

1956

# Thalda L. Baker v. Archibald H. Cook and May K. Cook : Brief of Appellants

Utah Supreme Court

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Hurd, Bayle & Hurd; Hanson & Baldwin; Attorneys for Appellant;

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Case No. 8550

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

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THALDA L. BAKER,

*Plaintiff and Respondent,*

—vs.—

ARCHIBALD H. COOK and MAY  
K. COOK,

*Defendants and Appellants.*

Clerk, Supreme Court, Utah

APPELLANTS' BRIEF

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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THALDA L. BAKER,

*Plaintiff and Respondent,*

—vs.—

ARCHIBALD H. COOK and MAY  
K. COOK,

*Defendants and Appellants.*

Case No. 8550

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APPELLANTS' BRIEF

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STATEMENT OF FACTS

This is an action brought by the plaintiff to recover for personal injuries sustained while she was employed to do general housework at the home of the defendants. On the morning of August 20, 1953, the defendant May K. Cook employed the plaintiff to do household cleaning for her, and shortly after noon of that day, the plaintiff came to the home of the defendants to begin work. The first work that was required of her was to wash ground floor windows on the outside of the apartment occupied by the defendants. For this purpose the defendant May K. Cook furnished plaintiff a ladder, which plaintiff

took outside to begin work. Shortly thereafter the plaintiff re-entered the kitchen of the defendants' residence and complained that she had been injured, showing Mrs. Cook a cut on her left leg. The foregoing are all of the undisputed facts involved in this action, but there are a number of other circumstances regarding which the parties are not in agreement.

Plaintiff's testimony was to the effect that after she had set up the ladder outside the window the defendant May K. Cook looked out and suggested that plaintiff turn the ladder around the other way with the steps away from the building (Tr. 18, 97).

Plaintiff denied that Ex. D-24 was the ladder that she used on the day in question (Tr. 101, 147). Plaintiff then testified that she had mounted the ladder to begin work when she heard a cracking noise, and the next thing she knew, she was down on the ground on her hands and knees (Tr. 18-19). She then went back into the defendants' apartment and informed the defendants of what had occurred. She also testified that after the accident the metal portions of the ladder were so bent that it would not stand up, (Tr. 22) and that when she put her hand on the ladder to help herself up the metal bent under her hand (Tr. 20-21, 103-105).

The defendant May K. Cook testified at the trial that on the day in question she gave the plaintiff the ladder introduced in evidence as Exhibit D-24 to use and then left the apartment where she and the other defendant

lived. When she returned the accident had already occurred, and she knew nothing about the manner in which plaintiff was injured (Tr. 108-109). She also testified that the ladder (D-24) was in substantially the same condition at the time of trial as it had been after the accident and injury to plaintiff, and that both she and other cleaning women had used the ladder before the accident and continued to use it after the accident (Tr. 109-110).

After all of the evidence had been received, the court submitted the matter to the jury upon general instructions and the following special verdict:

“PROPOSITION No. 1: The defendants were negligent in furnishing to the plaintiff a defective ladder which was not reasonably suited for the use to which it had to be put by Mrs. Baker in doing her work.

“PROPOSITION NO. 2: The plaintiff was negligent in mounting the ladder after she knew, or in the exercise of reasonable care should have known, that it was defective and not reasonably suited for the use to which it had to be put in doing her work.

“PROPOSITION NO. 3: The negligence of defendants, if found in Proposition No. 1, was a substantial factor in proximately causing injury to Mrs. Baker.

“PROPOSITION NO. 4: The negligence of the plaintiff, if found in Proposition No. 2, was a substantial factor in proximately causing injury to herself.



“QUESTION NO. 5: As shown by a preponderance of the evidence in this case, what amount of money would fairly and adequately recompense Mrs. Baker for such injuries, if any, as were proximately caused by her fall from the ladder?

A. General damages, if any

B. Loss of earnings to date, if any

### Total Damages

The jury was instructed that they should answer the first four propositions “True,” “False” or “Unable to Say.” All of the jurors answered propositions 1 and 3 “True,” and seven of them answered numbers 2 and 4 “Unable to Say.” Thereupon the trial court ruled that the defendant had failed in her burden of proof as to plaintiff’s contributory negligence and sent the jury out to consider proposition No. 5. The jury found general damages in the amount of \$5,000.00 loss of earnings in the amount of \$2,500.00 for total of \$7,500.00. To this amount the court added the sum of \$1,818.20 being medical expense to which the plaintiff had testified.

After the jury had retired to consider the matter, the court on motion of counsel dismissed the case as to the defendant Archibald H. Cook. This appeal is prosecuted by the other defendant May K. Cook, from the judgment rendered against her.



## STATEMENT OF POINTS

## POINT I.

THERE IS NO EVIDENCE TO SUPPORT THE JURY'S FINDING OF LOSS OF EARNINGS.

## POINT II.

THE COURT ERRED IN SUBMITTING PROPOSITIONS ONE TO FOUR INCLUSIVE TO THE JURY.

## POINT III.

THE COURT'S RULING ON THE JURY'S FAILURE TO ANSWER PROPOSITIONS TWO AND FOUR WAS ERRONEOUS.

## POINT IV.

THE COURT ERRED IN FAILING AND REFUSING TO SUBMIT TO THE JURY THE DEFENDANT'S THEORY OF THE CASE.

## POINT V.

THE COURT'S QUESTIONING OF THE JURY AFTER THEY HAD RETURNED THEIR ANSWER TO PROPOSITION NO. 5 WAS PREJUDICIAL ERROR.

## ARGUMENT

## POINT I.

THERE IS NO EVIDENCE TO SUPPORT THE JURY'S FINDING OF LOSS OF EARNINGS.

The only evidence as to the plaintiff's earnings was plaintiff's own testimony to the effect that her average yearly earnings for the three years immediately pre-

ceeding the injury was “about \$6,000.00” or “about Twenty-Three Hundred a year.” (Tr. 12-13). Plaintiff also stated that she would produce records to substantiate this statement (Tr. 13). It appeared after the noon recess that she was not able to locate any records at her home (Tr. 106). When counsel inquired of the Federal Bureau of Internal Revenue it appeared that the records in question were not available there either (Tr. 160). The only additional evidence having any bearing on the plaintiff’s income was her own statement that she had been unemployed for the three months immediately prior to going to work for the defendants (Tr. 13, 86). On such a state of the record any findings as to loss of earnings is based solely on conjecture and supposition. Plaintiff’s employment history shows numerous changes in employment (Tr. 5-11), and even admitting that in the past average earnings had been “about \$2,300.00 a year,” in view of her own statement as to having been unemployed for three months preceding the accident, such yearly income figures are without probative value as to her loss of income since the accident.

As said by this Court in *Seybold v. Union Pac. Ry. Co.*, 121 Ut. 61, 239 P. (2d) 174:

“We have no disagreement with the time-honored rule that if there is substantial evidence to support the conclusion of the trier of the fact it will not be disturbed on review. But that means more than a mere scintilla of evidence. See 9 Whigmore 3rd Ed., Sec. 2494. . . . If there is any substantial competent evidence upon which a jury

acting fairly and reasonably could make the finding it should stand. But if the finding is so plainly unreasonable as to convince the court that no jury acting fairly and reasonably could make the finding, it cannot be said to be supported by substantial evidence.”

To the same effect is *Wyatt v. Baughman*, 121 Ut. 98, 239 P. (2d) 193.

Of course if it is determined that as a matter of law the evidence does not support the finding of the jury, it was error for the trial court to submit the question of loss of earnings to the jury. The defendant excepted to the court’s instruction No. 14 covering this issue (Tr. 168).

## POINT II.

### THE COURT ERRED IN SUBMITTING PROPOSITIONS ONE TO FOUR INCLUSIVE TO THE JURY.

Defendants’ contention that the submission of these propositions to the jury was error is based on two separate grounds: First that Proposition No. 1 as drawn assumes facts in dispute; Second that by giving the jury three alternatives in their answer, the Court permitted them to answer the questions without deciding them.

We shall consider our first ground of objection. Proposition No. 1 states that defendants were negligent “in furnishing to the plaintiff a defective ladder . . .” The question as to whether the ladder was defective was the crux of the case, and by the use of the word “in” the proposition assumes that the ladder furnished was de-

fective, and that defendants were negligent. A similar situation was before the court in *Mass v. W. R. Arthur & Co.*, 239 Wis. 581, 2 NW (2d) 238, where the trial court submitted a question to the jury as to whether a driver of an automobile was negligent “with respect to (a) in attempting to overtake and pass the car . . . at the intersection . . .” The court held that by the use of the word “in” the special interrogatory assumed that the car was passing at the intersection, and since this was one of the questions in issue under the evidence, such interrogatory was erroneous as amounting to a comment on the evidence. This decision was cited with approval in *Huffman v. Reinke*, 268 Wis. 489, 67 N.W. (2d) 871, where the court said that where a question as framed assumes that one of the parties was negligent, it should not be given.

In *Foemmel v. Mueller*, 255 Wis. 277, 38 NW (2d) 510, the special verdict given by the court was:

“Question 3.

“Immediately preceding and at the time of the accident involved here, was the defendant Charles Mueller negligent in respect to A. . .

“B. In stopping on the highway in the place he did without placing burning fusees or flares upon the road near his standing truck?

“C. In failing to have clearance lights burning upon the truck?”

Speaking of the special questions, the court said:

“They are defective because in Question 3-B, by the use of the word ‘in’ just preceding the word ‘stopping’ the meaning of the question is such that

it assumes Mueller did fail to place burning fusees or flares while stopping on the highway. Instead, the court should have submitted the direct question whether 'Mueller was negligent in stopping without placing' such fusees or flares.

"Likewise Question 3-C is defective because by using the word 'in' just preceding the words 'failing to have clearance lights burning' the meaning is such that the question assumes Mueller did fail to have such lights. There should have been submitted the direct question whether Mueller was negligent in failing to have clearance lights burning. . . ." Citing *Maas v. W. R. Arthur & Co.*, *supra*.

The situation here is similar to one that was before the court in *Thoresen v. Grything*, 264 Wis. 487, 59 NW (2d) 682. This was a case involving a rear end collision between a truck and a car driven by one Grything, and was submitted to the jury on a special verdict. The court said:

"The real issue with respect to the conduct of Grything was not submitted to the jury. It might be inferred that the jury in considering its answer to the question concerning his control of his car might have concluded that there was no sudden stopping. The inference might be permitted if the court had instructed the jury with respect to Grything's duty as to stopping.

"The questions should be framed so far as practicable to secure the most direct consideration of the evidence as it applies to the issues made by the pleadings and supported by the evidence.' *Liberty Tea Co. v. LaSalle Fire Ins. Co.*, 206 Wis. 639, 238 N.W. 399."

As in the Grything case cited above, the real issue with respect to the conduct of the defendant May K. Cook was never submitted to the jury. The questions which the jury should have decided were firstly, whether the ladder (Ex. D-24) was the ladder used by plaintiff, secondly, whether it was defective, and thirdly, whether the defendants knew, or should have known that it was defective. Proposition No. 1 as framed by the court ignores all of these matters and assumes that the ladder was defective and that the defendants were negligent.

As said by this court in *Startin v. Madsen* 120 Ut. 631, 237 P. (2) 834, "The instructions should not be susceptible of misconstruction as either comments on the evidence or arguments for either side of the case."

As to the second ground of defendant's objection to the submission of the first four propositions to the jury the defendant respectfully submits that as drawn, the propositions enable the jury to evade their duty and still return answers to the questions.

The purpose of special interrogatories and special verdicts is to give the parties and the court an opportunity to ascertain whether the jury has understood and applied the law to the proven facts, *Elio v. Akron Transp. Co.*, 147 Oh. St. 363, 71 N.E. (2d) 707. The defendant submits that the propositions given to the jury by the trial court fall short of this criterion. They are not "so clear and concise as to be readily understood by the jury, and . . . so framed as to call for a simple categorical answer." 53 Am. Jur., page 741, Sec. 1070. See also *Scott v.*



*Cismadi*, 80 Oh. Ap. Rep. 39, 74 N.E. (2d) 563, holding that each interrogatory submitted to a jury should be limited to a single direct and controverted issue of fact and should be so stated that the answer will necessarily be positive direct and intelligible.

Although counsel has done extensive research on this matter we have been unable to find at single case where an appellate court has passed on special interrogatories or a special verdict framed as were the court's Propositions one to four in this case, using the third alternative. With the growing use of special verdicts by the trial courts of this state the question is one of importance upon which this Court should pass for the guidance of the trial courts, and members of the bar.

The matters embraced in Propositions 2 and 4 were issues vital to the success or failure of plaintiff's case—the matter of contributory negligence and proximate cause. To submit such questions to the jury with an instruction that they may answer that they are “Unable to Say” is to invite members of the jury to shirk their sworn duty to pass upon the evidence and decide the facts. Under the court's instructions they may answer all of the propositions and still not decide the issues.

### POINT III.

THE COURT'S RULING ON THE JURY'S FAILURE TO ANSWER PROPOSITIONS TWO AND FOUR WAS ERRONEOUS.

Research shows that the numerical weight of authority in the country is to the contrary of the above proposi-



tion. However, in most states there have been statutes enacted, or rules of procedure promulgated, which require such a decision. Without a careful analysis of the statutes or procedural rules under which decisions were rendered, it is impossible to determine whether they are in point under the Utah Rules of Procedure.

Courts in Texas have uniformly held in accord with defendant's contention. An early case was *Goggan v. Wells Fargo & Co.* (C.C.A. Tex. 1920) 227 S.W. 246, which holds that when the jury answered several material special issues 'Unable to Answer' this amounted to no answer at all. It was error for the court to enter a judgment on such verdict. The court in its opinion cites as statutory authority for such holding Article 1988 Vernon's Sayles' Texas Civil Statutes, 1914. This section simply provides: "The verdict shall comprehend the whole issue or all the issues submitted to the jury." The statute has been carried forward and is a part of Rule 290 Texas Rules of Civil Procedure. This rule reads:

"A verdict is a written declaration by a jury of its decision, comprehending the whole or all the issues submitted to the jury, and shall be either a general or special verdict, as directed, which shall be signed by the foreman of the jury.

"A general verdict is one whereby the jury pronounces generally in favor of one or more parties to the suit upon all or any of the issues submitted to it. A special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court."

Since the foregoing rule is not substantially different from the provisions of Rule 49 Utah Rules of Civil Procedure, the decisions of the Texas courts are in point as to Utah procedure, the Utah Court having never passed on the question.

The rule laid down in the Wells Fargo case, *supra*, has been uniformly followed in Texas. In *Lakewood Heights Co. v. McCuiston* (CCA Tex. 1921) 226 S.W. 1109, it was held:

“ . . . when a cause is submitted on special issues, such issues must be determined by the jury. In such case the court is powerless to decide any issue so submitted. Differently stated, the court in a jury trial in which special issues are submitted to the jury can only decide such issues as have not been submitted and have not been requested to be submitted to the jury.” citing cases.

In *Nolan v. Smith*, (CCA Tex. 1942) 166 S.W. (2d) 750 the court said, quoting from *Adams v. Houston Nat'l Bank*, (Tex. Com. App.) 1 S.W. (2d) 878:

“ ‘The constitutional right to a jury trial does not include those cases where, under the evidence, there is no controverted issue of fact for determination. In such a case there is nothing which the court could submit to a jury and there is therefore no error in discharging the jury previously impaneled and in rendering judgment in accordance with the undisputed facts.’ ” Citing also to the same effect the case of *Traders Etc., Co. v. Weatherford*, (Tex. Civ. App. 1939) 124 S.W. (2d) 423.

Going on, the court quoted from the case of *Copeland v. Brannan*, (Tex. Civ. App.) 70 S.W. (2d) 660:

“ ‘There was no finding of the jury on some of the material questions presented, and having submitted these issues to the jury, and the jury not having found on them, the court was not authorized to supply such findings, nor to render judgment on the issues answered, but should have refused to accept the same; and the jury should have been returned for further consideration, and, in case they could not agree on such material issues, a mistrial should have been declared. The court had no authority to render judgment on the verdict, absent any finding on such material issue submitted.’ ”

The case of *Texas Employers' Ins. Ass'n. v. Horn* (CCA Tex.) 75 S.W. (2) 301, also cited the above language with approval. In *Denison v. Brown*, (CCA Tex. 1915) 172 S.W. 725, questions were submitted to the jury, and one remained unanswered. The trial court concluding that the unanswered question was repetitious of one of those answered and that therefore the factual question had been decided, then rendered judgment. On appeal this was reversed, the court holding that the fact of an agreement on one question and inability to agree on the other when they both covered the same factual situation conclusively showed that the jury did not correctly understand the questions. Remanded for a new trial.

To the effect that where the jury fails to answer special issues essential to the judgment, a mistrial should be declared, are: *Dato v. Geo. W. Armstrong Co.* (C. of

A. Tex. 1924) 260 S.W. 1024; *Cranston v. Gautier* (CCA Tex. 1926) 284 S.W. 620; *Wheat v. Lancaster*, (CCA Tex. 1926) 284 SW 629.

Special questions must be plain and unambiguous and call for findings on questions of fact which are conclusive of the real issue involved in the case. *Farr v. Haggerty*, 273 Mich. 547, 263 NW 739; *Gilbert v. Stickley*, 204 Mich. 342, 169 N.W. 866; *Miller v. James McGraw Co.*, 184 Md. 529, 42 A. (2d) 237.

In the case of *Tober v. Pere Marquette R. Co.*, 210 Mich. 129, 177 NW 385 the Michigan Court held:

“A failure of the jury to answer a question containing an affirmative fact essential to and of some controlling force in reaching a verdict has been held to result in a mistrial.” citing cases. “The court should have instructed the jury it was their duty to answer the special questions without permission to return divided answers or suggestion as to reporting how they stood if unable to agree and thus avoid a decision.”

In that case after the jury was instructed they returned and asked further instruction as to the manner in which they must answer the special questions. The court told them that if all were unable to agree they should indicate how many voted one way and how many voted the other and return the special verdict.

A slightly different approach to the problem was used by the court in *LaFayette v. Bass*, 122 Okla. 182, 252 P. 1101 where it was said “Unable to Say” amounted to a failure to answer, and when the court without ob-

jection from the parties accepted these answers and proceeded to enter judgment on the basis thereof, it amounted to a withdrawal of those issues from the jury. This, the appellate court held, the trial judge had authority to do under the Oklahoma rules of procedure. The judgment was affirmed. Such would be the rule in Utah also, since Rule 49 Rules of Civil Procedure specifically provides that failure by the party to demand submission of an issue to the jury is a waiver of his right to a jury determination on such issue. In this case, however, defendant requested submission to the jury of the issues of contributory negligence and proximate cause embodied in Propositions 2 and 4 by her requested instructions 2 (7) and 11. The authorities cited by defendant under Point IV showing the necessity for instructions to cover all of the issues in the case are also controlling here. Under this theory, the trial court failed to instruct the jury on all issues of the case, which is reversible error, under the holdings of this court.

The Massachusetts court in *Cote v. Luce*, 225 Mass. 123, 113 N.E. 777, held that failure of the jury to agree on answers to special interrogatories does not amount to a finding of fact. "These issues . . . remain undetermined." and in *Stone v. Orth Chevrolet Co.*, 284 Mass. 525, 187 N.E. 910, the court said that while it is discretionary to require a special verdict, and no exception may be taken to the court's granting or refusal to grant the same, if a special verdict is ordered and the answers given do not dispose of all material issues in the case it is reversible error to direct a verdict thereon.

## POINT IV.

THE COURT ERRED IN FAILING AND REFUSING TO SUBMIT TO THE JURY THE DEFENDANT'S THEORY OF THE CASE.

It has been the defendant's contention from the outset of this case that plaintiff's injuries were due solely to her own negligence in the manner in which she used the ladder furnished her by the defendant. Whether she slipped and fell from the ladder, or whether she failed to set the ladder up properly and it tipped over, the defendant of course does not know. However, the defendant has contended from the beginning that the ladder (Ex. D-24) did not collapse; that is, it did not break down due to a failure in construction. To prove such contention, defendant herself testified that the ladder had been used since the accident, both by herself and others (Tr. 109, 110, 116, 117). The witness Beth Christensen testified that she had used the ladder both before and since the accident to plaintiff, (Tr. 123, 125). Defendant produced the ladder in court on the theory that an inspection of it would be sufficient to convince anyone that the ladder did not break down; that it did not bend as claimed by the plaintiff. By requested Instruction No. 2 the defendant attempted to have these matters submitted to the jury, but such instruction was refused by the court and the jury did not have the opportunity to pass on the question of whether (Ex. D-24) was the ladder which plaintiff used; and whether the ladder used, (whether it was D-24 or not) collapsed. The court's instructions erroneously assumed that the only negligence with which plain-

tiff could have been chargeable is in using a ladder which she knew or should have known was unsafe. The instructions completely ignore the fact that plaintiff may have so set up the ladder that it tipped over when she got on it. This matter is controlled by the decision of this Court in *Startin v. Madsen*, 120 Ut. 631, 237 P. (2d) 834, where it was said:

“It was the duty of the trial court to cover the theories of both parties in his instructions. *Martineau v. Hanson*, 47 U. 549, 155 P. 432; *McDonald v. U.P. Ry. Co.*, 109 U. 493, 167 P. (2d) 685.”

When the instructions are considered as a whole as they must be, *Walkenhorst v. Kesler*, 92 Ut. 312, 67 P. (2d) 654; *Redd v. Airway Motor Coach Lines*, 104 Ut. 9, 137 P. (2d) 374; they do not measure up to the standard laid down by this court in *Startin v. Madsen*, *supra*. Nor does the trial court's procedure comply with the rule laid down by this Court in the case of *In Re Hanson's Will*, 50 Ut. 207, 167 P. 256, where it was said:

“In this case the special verdict covered every issue, and therefore a general verdict was unnecessary. In case a special verdict does not cover every issue, then, as a matter of course, a general verdict is necessary to authorize a judgment on the verdict.”

Since the special verdict submitted by the court did not cover all of the issues in the case, the rule laid down by the *Hanson*, case, *supra*, requires that the trial court also submit a general verdict to the jury.



## POINT V.

THE COURT'S QUESTIONING OF THE JURY AFTER THEY HAD RETURNED THEIR ANSWER TO PROPOSITION NO. 5 WAS PREJUDICIAL ERROR.

Pages 176 to 182 inclusive of the transcript cover questioning of the jury by the court. This occurred after the jurors had returned their answer to proposition No. 5, and after counsel for the defendant had raised the question that merely because the jurors were "Unable to say" did not necessarily mean that they had not been convinced by the evidence. The defendant respectfully submits that a reading of this portion of the transcript is sufficient to show that the trial court by adroit cross questioning led the jurors to the conclusion that they were not confused by the propositions, but were merely unconvinced by the evidence. The court used leading questions (lines 9, 14, 22 page 177; lines 11, 24 page 179; lines 29-30 page 181). By commenting on questions which counsel for the defendant wished to have asked, the court nullified the effect of such questions before asking them. (Tr. 180).

It should be noted that the first answers of the jurors Gold (Tr. 176-177) and Dunn (Tr. 178-179) indicated that the questions had confused them, but that after the trial judge cross examined these jurors and led them by his questions they then concluded that the questions had not confused them. Thereafter the other jurors questioned went along with this statement.

It should also be remembered that the jurors had had a long and trying day. The events which occurred in those pages of the transcript took place after 9 P.M.; (Tr. 175) after the jury had been out for more than six hours (Tr. 164). After so long a deliberation and at a rather late hour of the night, when the presiding judge cross examines and questions the jurors in the manner shown by the transcript herein, the result is a foregone conclusion. Having once stated their position the jurors would not easily recede from it, particularly in the face of the comments and questions of the judge.

## CONCLUSION

By way of summary, appellant urges that the judgment of the District Court is in error for the following reasons:

1. That there is no evidence to support any finding of, or judgment for, respondent's claimed loss of earnings.
2. That the special verdict submitted to the jury was improper in that facts in dispute were assumed by the language of the verdict. Also that the special verdict was in error in permitting the jurors to return the answer "Unable to Say" to the questions posed.
3. That the jury having answered two of the questions in the special verdict "Unable to Say" the trial court should have declared a mistrial, since such answers amount to no finding at all on the questions so answered.

4. That the trial court failed to instruct the jury on the defendants' theory of the case.

5. That the trial court committed reversible error in its examination of the jurors after they had returned their verdict.

For the foregoing reasons, appellant respectfully urges that the judgment of the District Court be reversed and that the case be remanded for a new trial.

Respectfully submitted,

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