of exceptions under Sec. 700, unless the Conformity Act carries over the state practice.

But there are two difficulties that prevent the application of the Conformity Act. In the first place that act has always been limited to matters of trial practice. It has never been applied to enlarge appellate review. For example, the state practice frequently allows exceptions to rulings on motions for a new trial, but it is well settled that such exceptions are unavailable in a federal court.[17]

And finally the fact that Congress has provided for an appellate review which did not include such rulings precludes the application of the Conformity Act.[18]

This is illustrated by the well known rule that the federal practice of commenting on the evidence, and charging the jury orally is not affected by a different state practice, because the Judiciary Act provided for trial by jury as at common law.[19] It seems impossible to escape the conclusion that the present statute does not authorize exceptions to rulings on propositions of law in accordance with the state practice, and therefore adequate appellate review is impossible when the trial is without a jury in a federal court.

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15. (1870) *Kearney* v. *Case* 12 Wall. 275.
16. (1824) *Bulkely* v. *Butler* 2 B. & C. 434.
17. (1883) *Terre Haute Ry. Co.* v. *Struble* 109 U. S. 381; (1921) *Tanners Products Co* v. *Nulty* 272 Fed. 898.
18. (1904) *Streeter* v. *Sanitary Dist.* 133 Fed. 124.
19. (1886) *Vicksburg Ry. Co.* v. *Putnam* 118 U. S. 545.