

APPELLATE PROCEDURE IN EQUITY CASES:
A GUIDE FOR APPEALS AT LAW *

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INTRODUCTION

The shorter textbooks on equity have given but passing attention to the subject of appeal.¹ Professor McClintock stresses chiefly the scope of review.² He points out that in common law cases, which are reviewed by writ of error, the only question is whether the judgment should be affirmed or should be reversed because of errors committed to which exceptions were taken at the time. In equity, on the other hand, review is by appeal, and the question is, not whether the lower court committed error, but whether it rendered a decree which should have been rendered in the light of the entire case as disclosed by the record. In common law cases the appellate court could ordinarily review only rulings of law. In equity cases, on the other hand, the appellate court could review findings of fact as well as conclusions of law. This power was freely exercised so long as evidence was taken in writing. But when the evidence came to be taken orally in open court, the appellate court gave much more weight to the findings of fact by the trial judge since he had seen and heard the witnesses testify and could therefore better determine their credibility. But even then, Professor McClintock concludes, the appellate court was not bound by the findings of the court below on the issues of fact.

Equity appeals are also discussed by Professor Clephane in the last nine pages of his *Handbook of the Law of Equity Pleading and Practice*.³ He makes note of the following features of such appeals: ordinarily they lie only from final decrees; appeals can be taken only by the parties to the writ or their representatives; time and manner of taking appeals are wholly statutory; appellant must generally give a

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1. There is no discussion of appeal in WALSH, A TREATISE ON EQUITY' (1930), nor in CLARK, EQUITY (1919). Of course, it should be borne in mind that these books are concerned primarily with substantive law.

2. MCCLINTOCK, HANDBOOK OF EQUITY (1936) § 18.

3. (1926) pp. 417-425. The discussion rather closely parallels that in SHIPMAN, HANDBOOK OF THE LAW OF EQUITY PLEADING (1897) 154-158, to whom proper credit is given by Professor Clephane.

bond to answer for costs. In case the appeal is to operate as a super-seedeas, a bond for performance of the decree is required. An equity case is reviewable as to both law and fact though the conclusions of the trial court on the facts are highly persuasive. But, generally, only objections raised below will be reviewed.

The significant thing about common law pleadings in error was that their scope was so limited that they did not bring about a review of the merits of the judgment. The appellate court did not pass on whether or not the judgment below was fair or just, nor on what the correct judgment should have been. Instead, the sole question was, Did the trial judge commit an error? If he did, the judgment must be reversed. The use of the jury in common law cases was the all-important factor which for centuries kept the scope of review limited to the question of the commission of error. The appellate court could ascertain whether an error had been made in admitting or excluding evidence or in other matters involved in the trial before the jury, but it could not be certain what effect, if any, it had had upon the verdict. Hence, all that the appellate court could do was to remand the case to the trial court for new trial. The jury had the exclusive right to weigh the evidence and ascertain the facts. Correction of the verdict by the appellate court would be an infringement of the right to jury trial.

The function of an appellate court in reviewing equity cases, on the other hand, is not to search the record for errors of law, but to examine the result in the light of the evidence to see if justice has been done.⁴ Thus, the equity doctrine is in accord with the modern theory that the primary purpose of review is to see that justice is done in the individual case. The law doctrine, however, places the stress on the other possible appellate functions: the maintenance of trial court standards, and the development of the law. One of the needed reforms in our legal procedure is to take over into other fields the equity notion of the function of review.

I. APPEAL IN ENGLAND

The history of the scope of review in Continental Europe has been wholly different from that in England and the United States.⁵

4. Blume, *Review of Facts in Non-Jury Cases* (1936) 20 J. AM. JUD. SOC. 68, 72. Chief Justice Lamm stated in *Lee v. Lee*, 258 Mo. 599, 604, 167 S. W. 1030, 1032 (1914): "In chancery the question is, not what the chancellor instructed himself to do, or how he talked the matter over with himself—the question is: Did he seek equity and do it?"

5. ENGELMANN, *HISTORY OF CONTINENTAL CIVIL PROCEDURE* (Millar's Trans. 1927) 369; POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941) 6; Wright, *French and English Civil Procedure* (1926) 42 L. Q. REV. 327; Du Vivier, *The Appellate Courts and Appellate Procedure of France* (1926) 6 AM. L. SCHOOL REV. I.

This has been because no right of jury trial has been involved. On the Continent the same persons tried both issues of fact and issues of law. There was no dividing of the issues between judge and jury as in the Anglo-American system. Hence, the appellate court could review the facts as fully as it could the legal issues. The appellate court did not have to send the case back to the trial court for a new trial, but could itself dispose of the whole controversy and render the judgment which should have been rendered.

While the review of cases at law in England was quite different from the Continental review, nevertheless the English courts applied the Continental theory to the review of chancery cases. The purpose of review in chancery cases was not simply to determine whether an error had been committed, but rather to determine what the proper decree should be. But this did not mean, until quite recently, that the appellant received a genuine rehearing as he might on the Continent. The appellate court could not deal with new questions. The chancery appeal thus resembled the common law writ of error in being confined to the review of matters previously passed upon by the trial court.⁶ There could be no presentation of new evidence or new points not raised below. The cramped scope of review was thus as follows: in law cases there could be no review of the facts at all, while in chancery cases there might be such a review provided that the review did not involve the presentation of new evidence or of new points not raised below. It has been said that the limited chancery review was a survival of the early common law theory of an accusation against the judge.⁷

Chancery, patterning itself on the model of the Roman and the canon law, developed the appeal as a rehearing of the case long before the nineteenth century Parliamentary reform of the scope of review in cases at law.⁸ In fact, Holdsworth states that "equity had always adopted the straightforward method of questioning a decision by a rehearing of the case."⁹ It has been asserted that the broad scope of equity review was due to the dominant position of the King when the chancery system was developing.¹⁰ This is dubious, however, inasmuch as the Roman and canon law, from which the equity procedure was derived,¹¹ permitted a hearing *de novo* on appeal.

6. 2 DANIELL, *CHANCERY PRACTICE* (4th ed. 1871) 1459.

7. Sunderland, *Improvement of Appellate Procedure* (1940) 26 IOWA L. REV. 3; reprinted in (1941) 25 J. AM. JUD. SOC. 79.

8. ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) 28.

9. 9 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1926) 373.

10. Goodnow, *The Writ of Certiorari* (1891) 6 POL. SCI. Q. 493.

11. In *Wiscart v. Dauchy*, 3 Dall. 321, 327 (U. S. 1796), Mr. Chief Justice Ellsworth states: "An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and a re-trial; but a writ of error

While up to 1800 common law procedure was superior to equity procedure in most phases, Professor Holdsworth has stated that equity procedure was nevertheless superior in three aspects: (1) equity procedure involved the commencement of an action by one uniform writ, the writ of subpoena; (2) equity had a much less technical doctrine of election of remedies; and (3), of more interest to us, equity appellate procedure involved a rehearing, while the common law still resorted to the writ of error and bill of exceptions.¹²

Appellate procedure in chancery prior to the past century involved delay and expense.¹³ The procedure up to the decree was in itself very dilatory. But even after the decree had been drawn, a long time could elapse before the suitor had final relief. Dickens' *Bleak House* with its long drawn out case of *Jarndyce v. Jarndyce* tells the story. At any time prior to enrollment there could be a petition for rehearing to the trial judge. The enrollment of the decree was often long delayed. Even when it had been enrolled it could in certain cases be vacated. If there could be no vacation, there could still be a bill of review. Even if the bill of review failed there could still be an appeal from the trial judge to the chancellor, and from him to the House of Lords. Furthermore, the chancellor could, like the trial judge, rehear a case brought to him on appeal. No reasonable finality seemed possible.

As Professor Holdsworth states: "Any point arising in the course of a suit might be discussed (1) before the Master of the Rolls, (2) before the same person by way of rehearing, (3) before the Lord Chancellor, and (4) before the House of Lords."¹⁴ In 1813 the congestion and delay resulted in the creation of a Vice-Chancellor to assist the Chancellor.¹⁵ But little good was accomplished, since the new official could hear only cases especially delegated to him by the Chancellor and an appeal lay to the Chancellor. After much discussion in Parliament a commission was appointed in 1825 to inquire into the condition of the Chancery Court. But Lord Eldon headed the commission and a whitewash ensued. Two additional Vice-Chancellors were appointed in 1842.

is a process of common law origin, and it removes nothing for re-examination but the law."

12. 9 HOLDSWORTH, *op. cit. supra* note 9, at 372.

13. *Id.* at 368; POTTER, AN INTRODUCTION TO THE HISTORY OF EQUITY AND ITS COURTS (1931) 19.

14. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1922) 438. It was established in the latter half of the seventeenth century that appeal lay to the House of Lords from the equity side of the Court of Chancery. 1 HOLDSWORTH, *supra*, at 372; 1 NEWLAND, THE PRACTICE OF THE HIGH COURT OF CHANCERY (1826) 370; POUND, *op. cit. supra* note 5, at 63.

15. 1 HOLDSWORTH, *op. cit. supra* note 14, at 442. For perhaps the classic account of rehearings and appeals in English Chancery see 2 DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY (6th ed. 1894) 1439-1485. See also 1 NEWLAND, *op. cit. supra* note 14, at 360-377.

In 1851 an appellate court intermediate between the Vice-Chancellors and the Master of the Rolls on the one hand, and the House of Lords on the other, was established.¹⁶ It was made up of two Lord Justices in Chancery and the Lord Chancellor. On the request of the Lord Chancellor they could be assisted by the Master of the Rolls or the Vice-Chancellors. Thus, the chancery system consisted of the Master of the Rolls and the three Vice-Chancellors sitting separately as trial judges; the Lord Justices in Chancery, usually assisted by the Master of the Rolls, sitting together as an appellate court; and the House of Lords. An appeal might be taken from a single justice to the Court of Appeal in Chancery composed of three Chancery judges.¹⁷ From this, a second appeal lay to the House of Lords.

In 1854 Parliament authorized the waiver of juries in common law actions.¹⁸ Looking backwards one might have expected that the appellate courts would now be permitted to review the facts in jury-waived cases. But the act of 1854 also provided that the finding of the judge in the jury-waived case should have the same effect as the verdict of a jury. It required the Judicature Act to eliminate this restriction upon the effectiveness of appeal in jury-waived cases. English appellate courts now review questions of fact in such cases as freely as in suits in equity.¹⁹

At the beginning of the nineteenth century the method of taking evidence was by written questions and answers. All depositions read at the original hearing were read again on appeal.²⁰ The losing party might, if he wished, appeal to the Lord Chancellor sitting as the House of Lords.²¹ In that event each party prepared a short statement of the pleading, evidence, and proofs (called a "case") and an appendix, which contained in their entirety such documents and evidence read in the lower court as he deemed essential to presenting his case.²² The proceedings moved very slowly and involved great expense.²³

But all this was radically altered in 1852. The prior mode of examination in writing before officers of the court was abolished except in certain situations. Parties might give notice whether they wished to have testimony orally or by affidavit.²⁴ Two years later, however, the Lord Chancellor issued an order that all testimony should

16. I HOLDSWORTH, *op. cit. supra* note 14, at 443, 444.

17. Kales, *The English Judicature Acts* (1921) 4 J. AM. JUD. SOC. 133; see also *The Supreme Court of Judicature Act and Law Reform* (1874) 8 AM. L. REV. 256, 258.

18. 17 & 18 VICT., c. 125, § 1 (1854).

19. (1940) ANNUAL PRACTICE, Order 58.

20. 2 DANIELL, *CHANCERY PRACTICE* (4th ed. 1867) 1366-1369.

21. 3 DANIELL, *CHANCERY PRACTICE* (1st ed. 1841) 129.

22. PALMER, *PRACTICE IN THE HOUSE OF LORDS* (1830) 50, 51.

23. EGAN, *LETTERS ON DELAY IN CHANCERY* (1850).

24. 15 & 16 VICT., c. 86, §§ 28-30 (1852).

be taken before an examiner. The examiner was usually to report the testimony as a narrative and not in question and answer form.²⁵

As might be expected, the Judicature Act of 1873²⁶ laid down some all-important principles concerning equity procedure. In all cases, both at law and in equity, testimony was to be taken by oral examination, except when the court ordered otherwise for special reasons. The parties might, however, agree by formal written consent that the testimony be taken by affidavit. In cases where depositions were used they were ordinarily to be in narrative form. Of greater interest is the nature of the record in the Court of Appeal, the newly created appellate court. Depositions appeared in the record as previously, while affidavits appeared by printed or office copies. Oral testimony appeared by production of the judge's notes or such other materials as the court might deem expedient.²⁷ This practice was continued in effect in the twentieth century.²⁸ English appellate practice has remained about the same since 1888.

Of great significance is the power of the Court of Appeal to receive further evidence. This may be by oral testimony, by affidavit or by deposition.²⁹ This may save the expense and delay of remanding a case to the lower court for further proceedings. Thus, testimony may be presented to the Court of Appeal by deposition, by affidavit, by summary through the judge's notes, and orally when further evidence is received. One of the respects in which English equity procedure is greatly superior to the equity procedure of the vast majority of our state courts, as well as to that of the Federal courts, is this power of the appellate court to hear new evidence.

About 1912 Lord Loreburn, the English Chancellor, thus described how a case is made up for appeal and what methods are adopted for shortening the transcript under the reformed equity procedure in England:

"The method is different for the Court of Appeal and the House of Lords, to which an appeal from the Court of Appeal is allowed.

"In the Court of Appeal, where there is a great deal of business, including many small cases and many purely interlocutory appeals, a case is not, as a rule, formally made up at all. Copies of the pleadings and of the documents, and transcripts of the evidence if there has been a transcript made, are furnished to each

25. I DANIELL, *CHANCERY PRACTICE* (3d ed. 1857) 716.

26. 36 & 37 VICT., c. 66. See rule 36 promulgated under the statutes.

27. (1927) *ANNUAL PRACTICE*, Order 58, rule II. See I DANIELL, *CHANCERY PRACTICE* (7th ed. 1901) 1072.

28. 15 & 16 GEO. V., c. 49, § 103 (1925).

29. (1927) *ANNUAL PRACTICE*, Order 58, rule 4. See I DANIELL, *op. cit. supra* note 27, at 1074.

of the judges. If there has been no transcript, then the evidence is gathered from the trial judge's notes or from the notes or recollection of counsel. Each of these pieces, namely, pleadings, documents, and evidence, is separate; no attempt is, as a rule, made to make up a case, and the material is used as it would be on a hearing in the court of first instance. Sometimes, of course, in heavy cases all the materials are printed, but this is where they have been printed in the court of first instance for the convenience of parties."³⁰

Thus there is not the least suggestion concerning a narrative record in the present English practice.³¹ No printed records of any kind have ever been required in the English Court of Appeal.³² No written briefs are ever used in that court, and the only method employed for presentation of the views of the lawyers is the oral argument.³³

The English Court of Appeal may finally dispose of a case. The Judicature Act provides:

“. . . for all the purposes of and incidental to the hearing and determination of any appeal, . . . the Court of Appeal shall have all the power, authority and jurisdiction of the High Court.”³⁴

Thus the Court of Appeal has, besides its jurisdiction to hear appeals, all the powers of a trial court. It may in its discretion consider points raised for the first time on appeal, though this may result in depriving even the successful appellant of his costs.³⁵ It may avoid the need of a new trial. It may, however, grant a new trial where that is just. It may, as has been seen, hear further evidence on appeal. There is an absolute right to introduce such evidence in cases of appeal from interlocutory orders, or when the evidence concerns matters occurring after the time of the trial court's decision.³⁶ With respect to other appeals, leave of the Court of Appeal is necessary before such evidence may be introduced. Such leave will not be given where the

30. *The Operation of the Reformed Equity Procedure in England* (1912) 26 HARV. L. REV. 99, 106-107. This statement was made by the Chancellor in response to a question propounded to him by Mr. Justice Lurton of the United States Supreme Court prior to the adoption of the Federal Equity Rules in 1912. His answer related to cases in law and equity, but not to admiralty or probate or divorce cases, which, however, he stated were not very much different.

For another good short summary of English appellate procedure see Atkin, *Appeal in English Law* (1927) 3 CAMB. L. J. 1.

31. Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals* (1929) 42 HARV. L. REV. 483.

32. (1940) ANNUAL PRACTICE, Order 58, rule 11.

33. Sunderland, *An Appraisal of English Procedure* (1925) 11 A. B. A. J. 773, 779.

34. 15 & 16 GEO. V, c. 49, § 27 (1) (1925).

35. (1928) ANNUAL PRACTICE, Order 58, rule 8.

36. (1940) ANNUAL PRACTICE, Order 58, rule 4. See Note (1929) 38 YALE L. J. 971. In practice the introduction of new evidence is relatively rare. Atkin, *Appeal in England* (1927) 3 CAMB. L. J. 1, 8.

party deliberately or carelessly failed to produce such evidence. The evidence may be presented by oral testimony, by affidavit, by deposition, or by reference to an expert for inquiry and report. The appellant is to notify the respondent that he will apply for leave to introduce new evidence. If he wishes to examine witnesses before the Court of Appeal he must notify that court and obtain leave before the hearing on appeal.

While in America there is usually no appeal from interlocutory orders,³⁷ in England there is an absolute right to appeal from certain interlocutory orders, while others are appealable only with leave.³⁸ Among the interlocutory orders appealable without leave are orders granting or denying an injunction.³⁹

If application is made for a new trial, it is made directly to the Court of Appeal, and not to the trial court as in America.⁴⁰ It may even upset the verdict of a jury if all the facts are clear. The procedure in applying for a new trial is like that in taking an appeal.⁴¹

An English appeal does not, as in some American states, automatically stay execution.⁴² An appellant wishing such a stay must apply to the trial court, and if refused, to the Court of Appeal. Ordinarily the appellant need not give security for costs.⁴³ There are no writs of error, no bills of exception, and no assignments of error.⁴⁴ Notice of motion for a rehearing must be served on the respondent within fourteen days in case of appeal from interlocutory orders, and six weeks from a final judgment, but may be extended by the trial court or by the Court of Appeal.⁴⁵

As has been seen, the common law notion of review did not involve a rehearing of the case. Professor Holdsworth states: "The idea of an appeal by means of a rehearing came into English law from the Chancery; and it was not till the Judicature Acts that the common law procedure in error in civil cases was swept away, and the Chancery procedure substituted for it."⁴⁶

In England today the facts may be reviewed and new evidence admitted even in jury cases.⁴⁷ The English courts are, of course, untroubled by any constitutional guaranty of jury trial. Yet the prac-

37. (1923) 34 YALE L. J. 905.

38. Judicature Act, 15 & 16 GEO. V, c. 49, § 31 (1c) (1925).

39. Judicature Act, 15 & 16 GEO. V, c. 49, § 31 (ii) (1925).

40. Judicature Act, 15 & 16 GEO. V, c. 49, § 30 (i) (1925); (1941) ANNUAL PRACTICE, Order 39, rule 1; Blume, *Motions for New Trials in the Federal Courts* (1941) 25 J. AM. JUD. SOC. 109, 111.

41. (1941) ANNUAL PRACTICE, Order 39, rule 2.

42. Clark, *English Appellate Procedure* (1929) 39 YALE L. J. 76, 90.

43. *Ibid.*

44. *Id.* at 86.

45. *Id.* at 87.

46. I HOLDSWORTH, *op. cit. supra* note 14, at 214, 215.

47. (1928) ANNUAL PRACTICE, Order 58, rule 4.

tice has been that in cases of verdicts by the jury, the appellate court is slow to make findings of fact counter to the finding of the jury.⁴⁸

The English Court of Appeal, though authorized to sit in three divisions, usually finds two divisions sufficient to handle the cases before it. Appeals from the King's Bench Division and Probate, Divorce, and Admiralty Division usually go to one division and appeals from the Chancery Division to the other.⁴⁹ The division handling chancery appeals is regularly manned by two Chancery judges or barristers and one King's Bench Division judge or barrister. Three judges must sit together in the appeals from trial orders, decrees or judgments unless the parties consent to a hearing before two judges. Appeals from interlocutory orders, decrees, or judgments may be heard by not less than two judges.⁵⁰

I close my discussion of English equity appeals with a feeling of admiration. Their function and method deserve emulation. Best of all, they have become the actual pattern for appeals in cases at law. Today it seems more convenient to speak of English civil appellate procedure rather than of appellate procedure in law cases and appellate procedure in equity cases.

II. APPEAL IN THE STATE COURTS

In the eighteenth century the legislature was the highest court of review of equity cases in the colonial courts in Delaware, New York and Rhode Island.⁵¹ At one period in several states no appeal in equity cases was possible. However, equity jurisdiction was given to the highest court with or without concurrent jurisdiction in the main trial courts in Massachusetts, Rhode Island, Pennsylvania, and Maine.⁵² In South Carolina, on the other hand, there were set up circuit courts of chancery with a Court of Appeals in Equity made up of the circuit chancellors.⁵³ In other states there were circuit courts of chancery with appeals to the general court of review.⁵⁴

In states with intermediate appellate courts, review of equity cases has usually been denied to the intermediate court.⁵⁵ Though existent

48. Note (1929) 38 YALE L. J. 971, 977.

49. Kales, *The English Judicature Acts* (1921) 4 J. AM. JUD. SOC. 133, 136; Clark, *English Appellate Procedure* (1929) 39 YALE L. J. 76, 78. See also *English Procedure in Trials and Appeals* (1929) 13 J. AM. JUD. SOC. 117; (1929) 3 CONN. BAR J. 13.

50. 9 HALSBURY'S LAWS OF ENGLAND (1909) 64.

51. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941) 101, 102; POUND, *ORGANIZATION OF COURTS* (1940) 65, 76, 77; ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) 9, 215.

52. POUND, *ORGANIZATION OF COURTS* (1940) 134.

53. *Id.* at III, II4, 134.

54. *Id.* at 135.

55. This has been true in Alabama, California, Georgia, Indiana, and Missouri, but not in Illinois, Louisiana, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and

in Tennessee from 1895 to 1907, there is today no appellate court, intermediate or otherwise, devoted exclusively to equity cases, though Oklahoma and Texas have separate appellate courts for criminal cases. There seem to be no compelling reasons for setting up such a court, particularly in consideration that the experience with separate criminal appellate courts has not been satisfying.

The past fifty years have seen the passage of numerous state laws regulating appellate procedure.⁵⁶ Yet there has been no great uniformity among these statutes. In the words of one writer "this department of procedure remains a highly particularistic one."⁵⁷

(a) *Method of Review*

In many states today there exist both the writ of error and the appeal. The result has been confusing even when the two remedies have been made concurrent. It has been doubly so where the older rule that the two remedies are mutually exclusive continues in effect. In that state of affairs the party seeking review might be forced to proceed by both methods in close cases. The use of both methods was quite frequent in the former federal practice. To avoid this additional procedure a number of states have passed statutes combining the two into a single method designated "appeal".⁵⁸ Congress in 1928⁵⁹

Texas. POUND, ORGANIZATION OF COURTS (1940) 133, 225-241. Cf. Sunderland, *The Problem of Trying Issues* (1926) 5 TEX. L. REV. 18; Curran and Sunderland, *Organization and Operation of Courts of Review* (1933) THIRD REPORT OF MICHIGAN JUDICIAL COUNCIL 57, 161-175.

Tennessee, a state whose experience has been exceptional, set up a Court of Chancery Appeals in 1895. Acts of 1895, c. 76. It was composed of three judges and was to pass on such equity cases, other than state revenue cases, as the Supreme Court of the state might assign to it. In 1907 the court was increased in size to five and was renamed the Court of Civil Appeals, and given appellate jurisdiction of other civil cases up to \$1000 with certain exceptions. Acts of 1907, c. 82. In 1925 this court was renamed the Court of Appeals and its jurisdiction still further extended. Acts of 1925, c. 100.

56. They are collected in Dean Pound's new book, APPELLATE PROCEDURE IN CIVIL CASES (1941).

57. Millar, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 HARV. L. REV. 1017, 1058. As to equity appeals in the nineteenth century see POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 289-310.

58. ARIZ. REV. CODE (Struckmeyer, 1928) § 3658; ILL. STAT. ANN. (Smith-Hurd, 1936) c. 110, § 198 (1); KAN. GEN. STAT. ANN. (Corrick, 1935) § 60-3304; MICH. COURT RULES (1931, 1933) 55; SEARL, THE 1933 MICHIGAN COURT RULES ANNOTATED (1933) iii; NEB. COMP. STAT. (1929) §§ 20-1912 to 20-1914; N. J. S. A. (1939) 2:27-347. As to other states see POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 324-325, 388-389.

It has been stated that because of the jealousy toward equity, the procedure by writ of error tended to be the model. POUND, *op. cit. supra* note 56, at 318, 319.

"As for appellate procedure the changes here [U. S.] have been legion, producing highly diversified systems in different jurisdictions. Notable in this province is the merger of the common-law writ of error and the chancery appeal, attendant upon the fused procedure in the United States." Millar, *The Old Régime and the New Civil in Procedure* (1937) 14 N. Y. U. L. Q. REV. 197, 222.

Professor Sunderland regards the substitution of notice of appeal as a method of instituting appellate proceedings for the writ of error or appeal as one of the four main modern elements in an appeal. *Observations on the Illinois Civil Practice Act* (1934) 28 ILL. L. REV. 861, 872-873.

59. 45 STAT. 54, 466 (1928), 28 U. S. C. A. §§ 861a, 861b (Supp. 1941).

sought to substitute the appeal for the writ of error, but accomplished little, since the appeal in law cases continued to be regulated by the statutes relating to writs of error, while the appeal in equity cases was regulated in a different manner.⁶⁰ It took the new Federal Rules of Civil Procedure to accomplish the fusion.

(b) *Time for Appeal*

Occasionally time limitations upon equity appeals are shorter than upon those in law cases. For example, in Maine equity appeals must be taken within ten days after the decree is filed and notice given to the parties, although this period may be extended thirty days upon leave of court in cases where the appellant has neglected by accident or mistake to perfect the appeal within the time originally limited.⁶¹ Writs of error, on the other hand, could be brought at any time within six years after the entry of the judgment complained of.⁶² A similar variance exists in Massachusetts and Tennessee.⁶³

(c) *The Record*

The common law courts developed a technical sort of record which included only certain phases of the full proceedings, that is to say, the process, pleadings, verdict and judgment. The English Chancery courts developed no such record inasmuch as the method of proceeding was by written evidence. But in the American state courts oral testimony came to be widely used during the nineteenth century. This meant that there must of necessity be a certification by the trial court for purposes of appeal of the evidence taken in open court much like the bill of exceptions used in cases at law. Since in most jurisdictions the same judges had both equity and law jurisdictions, the judge in equity cases was bound to be affected by the idea of a technical record even before oral testimony came to be used in the equity courts. Hence, it is not surprising that there are a good many cases devoted to the question of what constitutes a part of the record on review in equity appeals. Equity courts, like law courts, have thus regarded interlocutory motions, motions preceding judgment, and affidavits and various

60. Payne, *The Abolition of Writs of Error in the Federal Courts* (1929) 15 VA. L. REV. 305, 318.

61. ME. REV. STAT. (1930) c. 91, §§ 53, 55, 57; Curran and Sunderland, *Organization and Operation of Courts of Review* (1933) THIRD REPORT OF MICHIGAN JUDICIAL COUNCIL 57, 204.

62. ME. REV. STAT. (1930) c. 116, § 10; Curran and Sunderland, *op. cit. supra* note 61, at 206.

63. In Massachusetts, appeals in equity cases must be taken within twenty days after the entry of the decree, while writs of errors may be brought within six years after judgment. 2 MASS. GEN. LAWS (1932) c. 214, §§ 19, 26; c. 250, § 5.

In Tennessee, sixty days are allowed for equity appeals, and two years for writs of error. TENN. CODE (1932) §§ 9047, 9069.

other papers as not within the record proper and so not reviewable unless included in the bill of exceptions. In a few states statutes have been passed to overcome this difficulty.⁶⁴

The equity courts arrived at an ideal form of appellate record. Since an appeal is basically a review of a case which has already been tried, the appellate record logically should consist largely of a copy of what has already been submitted in the trial court. No changes are needed; if they are required, their preparation becomes a heavy burden on the profession. This was the great defect in the bill of exceptions used in common law cases. The equity courts, on the other hand, in many jurisdictions substituted for them a transcript of the proceedings in the trial court. There has been a tendency, particularly in equity cases,⁶⁵ for the states to provide that on appeal the whole transcript of evidence may, at the option of one of the parties or the court, be used in the record on appeal. Over forty of the states have not required the narrative record either in equity cases⁶⁶ or cases at law.⁶⁷

(d) *Appeal from Interlocutory Judgments*

In the United States the common law rule was that appeal would lie only from a final judgment.⁶⁸ This rule is based on common law decisions involving the writ of error.⁶⁹ The history of equity procedure in England shows a wholly different situation. In Blackstone's time orders and interlocutory decrees were being reviewed just as were final decrees,⁷⁰ even by the House of Lords. The explanation for this is probably as follows: appeals to the House of Lords from the Lord Chancellor were established at a fairly late date in legal history, the latter half of the seventeenth century. Prior to that time cases began and ended in the same court, review being by way of rehearing before the Chancellor. It was natural that the Chancellor would review all

64. ILL. STAT. ANN. (Smith-Hurd, 1936) c. 110, § 198 (2).

65. The states having done so in equity cases and equity cases only are: Massachusetts, 7 ANN. LAWS (Michie, 1933) c. 214, § 25, Superior Ct. Rule 76 (1932), and Note (1925) 11 MASS. L. Q. 44; Nebraska, State *ex rel.* Farmers Mut. Ins. Co. of Nebraska v. Colby, 107 Neb. 372, 186 N. W. 355 (1922). The whole transcript of the evidence is transferred with certain formal omissions in equity cases and equity cases alone in: Alabama, Chancery Rule 84 (1923); Delaware, REV. CODE (1915) § 4438.

66. Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals* (1929) 42 HARV. L. REV. 483, 509, n. 120; Stone, *The Record on Appeal in Civil Cases* (1937) 23 VA. L. REV. 766, 792.

67. *Final Report of the Michigan Procedural Commission* (1929) 99.

68. Crick, *The Final Judgment as a Basis for Appeal* (1932) 41 YALE L. J. 539, 548. The early rule in Delaware, however, under article 7 of the Constitution of 1792 gave jurisdiction to the appellate court "To receive and determine appeals from interlocutory or final decrees of the Chancellor." See *Taten v. Gilpin*, 1 Del. Ch. 13 (1816).

69. Crick, *The Final Judgment as a Basis for Appeal* (1932) 41 YALE L. J. 539, 541.

70. *Id.* at 545-548; 3 BL. COMM. *442-455.

interlocutory decrees and orders since at first he was the only chancery judge, the masters being regarded as clerks rather than as judges.

A second possible explanation of chancery review prior to final decree is that the character of litigation in chancery made early review desirable. Equity assumed jurisdiction where the legal remedy was inadequate. This meant that much of its litigation was of a complicated nature. The equity courts made greater use of subordinate officials and required the documentation of evidence. The equity order and decree was of a more flexible type. All in all, it was therefore more convenient to permit interlocutory review.

The common law rule of no review before final judgment was applied to equity cases by statute at an early date in several jurisdictions. The Federal Judiciary Act of 1789 provided for appeals from "final judgment or decrees" exclusively.⁷¹ In 1830 Ohio and Maryland statutes provided similarly.⁷² In Missouri a statute providing for chancery appeals when a party was "dissatisfied with the determination or decree" was interpreted as meaning final decree only by way of analogy with the statute covering appeals at law.⁷³ But there were certain kinds of cases such as partition and the granting of a receivership for a business where serious injury to the parties would ensue if it was necessary to wait until the whole case had been dealt with. Hence, several states early provided for interlocutory appeals in certain situations.⁷⁴

If an interlocutory order is reviewed at once it may make later proceedings unnecessary, as in the case of an order granting a new trial or an order which in effect determines the writ. Furthermore, such an appeal may sometimes prevent irreparable injury as in the cases of granting, refusing or dissolving injunctions.⁷⁵ Yet, if appeal lay as to every order the court might be paralyzed. No absolute answer is available; experience must be the test.

The reason usually stated for denying interlocutory review has been that congestion in the appellate court is thus avoided.⁷⁶ But there has been much controversy as to when a judgment or decree is final. This may result in confusion as to the time limit for appeal. Such controversy would be avoided if interlocutory review were permitted. Moreover, granted that the rule of interlocutory review saves the appellate courts from congestion, it hinders the trial court since the deter-

71. 1 STAT. 72 (1789).

72. 29 OHIO LAWS 90 (1830); MD. LAWS (1830) c. 185.

73. *Tanner v. Irwin*, 1 Mo. 65 (1821).

74. Crick, *The Final Judgment as a Basis for Appeal* (1932) 41 YALE L. J. 539, 553, n. 66. Statutes were passed in Louisiana, Maryland, Massachusetts and Virginia. As to the present situation, see POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 349, 350.

75. Sunderland, *The Problem of Appellate Review* (1927) 5 TEX. L. REV. 126, 127.

76. Crick, *loc. cit. supra* note 74, at 557; Proskauer, *A New Professional Psychology Essential for Law Reform* (1928) 14 A. B. A. J. 121, 125.

mination of a given issue might make a trial unnecessary. In some cases interlocutory review will also be of great convenience to the parties to the suit. The solution is not necessarily appeal as of right in all cases before judgment or decree. Is not the answer to be found in discretionary review? Let the trial court or the appellate court decide what cases shall be reviewed.⁷⁷

The United States Supreme Court has stated: "Probably no question of equity justice has been the subject of more frequent discussion in this court than the finality of decrees The cases, it must be conceded, are not altogether harmonious."⁷⁸

(e) *Questions Raisable on Appeal*

As has been seen, before the Judicature Act of 1873 the English Appellate Courts did not consider questions not raised in the trial court. This rule doubtless still prevails in most American courts. One writer on equity practice has stated: "The general rule with some exceptions is well settled by numerous decisions that objections will not be considered by an appellate court in reviewing a case unless they were presented and insisted on in the court below as shown by the record."⁷⁹

Early in the nineteenth century there was a tendency to allow the question of the adequacy of a legal remedy as barring equitable relief to be raised in appeal though the question had not been raised in the trial court. The New York Court in 1820, by Chief Justice Spencer, stated in reversing a judgment and dismissing a bill in equity on the ground of lack of equity jurisdiction: "I regret that the bill was not so framed as to enable the court to put an end to the controversy; but justice must be administered on established principles, and according to established forms."⁸⁰

Since 1820, however, great changes have occurred. Most courts have for some time agreed that where a case has been tried in equity, the question of the adequacy of the legal remedy cannot be raised for the first time on appeal.⁸¹ The latter rule seems sound. If the objection had been made at the trial, it could have been corrected by a transfer to the law side of the court even in jurisdictions retaining the formal distinction between law and equity. In the Code states there is

77. POUND, *loc. cit. supra* note 74; Crick, *loc. cit. supra* note 74, at 564.

78. McGourkey v. Toledo & Ohio Central Ry., 146 U. S. 536, 544, 545 (1892) (opinion by Brown, J.).

79. 2 BEACHE, MODERN PLEADING AND PRACTICE IN EQUITY (1900) § 974. But see as to the older equity practice, POUND, *op. cit. supra* note 74, at 133.

80. Beekmen v. Frost, 18 Johns. 544, 564 (N. Y. 1820).

81. City of Omaha v. Venner, 243 Fed. 107 (C. C. A. 8th, 1917); Hart v. Oliver, 206 Ill. 209, 129 N. E. 833 (1921); Dant & Russell v. Pierce, 122 Ore. 337, 255 Pac. 603 (1927); POUND, *op. cit. supra* note 74, at 298; Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part I* (1932) 7 WIS. L. REV. 91, 101.

even less reason for the rule, since the only reasons there for continuing the distinction between legal and equitable causes of action are the right to trial by jury in law cases and certain differences in the manner of appellate review. Waiver of jury trial is increasingly common, and a jury is often deemed waived when a party goes to trial without objection. The differences in the method of appellate review are not great enough to warrant raising the question for the first time on appeal. In many jurisdictions appellate review in equity cases and jury-waived cases is almost identical.⁸²

A great majority of states hold both in law and in equity cases that the objection that a complaint fails to state facts sufficient to constitute a cause of action may be considered though first raised on appeal.⁸³ This rule is perhaps faulty, since commonly the defect in the complaint is the consequence of a careless statement rather than of basic flaw in the plaintiff's case. Indiana properly repealed the rule by statute.⁸⁴ Fortunately, the prevailing rule has not been applied to the question of the sufficiency of an answer or a reply.

Where no objection is taken in the trial court to a nonjoinder of parties in a law action, the question cannot be raised for the first time on appeal; and the same rule is usually applied to nonjoinder in suits in equity. But in those equity cases where the rights of the omitted parties are so closely connected with the subject matter of the controversy that a final decree cannot be made without materially affecting those rights, most appellate courts will consider the objection although it was not raised below.⁸⁵ If the point is well taken, the case is usually remanded to the trial court with directions that the plaintiff be permitted to join the necessary parties if he acts within a reasonable period.⁸⁶ The objection is heard, however, not for the benefit of the person raising it, but because a final decree settling the rights of the parties cannot otherwise be made.⁸⁷

Professor Campbell has stated: "The rule that questions not raised below will not be considered on review applies in equity cases

82. But it has been suggested by the United States Supreme Court that the appellate court might in its discretion deem it advisable to raise the objection. *Twist v. Prairie Oil & Gas Co.*, 274 U. S. 684 (1927), *reversing*, 6 F. (2d) 347 (C. C. A. 8th, 1925).

83. Campbell, *loc. cit. supra* note 81, at 104, n. 69.

84. IND. STAT. ANN. (Baldwin, 1934) § III (5).

85. *McConnell v. Dennis*, 153 Fed. 547 (C. C. A. 8th, 1907); Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part II* (1932) 7 WIS. L. REV. 160, *Part III* (1933) 8 WIS. L. REV. 147, 173.

86. *Law v. Neola Elevator Co.*, 281 Ill. 143, 117 N. E. 435 (1917); *Nolan v. Barnes*, 268 Ill. 515, 109 N. E. 316 (1915); similarly on appeal from an intermediate court where the question was not there raised.

87. *Gulick v. Hamilton*, 287 Ill. 367, 122 N. E. 537 (1919).

as well as in law cases.”⁸⁸ However, he goes on to say: “But a few decisions have indicated a more liberal view in the consideration of new questions in equity cases where the entire proceedings are before the court for a review of both the law and the facts.”⁸⁹ The distinction has value only in those states laying down a rigid rule of review in cases at law.

In a few jurisdictions statutes have extended the right or duty of the appellate court to consider new issues, but these statutes have not differentiated between equity cases and civil actions at law.⁹⁰ On the other hand, in a few jurisdictions statutes have restricted the right to consider new questions without, however, differentiating between equity and law cases.⁹¹ An interesting Maryland statute made no express distinction between law and equity cases. One provision of the Maryland Code is that: “In no case shall the court of appeals decide any point or question which does not plainly appear by the record to have been tried and decided by the court below.”⁹² This statute was construed, however, as not applying to equity cases.⁹³ But the Code further provides: “On an appeal from a court of equity, no objection to the competency of a witness, or the admissibility of evidence, or to the sufficiency of the averments of a bill or petition, or to any account stated and reported in said cause, shall be made in the court of appeals, unless it shall appear by the record that such objection was made by exceptions filed in the court from which such appeal shall have been taken.”⁹⁴

It is the prevalent equity rule that only errors properly assigned will be considered on review.⁹⁵ However, appellate courts are at least as liberal as they are in considering questions not raised and preserved below. They will, therefore, consider contentions, although not assigned as error, that the complainant fails to state facts sufficient to constitute a cause of action,⁹⁶ that a necessary party to a bill in equity

88. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part II* (1932) 7 WIS. L. REV. 160, 178. As to the contrary older equity practice, see POUND, *op. cit. supra* note 74, at 133, 298.

89. He cites: National Bank of Commerce v. Rockefeller, 174 Fed. 22 (C. C. A. 8th, 1909); O'Brien v. Shea, 208 Mass. 528, 95 N. E. 99 (1911); Woodward v. Bullock, 27 N. J. Eq. 507 (1875).

90. 28 U. S. C. A. § 391 (1928); WIS. STAT. (1931) § 251.09; Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part III* (1933) 8 WIS. L. REV. 147-151.

91. Campbell, *loc. cit. supra* note 90, at 151-154; Conn. Pub. Acts 1882, c. 50, § 8; MO. REV. STAT. (1929) § 1061.

92. MD. CODE ANN. (Flack, 1939) art. 5, § 10.

93. Wicks v. Westcott, 59 Md. 270 (1882).

94. MD. CODE ANN. (Flack, 1939) art. 5, § 40. The statute was liberally construed to permit reasonable exceptions in *Lowe v. Whitridge*, 105 Md. 183, 65 Atl. 926 (1907).

95. Campbell, *loc. cit. supra* note 90, at 162. *But see* POUND, *op. cit. supra* note 74, at 131, 185.

96. *Chenoweth v. Budge*, 16 Ariz. 422, 145 Pac. 406 (1915).

was not joined;⁹⁷ occasionally it will be heard that equity had no jurisdiction because it appeared on the face of the complaint that the plaintiff had an adequate remedy at law.⁹⁸ In a number of jurisdictions the statutes⁹⁹ or rules of court¹⁰⁰ reserve to the court the power to consider "plain errors" which are not assigned. Even in the absence of statute or rule the appellate court has the power to review.

The appellate courts have been as ready to consider questions not raised in the brief as questions not raised below. They have considered the sufficiency of a complaint to state a cause of action,¹⁰¹ the nonjoinder of a necessary party in equity,¹⁰² and occasionally whether the plaintiff in an equity action had an adequate remedy at law.¹⁰³

(f) *Reception of New Evidence on Appeal*

The common law appellate courts did not admit new evidence on review, nor did they consider new questions. The chancery courts, again feeling the cramping influence of the writ of error, were no readier to do so. Thus the chancery appeal did not constitute a genuine rehearing as it did on the Continent. Furthermore, in a number of states the conclusive character of findings in law cases resulted in appeals in equity cases being treated like common law proceedings in error, where the court would not in any case consider the weight of the evidence. The law practice of remanding instead of rendering the correct judgment in the appellate court affected equity cases. Equity courts took up the use of assignments of errors and bills of exceptions.

On the other hand, the benefits of the broader scope of appeal in equity cases were not confined to the equity courts. The common law courts by way of imitation were persuaded to grant new trials for obvious and latent errors of fact on the basis of the fiction that such errors amounted to errors of law.

The superiority of the equity appeal may be readily seen by contrasting the weaknesses of the common law writ of error. The common law writ of error dealt most effectively with the most unimportant type of question, namely, errors of law in the judgment roll. It dealt less effectively through the granting of new trials with the errors of law occurring during the trial and affecting the conduct of the jury. It did not deal at all with errors of fact.

97. *Note v. Morton*, 46 Fla. 478, 35 So. 656 (1903).

98. *Williams v. Peeples*, 48 Fla. 316, 37 So. 572 (1904).

99. *NEB. COMP. STAT.* (1920) § 20-1919.

100. *Revised Rules of the Supreme Court of the United States* (1939) Rule 27 (6).

101. *Dayton v. Free*, 46 Utah 277, 148 Pac. 408 (1915).

102. *Clayton & Tyson v. Henley*, 32 Gratt. 65 (Va. 1879). This question has never been considered when just raised in a motion for a rehearing. *Weightman v. Washington Critic Co.*, 4 App. Cas. (D. C.) 136, 147 (1894).

103. *Williams v. Peeples*, 48 Fla. 316, 37 S. W. 572 (1904).

In several states the powers of the appellate court have been enlarged to permit the reception of new evidence, thus permitting the widest possible review of the facts.¹⁰⁴ This will often make unnecessary the remand of a case to clear up some point left in doubt by the evidence at the trial, or to furnish by obviously available means some gap in the proof. But the difficulty here in law cases has been that of the guaranty of trial by jury. Hence, Massachusetts has limited it to the case of error arising from "omission at the trial of some fact which, under the circumstances of the case, may subsequently be proved without involving any question for a jury."¹⁰⁵ Illinois in 1933 followed, in substance, the Massachusetts rule.¹⁰⁶

(g) *Scope of Review in Jury-Waived Law Cases.*

It is interesting to observe the course of American doctrine as to the scope of review in jury-waived cases. In some states there were statutes declaring that findings should be made and should have the same force and effect as the verdict of a jury. This was true in New York¹⁰⁷ and Kentucky.¹⁰⁸ In North Carolina such a provision was even incorporated into the constitution of the state.¹⁰⁹ The federal courts were once governed by a statute to the same effect.¹¹⁰ In these jurisdictions the review in jury-waived cases could not become like that in equity cases.

But in many states no such statutes or constitutional provisions barred the way. If they made any provision at all for findings or conclusiveness of facts, they did not further specify what effect they should have. Hence, the courts might have applied the equity doctrine concerning the scope of review, giving the findings of fact no more weight than the recitals in an equity decree. There was nothing sacred about the decision of the judge upon the facts. But the courts by judicial construction imposed upon themselves restrictions which the legislature had omitted to lay down.¹¹¹

To overcome this judicial construction a number of state legislatures passed statutes expressly authorizing a full review of both the facts and the law in jury-waived cases. But even this did not bring

104. Up to 1928 California, Kansas and Michigan had made provision for the taking of additional evidence on appeal. Note (1928) 16 CALIF. L. REV. 500, 521. See CALIF. CONST., art. VI, § 4¾; KAN. STAT. ANN. (Corrick, 1935) § 360-3316; MICH. COMP. LAWS (1915) § 12,034. As to the present rules see POUND, *op. cit. supra* note 74, at 368, 369.

105. Mass. Acts 1913, c. 716, § 3, MASS. GEN. LAWS (1932) c. 231, § 125.

106. ILL. STAT. ANN. (Smith-Hurd, 1936) c. 110, § 216 (1) (d).

107. N. Y. Laws (1852) c. 392, § 268, *amending*, N. Y. Laws (1849) c. 438, § 268.

108. KY. CODE (Rev. 1876) § 331 (2).

109. N. C. CONST., art. IV, § 13.

110. 28 U. S. C. A. § 773 (1928).

111. *State Bank v. Conway*, 13 Ark. 344 (1853).

about the desired reform in all such jurisdictions. In Connecticut the appellate court ruled that it had no constitutional power to review questions of fact since it was expressly designated by the state constitution as a "Court of Errors". Such a title showed "the conviction of the people that a jurisdiction of mixed law and fact, vested in any court of last resort, exercising a supreme and uncontrolled power, was inconsistent with a sound system of jurisprudence, and was dangerous to the administration of justice."¹¹² The same constitutional argument was applied in South Carolina.¹¹³ The Oregon court interpreted the language of the state constitution as being merely permissive as to review of the facts.¹¹⁴

Fortunately a number of courts accepted the extension of the scope of review. For example, in Washington such a statute has been in force for more than forty years, and the courts have applied the English doctrine. Law actions without a jury and equity actions are treated exactly alike. In both cases a finding will be reversed if there is a preponderance of evidence against it.¹¹⁵

California in 1927 passed the most far-reaching state statute allowing final power in the appellate court to dispose of a case without remanding. The statute¹¹⁶ was made possible by a 1926 amendment to the state constitution.¹¹⁷ The statute provided that in all cases "where a jury is not a matter of right, or where jury has been waived", the appellate court may make findings of fact contrary to, or in addition to, those made by the trial court, and so may take new evidence of events any time before decision, and may make final judgment. In fact, the statute expressly declares that it is to be construed liberally to avoid retrials. It has been frequently applied.¹¹⁸

About one-third of the states have extended the equity scope of review to jury-waived cases.¹¹⁹ Possibly an even larger group follow the older doctrine of one scope in equity case and another in cases at law whether the jury is waived or not. However, they sometimes

112. *Styles v. Tyler*, 64 Conn. 432, 451, 30 Atl. 165, 171, 172 (1894) (two judges dissenting).

113. *Land Mortgage Co. v. Faulkner*, 45 S. C. 503, 506, 507, 24 S. E. 288, 290 (1896).

114. *Frederick & Nelson v. Bard*, 66 Ore. 259, 134 Pac. 318, 320 (1913).

115. *Rankin v. Blanc*, 143 Wash. 22, 254 Pac. 254 (1927).

116. CALIF. CODES AND GEN. LAWS (Supp. 1927) § 956a.

117. CALIF. CONST., art. VI, § 4¾.

118. Note (1932) 20 CALIF. L. REV. 171; Note (1928) 16 CALIF. L. REV. 500; (1936) 24 CALIF. L. REV. 733; (1930) 3 SO. CALIF. L. REV. 351; (1928) 1 SO. CALIF. L. REV. 387.

119. *Clark and Stone, Review of Findings of Fact* (1937) 4 U. OF CHI. L. REV. 190, 215. The note to Rule 68 of the Preliminary Draft of the Federal Rules of Civil Procedure lists: Alabama, California, Colorado, Illinois, Minnesota, New Jersey, New York, North Dakota, Oklahoma, South Dakota, Texas, Utah, Vermont, Washington, West Virginia and Wisconsin; with, however, some doubt as to California and Washington. As to the scope of review thirty years ago see (1910) REP. LA. BAR ASS'N 39, 40, 53, 65, 87, 88.

construe away the distinction by a wide application of the presumption in favor of the trial court's finding, so that in effect the law scope is followed. A third group, consisting of eight or nine states, has completely assimilated the review of equity cases to that of the law.¹²⁰

One argument offered for limiting the scope of equity review in the state courts is the tendency of the states to require special findings.¹²¹ However, Illinois,¹²² and Michigan¹²³ have dropped the requirement of findings of fact. Moreover, in seven states there is no express statutory provision or court rule concerning special findings.¹²⁴ A majority of states have definite provisions concerning findings in both jury-waived and equity cases.¹²⁵ In about nineteen states there is a definite requirement that the court must make special findings of fact in writing and state them separately from the conclusions of law. In about twenty other states it is the rule that the court may make special findings of fact and must do so where requested by the parties.

One method of empowering an appellate court to dispose of a case without remanding is the passage of a statute providing that where the findings of fact of the trial court are assigned as error the appellate court may make new findings and render final judgment on them.¹²⁶ Even though statutes do not expressly provide that cases tried to a jury shall not be included within their scope, it is always held that if the finding of fact were made below by a jury, the constitutional jury safeguard bars the appellate court from substituting its own findings on appeal.¹²⁷

An outstanding virtue of appeals in equity is that remand for new trial is seldom necessary, since the appellate court reviews the facts. This is doubly true if the appellate court is given the power

120. Arizona, Connecticut, Idaho, Kansas, Kentucky, Nevada, New Mexico, North Carolina and Pennsylvania.

121. Clark and Stone, *loc. cit. supra* note 119, at 205. *But see* Sunderland, *Findings of Fact and Conclusions of Law in Cases Where Juries Are Waived* (1937) 4 U. OF CHI. L. REV. 218, 221, arguing that the great variety of statutes shows no such policy involved.

122. ILL. STAT. ANN. (Smith-Hurd, 1935) c. 110, § 188 (2).

123. MICH. COURT RULES (1933) rule 37, § 11.

124. Delaware, Georgia, Maine, Maryland, Mississippi, Virginia and West Virginia.

125. Clark and Stone, *Review of Findings of Fact* (1937) 4 U. OF CHI. L. REV. 190, 206.

126. Note (1929) 38 YALE L. J. 971, 973, n. 8. The Nebraska statutes so provide in equity cases. NEB. COMP. STAT. (1929) § 20-1925. The Montana statutes are to the same effect, while those of Alabama, California, Indiana, North Dakota and Oregon include cases at law as well.

Arguably a statute of this kind should permit the appellate court to consider oral evidence not submitted below. (1927) 36 YALE L. J. 570. But the Nebraska court has construed the statute as requiring merely a consideration of the trial record. *Miksch v. Tassler*, 108 Neb. 208, 187 N. W. 796 (1922).

127. *First National Bank v. Crawford*, 78 Neb. 665, 111 N. W. 587 (1907); *Wigfield v. Atridge*, 207 Ala. 560, 93 So. 612 (1922).

to hear new evidence on appeal. This saving of time and expense may be carried over into jury-waived cases. Thus it should be only in cases tried by jury that the need of a new trial should be common.

The need of remand for new trial in one class of cases, namely, those involving the preservation of excluded evidence in the appellate record, has been avoided in equity in a number of states by statute. Statutes in Michigan¹²⁸ and Oregon¹²⁹ have provided that where testimony is excluded in chancery cases the party offering it may have it taken down in the same fashion as testimony admitted, but may have it specially marked and separately preserved in the appellate record. There is no good reason why this cannot be done in law cases where the jury is waived. It may be done in jury cases but involves the absence of the jury during the giving of such testimony.¹³⁰

(h) *Recent Reform*

Recent procedural developments in the state judicial systems have not been extensive. They were confined largely to the perfection of such special devices as the summary judgment, the declaratory judgment, and discovery before trial.¹³¹ The Illinois Civil Practice Act with respect to appellate procedure was limited to improving the mechanics of review.¹³² It sought to substitute a broader appeal in place of the former methods of review, particularly for the appeal and the writ of error.¹³³ It sought to abolish the old technical distinction between the record proper and the transcript of proceedings in the trial itself.¹³⁴ Under the former practice, the latter had been called a "certificate of evidence" in equity and a "bill of exceptions" in cases at law. Under the new rule, all differences between parts of the record were abolished and all documents before the court on appeal might be considered for all purposes. It further provided that in cases tried without a jury no special findings of fact by the trial court are necessary to support the judgment or decree.¹³⁵ This altered the rule previously applied in equity cases that the decree must recite every fact necessary to support it, the old rule thus placing the burden of making the record on review upon the successful party in the trial court. But no change was

128. MICH. COMP. LAWS (1915) § 12,493. See Blume, *Problem of Preserving Excluded Evidence in the Appellate Record* (1929) 13 MINN. L. REV. 169, 175-176.

129. Ore. LAWS 1925, c. 80.

130. *Truslow v. State*, 95 Tenn. 189, 198, 31 S. W. 987, 989 (1895).

131. Clark, *The New Illinois Civil Practice Act* (1933) 1 U. OF CHI. L. REV. 209.

132. *Id.* at 219. See also Jenner and Schaefer, *The Proposed Illinois Civil Practice Act* (1933) 1 U. OF CHI. L. REV. 49, 64-70.

133. ILL. CIV. PRAC. ACT, § 74 *et seq.* The old distinctions are set out in DODD AND EDMUNDS, *ILLINOIS APPELLATE PROCEDURE* (1929) § 180.

134. ILL. CIV. PRAC. ACT, § 74 (2).

135. *Id.* at § 64 (2) and (3).

made as to the power of the appellate courts to review facts. The Supreme Court could thus still review the facts in all chancery cases, but could not do so in jury-waived cases. Thus, no uniform system was devised for equity and jury-waived cases. The Act did not include the solution, which Federal Circuit Judge Charles E. Clark favors, of a chancery review with as limited scope as a legal review. The appellate court was, however, empowered to "give any judgment and make any order which ought to have been given or made".¹³⁶ It was also empowered to grant amendments and receive further testimony in the appellate court.¹³⁷

The new Michigan court rules of 1931 introduced some desired reforms in appellate procedure. The procedure for appeal in jury-waived cases was made identical with that in equity cases.¹³⁸ Thus in jury-waived cases the appellant could assign error on the ground that the decision was against the preponderance of the evidence. Moreover, a single method of appeal, notice of appeal, was adopted for all cases.¹³⁹ The narrative form of record was abolished,¹⁴⁰ and the parties were to designate the contents of the record.¹⁴¹

(i) *Effect of Jury Trial on Appeal Under the Codes.*

Dean Leon Green has said: "The difficulties of evidence, instructions, new trials, appellate review, and the abuses which arise from crowded dockets, excessive costs, unethical practices, and most of the other troublesome incidents of the judicial process result primarily from jury trial."¹⁴²

In jury cases a large proportion of reversals is for error in instructions. This danger is not present in equity because no instructions are given.¹⁴³ Similarly, many jury cases are reversed for error in the admission of evidence. But in equity cases, the absence of a jury causes a less rigid application of the rules of evidence. Thus, there

136. *Id.* at § 92 (f).

137. *Id.* at § 92 (a)-(d). Such testimony may be admitted "where evidence has been erroneously excluded or where there has been an omission of proof at the trial of some facts, which, under the circumstances of the case, may subsequently be proved without involving any question for a jury and without substantial injustice to either party."

138. Sunderland, *The New Michigan Court Rules* (1931) 29 MICH. L. REV. 586, 595. See Rule 37, § II. As to recent improvements in other states see POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 321-376.

139. MICH. COURT RULES, 55, 57.

140. *Id.*, 59, § 3 (e).

141. *Id.*, 59, 62.

142. GREEN, JUDGE AND JURY (1930) 375.

143. Chief Justice Lamm of the Supreme Court of Missouri stated in *Lee v. Lee*, 258 Mo. 599, 604, 167 S. W. 1030 (1914): "To offer instructions in a cause in chancery is like carrying owls to Athens, coals to Newcastle, herring to Holland, gilding refined gold. The unbending rule of practice is that instructions fill no office at all in an equity case; hence, for appellate purposes, error cannot be predicated or assigned upon the giving or refusing of them."

should be fewer reversals in equity cases for rulings on points of evidence.

As has been seen, the Federal Constitution and the state constitutions make the complete fusion of law and equity difficult by providing for the preservation of jury trial in cases of a common law nature. If the use of the jury trial could be cut down, the two systems could be brought closer together. We cannot, of course, proceed directly by statute to that end, as has recently been done in England.¹⁴⁴ But we may proceed indirectly to discourage the use of jury trial. One way is by the passage of legislation making the right to a jury dependent on a prior written demand.¹⁴⁵ Another is by legislation exacting as a further condition of the right the payment of a special jury fee.¹⁴⁶ Amendment of the state constitutions to abolish the right of jury trial in all civil cases should be attempted.

Writing in 1936, Professor Sidney P. Simpson predicted: "From a purely procedural standpoint, it seems reasonably certain that equity as a separate system will have practically disappeared from the United States within another fifty years."¹⁴⁷

Professor Walter Wheeler Cook, however, in his 1940 "One Volume Edition of Cases on Equity" republishes this striking statement made by him in 1931 concerning equity appeals:

"It must not be imagined, however, that in the so-called Code states the distinction between common law and equity cases has entirely disappeared. The reasons for the preservation of the distinction are numerous. One is, doubtless, the traditional conservatism of the legal profession and its clinging tenaciously to habits of thought and ways of looking at things which are embedded in all the literature of the subject for centuries. For example, the recent 'reform' of English property law speaks of certain titles being good 'at law' and of others as taking effect 'only in equity'—this over half a century after the fusion under the judicature acts. Of perhaps more importance is the fact that in many of the code states the distinction is preserved by legislative or constitutional enactment. To understand this it must be noted that historically common law and equity procedure, inter alia, differed in two ways: in the mode of trying issues of fact and in the types of appellate review. At common law the issues of fact were tried by the court and, originally, entirely on the basis of written evidence—answers to interrogations and depositions made under oath—and the chancery appeal was in substance tried *de novo* by the appellate court of the questions of fact as well as of law. The latter difference was due largely to the fact that as the evidence was written the

144. 23 & 24 GEO. V, c. 36, § 6 (1933).

145. ILL. STAT. ANN. (Smith-Hurd, 1936) c. 110, § 188 (1).

146. CALIF. CODE CIV. PROC. (Dewey, 1931) § 631.

147. Simpson, *Fifty Years of American Equity* (1936) 50 HARV. L. REV. 171, 248.

higher court could pass on it as well as the trial court, whereas in the common law case the triers of fact, the jury, had seen the witnesses. While formally the distinction between action at law and writ in equity is abolished by the codes, in essence it is usually retained by provisions such, for example, as that found in Connecticut, that all issues of fact which prior to the code were triable to a jury shall remain so triable and all issues of fact formerly triable to the court shall remain so triable. In addition, in some states by statute or constitutional provision the distinctions as to the kind of appellate review is also retained and chancery suits are reviewed by appeal instead of by writ of error. So long as constitutions and statutory provisions retain jury trial in civil cases as at common law and court trial in chancery or equity cases, and corresponding differences in appellate review, the distinction between law and equity is not abolished. Much can be done and has been done by wise provisions encouraging waiver of jury trials; but not until these constitutional and statutory requirements referred to are done away with and something like the more flexible English system is adopted can a real fusion of law and equity take place. Even then, of course, the distinction between action for damages and specific relief will continue, but there will be no need to call one common law and the other equitable relief."¹⁴⁸

III. APPEAL IN THE FEDERAL COURTS

Article III, Section 2 of the Federal Constitution gives the Supreme Court of the United States appellate jurisdiction, both as to law and fact with such exceptions and under such regulations as Congress might make. This section was subjected to bitter attack. It was asserted that this provision abrogated the right to trial by jury and made all cases reviewable de novo as in equity. The result of this criticism was the adoption of the Seventh Amendment providing that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law." This provision meant that facts found by a jury in civil cases¹⁴⁹ at law were put beyond the examination of the appellate court and review of jury cases was confined to matters of law, while review in equity cases continued to embrace both law and fact.

(a) *The Record—Law and Equity*

At the beginning of the federal judicial system all cases, both at law and in equity, were brought to the Supreme Court by writ of

¹⁴⁸ COOK, *CASES ON EQUITY* (3d ed. 1940) 12-13, quoting Cook, *Equity*, in 5 *ENCYCLOPEDIA OF SOCIAL SCIENCE* (1931) 586-587. At p. 65, n. 20, of his casebook, Professor Cook refers to some of the leading state court decisions.

¹⁴⁹ For a claim that the Seventh Amendment does not apply to criminal cases see Shapiro, *Criminal Appeal on the Facts and the Federal Judicial System* (1939) 34 *ILL. L. REV.* 332.

error.¹⁵⁰ All were heard upon a statement of the facts by the judge or parties, and not upon a full record.¹⁵¹ This was the rule for fourteen years.

By the Act of March 3, 1803, specific provision was made for appeal in cases in equity and cases involving admiralty and maritime jurisdiction.¹⁵² Upon such appeal there was to be transmitted to the Supreme Court a transcript of the libel, bill, answer, depositions, and all other proceedings in the case. All oral testimony was to be stated verbatim.¹⁵³ From 1803 up to 1938 the records on appeal in law cases and in equity cases were regulated as to form and contents by different rules, based on the scope of appellate review. According to Professor Stone, the "first and probably the most important determinant" in the form of the settled record has been the historical difference in the scope of appellate review between law cases and suits in equity.¹⁵⁴

A second reason for the difference in the record between law and equity cases in the federal courts has been the contrasting methods of presenting and taking evidence and testimony in the two types of cases. The English practice, since reformed,¹⁵⁵ and the American practice in equity courts prior to the Judiciary Act were that the testimony in equity cases was presented to the trial court by deposition instead of by oral testimony. The Judiciary Act altered this by providing that the mode of proof by oral testimony and examination of witnesses in open court should be the same in all federal courts in all federal cases whether in equity or at law.¹⁵⁶ This provision conforming the equity method of testimony to that in law cases was the law from 1789 to 1802. In the latter year an act of Congress provided that the court in its discretion might order the testimony of witnesses taken by depositions upon request of either party.¹⁵⁷ There was thus an opening wedge for dispensing with oral testimony in equity cases. The disparity between law and equity cases was increased in 1842 when the Supreme Court, acting under authority of an act of Congress of 1842,¹⁵⁸ laid down rules under which examination by deposi-

150. 1 STAT. 244 (1789); POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941) 289-290.

151. 1 STAT. 83 (1789).

152. 2 STAT. 244 (1803).

153. Where the oral testimony appeared in the form of notes of the judge, the court reversed for further proof. *Mayor of New Orleans v. United States*, 5 Pet. 449 (U. S. 1831).

154. Stone, *The Record on Appeal in Civil Cases* (1937) 23 VA. L. REV. 766, 769.

155. *The Operation of the Reformed Equity Procedure in England* (1912) 26 HARV. L. REV. 99, 104-105.

156. 1 STAT. 88 (1789). No express repeal of this provision occurred until 1874. REV. STAT., §§ 862, 5596.

157. 2 STAT. 166 (1802).

158. 5 STAT. 518 (1842).

tions and commission became the ordinary method, while examination by oral testimony in open court became a matter of discretion in the court.¹⁵⁹ In 1861 the gulf became even greater when the court laid down a rule that even the oral testimony was to be no longer taken in open court but before an examiner on hearing who copied the testimony in narrative form except in situations where the question and answer form could more clearly present the statements of the witnesses.¹⁶⁰

The Equity Rules of 1912 changed all this, however, by restoring the rule in effect from 1789 to 1802. Rule 46 provided that the examination of witnesses and the rulings on objections to evidence should be the same in suits in equity as in actions at law. Thus, from 1802 to 1912 the matters which have composed the record on appeal in equity cases has differed from that at law. In equity cases during that period, most of the evidence appeared in written depositions which were sent up in their entirety to the appellate court for reexamination. In law cases, on the other hand, the testimony was given orally in open court, and was taken down either by the reporter or as judge's notes, and presented to the appellate court by bill of exception.

During most of the history of the federal courts the question and answer form of record was the rule for both oral and written evidence. From 1789 to 1803, as has been seen, a brief narrative statement was, however, all that went to the appellate court. But from 1803 to 1861 everything appeared verbatim. In 1861 there was a reversion to the narrative form as to oral evidence. But from 1891 to 1912 the question and answer method was again used in all cases. Thus the narrative record had been tested twice and twice abandoned in favor of a fuller record.¹⁶¹

(b) *The Struggle for a Unified Scope of Review*

The most important and difficult problems in securing a union of law and equity in the federal courts concerned the preservation of the right to trial by jury as guaranteed by the Seventh Amendment. Not quite so important and yet deserving of great care were problems concerning the manner of appeal and the scope of review.¹⁶²

From 1800 to 1865 there were no successful attempts to establish a united system of review at law and in equity.¹⁶³ In 1865 an

159. 1 How. xxxix (U. S. 1841). See also 17 Peters lxi (U. S. 1842), an unofficial volume not found in the small collection of United States Supreme Court Reports, in which they were originally presented. The rules are set out in HOPKINS, *FEDERAL EQUITY RULES* (8th ed. 1933) 43-61.

160. Amendment to Equity Rule 67, 1 Black 6 (U. S. 1861).

161. Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals* (1929) 42 HARV. L. REV. 483, 489.

162. Clark and Stone, *Review of Findings of Fact* (1937) 4 U. OF CHI. L. REV. 190.

163. *Id.* at 197.

act of Congress provided for trial by the court of cases at law without a jury.¹⁶⁴ But review was interpreted to be the same as in jury cases.¹⁶⁵ Thus the law method of review, not the equity method, became the pattern for jury-waived cases at law.

The increasing congestion in the federal courts led to demands for limiting the scope of review. Admiralty review as under the First Judiciary Act was limited in 1875 to a determination of questions of law arising on the record.¹⁶⁶ Attorney General Garland urged upon Congress the extension of the same limited scope of review to equity cases.¹⁶⁷ The pressure on the Supreme Court was, however, relieved in 1891 when the circuit courts of appeal were established. The practice again became to review the entire record in admiralty as well as equity cases. No findings of fact were required as a foundation for review. In 1930 the Supreme Court by amendment of the equity rules laid down a rule in equity and admiralty requiring separate findings of fact and conclusions of law to be stated.¹⁶⁸ According to Professor and now Justice Frankfurter this restored the limited scope of review of 1789.¹⁶⁹

The Equity Rules of 1912 dealt with matters of review. They covered the preparation of the record on appeal and also the effect of error.¹⁷⁰ As has been seen, they restored the requirement of a narrative statement of testimony in equity records. The critics were at first not unreceptive to such change.¹⁷¹ But within the space of a year criticism commenced. One writer pointed out that evidence which appeared in narrative form has a wholly different probative effect from that appearing in question and answer form and that frequently it was extremely expensive to reduce the evidence into form agreeable to all parties.¹⁷²

The equity practice as prescribed by Federal Equity Rule 75 was, however, comparatively liberal and simple.¹⁷³ On the other hand, the practice concerning bills of exception had become technical in some respects. While it is true that equity practice prescribed a narrative

164. 13 STAT. 501 (1865), 28 U. S. C. A., §§ 773, 875 (1928).

165. *Flanders v. Tweed*, 9 Wall. 425 (U. S. 1869).

166. 18 STAT. 315 (1875).

167. REP. ATTY. GEN. (1885) 42; *id.* (1886) 18; *id.* (1887) xv; *id.* (1888) xiv; Frankfurter and Landis, *The Business of the Supreme Court at Term, 1929* (1930) 44 HARV. L. REV. 1, 30.

168. FED. EQUITY RULES, 70½.

169. Frankfurter and Landis, *loc. cit. supra* note 167, at 32.

170. FED. EQUITY RULES 46, 70½ (as amended Nov. 25, 1938) 72, 75-77. With these rules compare, FED. RULES CIV. PROC. 43, 52, 60, 61, 75, 76.

171. Bunker, *The New Federal Equity Rules* (1913) 11 MICH. L. REV. 435, 451. It was thought that the great bulk of the appellate records would be reduced and expense saved.

172. Lane, *One Year Under the New Federal Equity Rules* (1914) 27 HARV. L. REV. 629, 642.

173. Clark and Moore, *A New Federal Civil Procedure* (1935) 44 YALE L. J. 387, 431.

record, subject to the exception that testimony might be set forth *verbatim* when necessary to a sound appreciation of such testimony,¹⁷⁴ yet the practice in law cases was the same, since Rule 8 of the Supreme Court relative to bills of exceptions required the narrative form, "save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."¹⁷⁵ Thus the procedures for review were about identical in form.

The Federal Equity Rules of 1912 did not directly change the divided form of review. Equity cases were still reviewed in one way, and law cases in another with respect to scope of review. However, Federal Equity Rule 46 restored the provision of the First Judiciary Act of 1789 that the testimony of witnesses in all equity trials should be taken in open court except in certain limited cases, and that the court should, as in actions at law, pass on the admissibility of all evidence. Thus, less argument could be made against the adoption by equity of the law scope of review. The appellate court could less effectively review questions as to the credibility of witnesses than as to written documents.

The Act of Congress of 1928 which abolished the writ of error and substituted appeal, thus seeming to take over the equity practice into cases at law, was soon interpreted as a change of name only.¹⁷⁶

(c) *Unification and the New Federal Rules*

Prior to the new federal rules there were five methods for preparing records on appeal in federal civil actions.¹⁷⁷ In actions at law the method was by bill of exceptions. Such a bill contained only so much of the evidence as was necessary to present clearly the question of law involved in the rulings to which exceptions were reserved. The evidence was set forth in condensed and narrative form. A number of states employed bills of exceptions in cases at law. England has long ago abandoned them.¹⁷⁸ The new federal rules dispense with them.¹⁷⁹ The other four methods of preparing records on appeal in civil cases prior to the new rules were: (1) the judge-made record, (2) the record made by direction of the parties or their counsel, (3) the record made by the parties and court, and (4) the clerk-made rec-

174. FED. EQUITY RULES 75 (b). The rule is construed in *Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275 U. S. 372 (1928).

175. The rule is set out in 286 U. S. 598 (1932).

176. ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) 244; Payne, *The Abolition of Writs of Error in the Federal Courts* ((1929) 15 VA. L. REV. 305.

177. Stone, *The Record on Appeal in Civil Cases* (1937) 23 VA. L. REV. 766, 773-781.

178. Sunderland, *An Appraisal of English Procedure* (1925) 11 A. B. A. J. 773.

179. Unfortunately they still exist in appeals in criminal cases. Moore and Adelson, *The Supreme Court, 1938 Term* (1940) 26 VA. L. REV. 697, 700. See Criminal Appeal Rule IX.

ord. The Federal Equity Rules of 1912 used the method of the record made by the parties and the court.¹⁸⁰ The new federal rules 75 and 76 are based largely on the old equity rule.

When the Advisory Committee on Rules of Civil Procedure prepared the new rules concerning appeal one of their purposes was to provide a record for the appellate court which could be used under the new joined procedure either for cases formerly in equity or writs formerly at law.¹⁸¹ At the same time they wished to provide a record which could be simply and inexpensively prepared as in states having modernized code procedure. They also wished to provide a record which would present the question to the court comprehensively and yet not overburden the court with superfluous matter.

While under the Equity Rules of 1912¹⁸² it was the requirement that there be a narrative statement of the testimony of witnesses in the record on appeal, the new civil rules permit a question and answer record.¹⁸³ If a narrative record is prepared, the other party may object and have the question and answer form substituted. The advantages of the question and answer form are (1) speedy preparation, (2) a more accurate picture of what happened below, and (3) cheapness in preparation.¹⁸⁴

The new federal rules abolish the old distinction in law cases between the record proper and the proceedings and evidence on the trial, and the method of bringing matters not of "strict record" into the record on appeal becomes unnecessary.¹⁸⁵ Assignment of errors as a prerequisite of review is no longer necessary. Summons and severance as a method of giving notice to co-parties are abolished.

The Act of 1934¹⁸⁶ gave the Supreme Court the power to unite the law and equity procedure. According to Dean and now Judge Charles E. Clark, Reporter for the Federal Rules of Civil Procedure: "Probably the greatest obstacle to this union, next to the question of jury trial, is the traditional difference in method of review of equity and

180. FED. EQUITY RULES 75, 77. The 1912 rules are set out in 226 U. S. 649-673 (1913). Federal Equity Rule 75 was amended May 31, 1932, to relieve litigants of the necessity of putting expert testimony in narrative form for the purposes of appeal.

181. Stone, *The Record on Appeal in Civil Cases* (1937) 23 VA. L. REV. 766, 784.

182. FED. EQUITY RULES 75 (b).

183. FED. RULES CIV. PROC. 75 (c).

184. ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) 142-147.

185. Ilsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure* (1939) 24 MINN. L. REV. 1, 48. Professor Sunderland lists this as one of the four main elements or stages in a modern appellate proceeding. *The New Michigan Court Rules* (1931) 29 MICH. L. REV. 586, 595; *Observations on the Illinois Civil Practice Act* (1934) 28 ILL. L. REV. 861, 872. The other three elements listed are: Use of notice of appeal instead of writ of error or appeal, serving notice of appeal on all parties alike and abolition of summons and severance as a method of serving co-appellants, and setting out grounds of appeal in the briefs and abolition of separate assignments of errors.

186. 48 STAT. 1064 (1934), 28 U. S. C. A., §§ 723 (b), 723 (c) (1941).

law cases."¹⁸⁷ It is true that legislation had very largely assimilated the procedure for review into a single type. The first step was to make harmless the taking of an appeal when a writ of error was proper or vice versa. The next step occurred in 1928 when the writ of error was abolished and the appeal substituted.

But these changes did not deal with the important problem of the scope of review. The problem of the scope could be approached in three ways. There could be retained the old federal rule that in jury-waived law cases the findings of fact should have the same effect as the verdict of a jury in an action at law, while in equity cases the findings of fact should be reviewable as to the weight of the supporting evidence as well as the sufficiency. But this did not unite appellate review in law and in equity. A second solution was to apply the scope of review in equity cases to jury-waived cases. The third solution was to apply the jury rule to equity and jury-waived cases. The second solution made the equity rule the new single rule for all cases not involving a jury. The third solution made the jury rule the new single rule for all cases.

The new federal rules introduce no change in the scope of review as to questions of law. It should be observed, however, that a party need not take exceptions in order to have a question for review.¹⁸⁸ Instead, it is sufficient to make reasonable objections or to make appropriate motions, making the objections specific, and setting forth in each instance the grounds for any motion presented.

But in non-jury law cases a great change has been made in the scope of review on questions of fact. As to jury cases, the new rules do not change the scope; as before, the appellate court may not review the facts. It may, of course, review the question as to whether there was substantial evidence to maintain the verdict, since that is a question of law and not a question of fact. Even in this situation, a motion for a directed verdict must be made at the close of the entire case.¹⁸⁹ Neglect to make such a motion is treated as an admission that there was sufficient evidence to justify the submission of the case to a jury. Furthermore, to be effective the motion must state the specific grounds upon which it is based.

Prior to the new rules, the findings of the trial judge in non-jury actions at law were not reviewable on the facts. The appellate court could only pass on whether or not the findings were supported by substantial evidence; thus, the scope of review was no broader than that

187. Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure* (1936) 49 HARV. L. REV. 1303, 1319.

188. FED. RULES CIV. PROC. 46.

189. *Baten v. Kirby Lumber Corp.*, 103 F. (2d) 272 (C. C. A. 5th, 1939).

in jury cases. In equity cases, on the other hand, the findings of the court were reviewable on the facts. The appellate court could review the weight of the evidence, though as mentioned above, there was a rather powerful presumption in favor of the action of the trial judge. It was, of course, wholly illogical that the findings of the trial judge should be treated differently in one type of action than in another type of action. The distinction was based on history rather than logic.

The Federal Rules of Civil Procedure appear to extend the equity scope of review to jury-waived cases. The Supreme Court Advisory Committee on Rules of Civil Procedure early saw the need of a uniform rule for equity cases and jury-waived cases.¹⁹⁰ There was a good deal of discussion as to whether the law rule or the equity rule should be adopted. The Advisory Committee selected the equity rule and the Supreme Court approved it. It should be noted, however, that under Rule 52 (a) the findings of fact are not to be set aside unless clearly erroneous, and that due regard is to be given to the opportunity of the trial court to judge of the credibility of witnesses. The Circuit Court of Appeals for the Fourth Circuit has held in an opinion by Judge Parker that the present rule as to the review of findings is simply a reembodyment of the old equity rule on the subject.¹⁹¹ In the Notes to the Rules of Civil Procedure it is stated that Rule 52 "accords with the decisions on the scope of the review in modern federal equity practice."¹⁹²

(d) *Equity Scope v. Law Scope*

Federal Circuit Judge Charles E. Clark favored assimilating the scope of equity review to that in law cases.¹⁹³ His notion is that the review in an equity case cannot be to any real extent, and should not be, a revaluation of the testimony of witnesses who appeared at the trial. This would impose too heavy a burden on the appellate courts and a task they are not fitted to accomplish. Furthermore, the appellate court has rather great freedom in cases at law because of the shad-

190. For authorities favoring the equity scope see POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941) 222, 300, 370; Blume, *Review of Facts in Non-Jury Cases* (1936) 20 J. AM. JUD. SOC. 68; Holtzoff, *Practice Under the Federal Rules of Civil Procedure* (1940) 20 B. U. L. REV. 390; Sunderland, *The Scope of Judicial Review* (Bar Proc. 1938) 17 NEB. LAW BULL. 228, 240. *Contra*: Clark and Stone, *Review of Findings of Fact* (1937) 4 U. OF CHI. L. REV. 190; Ilsen and Hone, *Federal Practice as Affected by the New Rules of Civil Procedure* (1939) 24 MINN. L. REV. 1, 34-35; Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure* (1936) 22 A. B. A. J. 533, 540.

191. *Guilford Construction Co. v. Biggs*, 102 F. (2d) 46 (C. C. A. 4th, 1939).

192. It has been asserted that this is not equivalent to "adopting" the equity rule. Ilsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure* (1939) 24 MINN. L. REV. 1, 34.

193. Clark and Moore, *A New Federal Procedure* (1935) 44 YALE L. J. 387, 414.

owy nature of the distinctions between questions of fact and questions of law.¹⁹⁴

Against a review of the facts in equity cases, it may be argued that since today equity courts may hear oral testimony as may the law courts, there is no longer a need for review since an appellate court is not in position to review oral testimony as effectively as it could review documentary evidence.¹⁹⁵ Thus, the natural tendency for appellate courts in reviewing equity cases would be to follow the stricter law scope of review. Furthermore, allowing review of the facts is likely to increase the number of appeals taken.¹⁹⁶ It has been thought that appeals in equity cases were proportionately more numerous than in actions at law because of the hope of obtaining a reversal on the facts.¹⁹⁷

It is further pointed out that the equity courts have themselves by the development of certain principles of review made the scope of equity review much like that of review at law.¹⁹⁸ In reviewing findings of fact they have often said that such findings will stand in the appellate court unless clearly erroneous, since the trial court had the opportunity of seeing the witnesses. The appellate court will distinguish between findings based on conflicting evidence and those based on undisputed evidence. It will also distinguish between findings based on oral testimony given in open court and those based on written documents. Findings based on conflicting evidence or oral testimony are presumed to be correct, and can be rebutted only by a clear showing of obvious error. As a consequence equity cases are actually seldom reversed on the facts.¹⁹⁹

It is also pointed out that adopting the equity mode of review continues two methods of reviewing cases. Under the old system equity cases were reviewed in one way and law cases, whether with or without a jury, in another way.²⁰⁰ Under the new system jury cases are reviewed one way and non-jury cases, whether equity or law, in another way. On the other hand, the adoption of the law method would mean a single method. The Seventh Amendment makes this the only single, uniform method available. Broad definition of error of law will prevent hardship in individual cases.

194. Clark, *The New Illinois Civil Practice Act* (1933) 1 U. OF CHI. L. REV. 209, 221.

195. Ilsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure* (1939) 24 MINN. L. REV. 1, 32.

196. *Id.* at 33.

197. Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure* (1936) 22 A. B. A. J. 533, 540.

198. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941) 300; Clark and Stone, *Review of Findings of Fact* (1937) 4 U. OF CHI. L. REV. 190, 207.

199. Clark and Stone, *loc. cit.* *supra* note 198, at 208-209.

200. Clark, *Review of Facts Under Proposed Federal Rules* (1936) 20 J. AM. JUD. SOC. 129.

Judge Clark has stated in criticism of the equity form of review that it

“not only invites reversals in cases fully and adequately tried and decided by the trial court, but it has the special disadvantage that it retains a divided procedure which it is the chief purpose of the proposed reform to abolish in the federal courts. Nor do I believe it capable of demonstration that in states following the rule of complete union even on appeal, states as widely separated as Connecticut and New Mexico, there is a more notable failure of justice than in other states, such as New York, where the rule does not obtain.

Without question the old distinction between equity and jury cases should be wiped out as affects review as well as original trial.”²⁰¹

Judge Clark has also argued against the equity scope of review “that the equity review in like manner is an administrative one, as compared to the law review which is a judicial one.”²⁰² Since facts are not reviewed in the cases of administrative tribunals they should not be as to equity courts. However, granting for the purpose of argument that the cases are analogous, one should note that a considerable group of lawyers advocate that judicial power be extended to review of the facts found by administrative tribunals.

Federal District Judge Chesnut of Maryland objected to the use of the equity model for a number of reasons.²⁰³ He felt that to give less weight to the findings of the court than to the verdict of a jury would tend to derogate from the importance of the judicial function. But the trial judge could review on motion for a new trial. Moreover, is not the judicial function treated respectfully in equity cases and in cases tried on the Continent? Judge Chesnut also felt that an appellate court was not in position to review the facts. But with the common use of court stenographers the appellate court can act much more effectively than it once could. Moreover, the appellate court is likely to be cautious about substituting its own judgment. In the third place, Judge Chesnut thought that long appellate records and more appeals would be encouraged. But justice may require more appeals. Furthermore, review of the facts might be made discretionary.

Having rehearsed the arguments against review of the facts, let us examine those in favor. Mistakes of fact can be and often are

201. *Ibid.*

202. Clark and Stone, *loc. cit. supra* note 198, at 214. *But see* POUND, *op. cit. supra* note 198, at 30.

203. Chesnut, *loc. cit. supra* note 197. Compare his views as set out in *Federal Rules of Civil Procedure*, Washington Institute (1938) 80-89.

more prejudicial than errors of law.²⁰⁴ A review of the facts is desirable and even necessary in order to maintain popular confidence in the administration of justice. Appellate courts should not be compelled to admit that they cannot decide cases according to the merits. A review of the whole case makes it possible to dispose of it without the need for a new trial and possible subsequent appeals.²⁰⁵ Technical decisions result when a tribunal deems that it can review only issues of law.²⁰⁶ The court may, as frequently happens in criminal cases, reverse for an alleged error of law where the true reason was its belief that there was error of fact. Even in case of review of judgments at law there must be some review of the facts to examine the sufficiency of the facts to sustain the judgment. Moreover, there is no clear distinction between questions of law and questions of fact.

The arguments against review of the facts go chiefly to the question of expediency; as, that the appellate court will be overburdened with work which it is not well suited for,²⁰⁷ and that the development of the law of the jurisdiction will be frustrated because of concentration on the facts.

According to Professor Blume, the writ of error method of review failed in equity cases, and was repealed in 1803, because questions of law and questions of fact were so intermingled that it was very difficult to keep them apart, because in a large number of cases the only important questions were questions of fact, and because too much power was left to the trial judge.²⁰⁸

The new Federal Rules of Civil Procedure have greatly improved the former system. In the words of Professor Sunderland: "Federal appellate procedure has heretofore been about as bad as any system. It probably is now about as good as any system."²⁰⁹

204. ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) 84. *Accord*: Shapiro, *Criminal Appeal on the Facts and the Federal Judicial System* (1939) 34 *ILL. L. REV.* 332.

205. ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) 88.

206. *Id.* at 83.

207. *Id.* at 85; Atkin, *Appeal in English Law* (1927) 3 *CAMB. L. J.* 1, 8.

208. Blume, *Review of Facts in Jury Cases* (1936) 20 *J. AM. JUD. SOC.* 68, 69-70.

209. *New Federal Rules of Civil Procedure as Related to Judicial Procedure in Ohio* (1939) 13 *U. CIN. L. REV.* 1, 129. See also, POUND, *op. cit. supra* note 198, at 328-329.