FINDINGS OF FACT*

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INTRODUCTION

To many of us rules of procedure are nebulous and for that reason we emphasize substantive rules of law even though most of us know the importance of the former. The authors hope in the following material to remove some of this cloudiness from one limited phase of procedure, that of "fact finding." This article is meant to be of assistance to trial judges on whom the final responsibility for preparation of the findings rests. It is also aimed at counsel who may assist in the preparation or who may object to the findings made by the court. Lastly, students should be aware of the fact-finding process that the trial court has gone through when studying appellate court decisions.

Although the basis of the material is derived from federal procedure, the advice and the suggestions should in the main be applicable to most state proceedings. We shall attempt to illustrate (1) the purpose of the findings, (2) when they are required, (3) how they should be prepared, (4) their effect on appeal, and (5) the effect of a failure to make the necessary findings.

I. WHAT IS THE PURPOSE OF FINDINGS?

Findings of fact serve a threefold purpose. One of these is to assist the trial court in the adjudication process; or, to quote Judge J. Skelly Wright, to prevent "shooting from the hip." He added:

> Sometimes people say their first impressions are probably right. Well, that may obtain with reference to informed guesses, but when you are deciding a lawsuit, a second impression after studying, after consideration, after analysis of the facts and the law, sometimes gives you a better result, a more reliable result than the

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* Bruce V. Wagner prepared this article from an outline of cases and comments compiled by Judge Carter for his use at the Ninth Circuit Judicial Conference. Judge Carter in making his syllabus relied on a memorandum and collection of cases prepared by Charles Powell, Chief Judge of the United States District Court, E.D. Washington.

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> first impression which you had before you had an opportunity to consider and deliberate, which are the warp and the woof of the adjudicatory process.[1]

Judge Frank in *United States v. Forness*[2] stressed the importance of fact-finding:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are "clearly erroneous", no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be.[3]

The second purpose of the findings is to serve other courts where issues of estoppel by judgment or res judicata are involved. A later court looking at a judgment based on such findings must know precisely what was decided, and this cannot be determined by the judgment alone, since: a) Rule 15(b), Federal Rules of Civil Procedure (FRCP), in substance provides that the pleadings are changed by the evidence introduced; and b) FRCP Rule 54(c) states in substance that the judgment is what you prove regardless of what you plead. It becomes obvious that the findings of fact are extremely important in defining for future cases the precise limitations of the issues and the determination thereon.

The third purpose of findings is to inform the court of appeals of the basis for the judgment. The problems that can occur because of poor findings of fact are well illustrated in the case of *Irish v. United States*.[4] This was an action under the Federal Tort Claims

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1 PROCEEDINGS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 163 (1963).
2 125 F. 2d 928 (2d Cir. 1942).
3 *Id.* at 942-43.
4 225 F. 2d 3 (9th Cir. 1955).

Act where the plaintiff, a minor, was struck by a mail truck driven by one Smith. As to the question of liability the trial court submitted only one statement: "It is not true that the said Smith negligently drove, operated, maintained or controlled the said mail truck. . . . That it is not true that the collision or the injuries sustained by the said minor David Irish proximately resulted from any negligence of the defendants or either of them."[5]

District Judge Wiig, writing the opinion for the court, commented that "a mere statement of law is not sufficient, for negligence depends on the conduct under the circumstances."[6] The findings should be so exclusive as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached the decision. He further stated that "had the court set out in its findings of fact the evidence believed, or the reasons no negligence could be found, this discussion would be unnecessary."[7] The opinion then reviewed the testimony of the driver of the truck, and of the only eye-witness to the accident. The latter's testimony was contradictory and the judge commented that the witness, a minor, seemed to have an affinity for any leading question which he could answer with a yes. He concluded that the findings of the trial court provided no understanding of the basis of the trial court's decision nor did they give any hint as to the factual basis for the ultimate conclusion. Therefore, the case was remanded for the purpose of making appropriate findings of fact, if possible; if not, then the judgment would be reversed.

Circuit Judge Chambers, concurred in the opinion[8] believing that Judge Wiig's solution was a reasonable one. However, Circuit Judge Healy dissented,[9] believing that the court's finding of no negligence was contrary to the evidence and thus clearly erroneous. It should be obvious that had the trial court made its findings explicit the main appellate issue would never have arisen.

This conclusion follows since FRCP Rule 52(a) prescribes that findings of fact in actions tried without a jury shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of a trial court to judge the credibility of the witnesses. The Supreme Court in *United States v. U.S. Gypsum Co.*[10] stated:

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5 *Id.* at 5.
6 *Ibid.*
7 *Id.* at 7.
8 *Id.* at 8.
9 *Ibid.*
10 333 U.S. 364 (1947).

> It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and the credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however.[11]

The court then defined the "clearly erroneous" rule as follows: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[12]

II. When Are Findings Generally Required?

The Federal Rules of Civil Procedure require a court to make findings of fact and conclusions of law in several instances. FRCP Rule 52 requires findings in all non-jury cases prior to entry of judgment. FRCP Rule 41(b) also requires such findings of fact and conclusions of law where the court grants defendant's motion for dismissal at the close of Plaintiff's evidence for failure to prove a case.

Prior to the 1963 amendment of FRCP Rule 41(b) such findings were required in a case tried by a jury as well as in a case tried without a jury. In the jury situation then, a motion for an involuntary dismissal under FRCP Rule 41(b) overlapped with a motion for a directed verdict, FRCP Rule 50(a). In *Makowsky v. Povlick*,[13] a jury case, the defendant's motion for dismissal under FRCP Rule 41(b) was granted; however, the court did not make the required findings of fact and conclusions of law. The appellate court, therefore, treated the motion as one for a directed verdict and accepted as true all the facts favorable to the plaintiff which the evidence tended to prove and drew all reasonable inferences against the defendants.

In *O'Brien v. Westinghouse Electric Corp.*,[14] also a jury case, the lower court granted defendant's motion for dismissal under FRCP Rule 41(b); however, it did make the required findings of

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11 *Id.* at 394-95.
12 *Id.* at 395.
13 262 F. 2d 13 (3d Cir. 1959).
14 293 F. 2d 1 (3d Cir. 1960).

fact and conclusions of law. Plaintiff on appeal asserted that the findings were made in a light most favorable to the defendant rather than to the plaintiff. The appellate court stated that in a jury case the question involved in a motion for involuntary dismissal can only be one of law and that the motion should have been for a directed verdict under which no findings of fact are necessary.[15] The court then disregarded the findings and reviewed the entire evidence.

The 1963 amendment to FRCP Rule 41(b) has clarified this somewhat confusing area. The Rule as amended will apply only to non-jury cases where such findings will be necessary. It is clear that in a case tried by a jury, the proper motion will be one for a directed verdict.

It should be noted that there are several areas where the Rules do not require findings of fact or conclusions of law. FRCP Rules 56 and 52(a) do not require findings in a motion for summary judgment. The case of *Filson v. Fountain*[16] cites with approval a statement made in *Lindsey v. Leavy:*[17] "Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required in rendering judgment, although the court may make such findings with or without request. Failure to make . . . findings and conclusions is not error."[18]

In *Gurley v. Wilson,*[19] the court reiterated that such findings were unnecessary to a summary judgment; however, it did point out that such findings could often be helpful to the appellate court if made by the trial court.[20] In line with this view the Southern District of California has adopted local rule 3(d)(2) which requires proposed findings and conclusions to be served with the motion for summary judgment.

Nor are findings and conclusions required under FRCP Rule 12 as amended in 1946.[21] However, if there are factual issues which are being determined, findings should be prepared. For example, residence may be a contested issue of fact in a venue problem. In *King v. Wall & Beaver St. Corp.,*[22] the defendant moved for a preliminary hearing under FRCP Rule 12(d) on the defense of improper venue, and for summary judgment of dismissal under FRCP Rule 56. Pleadings, affidavits, and depositions were submitted

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15 *Id.* at 9.
16 171 F. 2d 999, 1001 n.4 (D. C. Cir. 1948).
17 149 F. 2d 899 (9th Cir. 1945).
18 149 F. 2d at 902.
19 239 F. 2d 957 (D.C. Cir. 1956).
20 *Id.* at 958.
21 See Magidson v. Duggan, 180 F. 2d 473 (8th Cir. 1950); FRCP Rule 52(a).
22 145 F. 2d 377 (D.C. Cir. 1944).

to the court, and the court did conduct a preliminary hearing, giving the plaintiffs opportunity to bring forward any other evidence on the issue of the defendant's domicile. Under such circumstances the court ruled that such a preliminary hearing was not a summary proceeding, but a separate trial of separate issues. "Consequently, the lower court was justified, indeed, was required, to make findings of fact."[23]

Since the *King* case was decided in 1944, prior to the 1946 amendment to FRCP Rule 12, the question now is whether the above statement still holds true. *Moore's Federal Practice* points out that "although the literal language of the 1946 amendment stating that findings are unnecessary on decisions of motions under Rule 12 may obviate the above decision, we do not believe that it should for two reasons. The 1946 amendment should be read in conjunction and harmonized with the earlier provision of the rule requiring findings in all actions tried upon the facts."[24]

Moore further suggests that such findings be made on Rule 12(b) motions: 1) for lack of jurisdiction over subject matter; 2) for lack of jurisdiction over person; 3) for improper venue; 4) for insufficiency of process; and 5) for insufficiency of service of process.[25] This suggestion has merit since not all questions under the Rule will be limited to matters of law, and a district court may have to determine facts in ruling on such motions.

FRCP Rule 52(a) also makes necessary findings of fact and conclusions of law where there is a trial with an advisory jury. In *Reachi v. Edmond,*[26] the court made a finding contrary to that of the advisory jury. The appellant contended that the trial court should not have overturned the jury verdict and that its findings were clearly erroneous. However, the appellate court ruled that the advisory verdict was not binding upon the trial court, nor that it in any way affected the limitation placed upon an appellate court by FRCP Rule 52(a) to the effect that findings of fact are not to be set aside unless clearly erroneous.

Another area that may require a court to make findings on issues is that of special verdicts. Under FRCP Rule 49(a), if the court in submitting interrogatories to the jury omits any issue of fact, each party, unless he makes a timely demand, waives his right to a trial by jury of that issue. In the case of *Ingersoll v. Mason,*[27]

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[23] *Id.* at 381.
[24] 5 MOORE, FEDERAL PRACTICE ¶ 52.08 at 2673 (2d ed. 1951).
[25] *Id.* at 2674.
[26] 277 F. 2d 850 (9th Cir. 1960).
[27] 254 F. 2d 899 (8th Cir. 1958).

the court omitted the issue of contributory negligence on the part of the cross-complainant; no interrogatory bearing on that question was submitted to the jury or requested by either party. The trial court made a finding that there was not contributory negligence and the appellant asserted error. The appellate court held that in these circumstances under FRCP Rule 49(a) it became the duty of the trial court to make a finding and that the appellate court could not disturb such a finding unless it could be said to be clearly erroneous.

FRCP Rule 52 also requires findings in cases where the government is a party. In *United States v. Yellow Cab Co.*,[28] the Supreme Court stated that the Rule, providing that the findings of fact shall not be set aside unless clearly erroneous and that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses, applies to appeals by the government as well as to those by other litigants, and there is no exception which permits the government, even in an antitrust case, to ask the appellate court for what virtually amounts to a trial *de novo* on the record of findings as to intent, motive, and design.[29] Therefore, in these cases also, only those findings that are clearly erroneous will be set aside. A year later, in *United States v. Fotopulos*,[30] it was held that since under the Federal Tort Claims Act Congress chose to deprive the litigants of a right to trial by jury, the findings of the trial judge take on a greater significance than in an ordinary civil court action.[31]

Other specific areas where findings are required are patent infringement cases,[32] copyright infringement actions,[33] and requests for declaratory judgments.[34]

On the other hand, it is well established that findings are not necessary as to facts admitted in pleadings. In *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*,[35] an infringement of trademark case, the defendant admitted "that the name 'Nu-Enamel' has come to mean and is understood to mean . . ., the plaintiff and the plaintiff's products only, and the word 'Nu-Enamel' is a mark by which the goods of the plaintiff are distinguished from other goods of the same class."[36] The Supreme Court, therefore, ruled that since the defendant conceded the secondary meaning of the plaintiff's mark no evidence or finding was necessary.

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28 338 U.S. 338 (1949).
29 *Id.* at 341-42.
30 180 F. 2d 631 (9th Cir. 1950).
31 *Id.* at 634.
32 Hycon Mfg. Co. v. Koch & Sons, 219 F. 2d 353 (9th Cir. 1955).
33 Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354 (9th Cir. 1947).
34 Kochtitzky v. John A. Denie's Sons Co., 153 F. 2d 520 (6th Cir. 1946).
35 305 U.S. 315 (1938).
36 *Id.* at 320-21.

The more recent case of *Mah Toi v. Brownell*[37] also holds that neither proof nor finding is required in support of an allegation admitted in the pleadings. However, it would seem to be the better practice to include in the findings all admissions from pleadings and all admitted facts from the pre-trial order.

Nor are findings necessary when pertaining to immaterial issues. In *Woodhead v. Wilkinson*,[38] a negligence case, the defendant complained on appeal that the trial court had made no finding on the issue of plaintiff's contributory negligence. The California Supreme Court stated that a finding on the issue of contributory negligence would not be necessary since the trial court made a finding that the defendant's negligent acts were the sole and proximate cause of the injury. This follows from the rule that findings and conclusions are required on every *material* issue.[39]

III. Are There Particular Cases or Situations in Which Findings May or May Not Be Required?

1. Admiralty.

Admiralty Rule 46½[40] requires the trial court to find the facts specifically and to state separately its conclusions of law. This rule was adopted in 1930, and is now well established by case law. As early as 1942, Judge Learned Hand in *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*[41] made it obvious that the "unless clearly erroneous" provision of FRCP Rule 52(a) will apply to admiralty cases. In 1952, in *Griffith v. Gardner*,[42] the court concluded that findings in an admiralty case may represent the judgment of the trial court on the mass of details involving not only the trustworthiness of witnesses but other appropriate inferences that could be drawn from the evidence. The later cases of *Panama Canal Co. v. Sociedad de T.M.S.A.*[43] and *Founders' Ins. Co. v. Rogers*[44] make it clear that any review of the findings in an admiralty case is circumscribed by FRCP Rule 52(a).

Despite Admiralty Rule 45,[45] providing that further proof may be taken by leave of the appellate court in such a matter as may be described by statute or by such court, it has been made clear in

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37 219 F. 2d 642 (9th Cir. 1955).
38 181 Cal. 599, 185 Pac. 851 (1919).
39 See United States v. Seminole Nation, 299 U.S. 417 (1937), wherein the Supreme Court states that a judgment may not be upheld which is not supported by definite findings of fact extending to *all essential* issues.
40 28 U.S.C. foll. § 2073 (1958).
41 126 F. 2d 992 (2d Cir. 1942).
42 196 F. 2d 698 (9th Cir. 1952).
43 272 F. 2d 726 (5th Cir. 1959).
44 281 F. 2d 332 (9th Cir. 1960).
45 28 U.S.C. foll. § 2073 (1958).

McAllister v. United States[46] that there no longer is a trial *de novo* in the circuit court. The Supreme Court cites Judge Hand's opinion in *Petterson Lighterage & Towing Corp. v. New York-Central R. Co.*[47] Judge Hand points out that although the rule still remains, it is substantially an anachronism, in that,

> there is no "manner" [by which to take further proof] consistent with Rule 46½ except to have the District Judge take it, or at least to have it referred to him in the first instance after it has been taken. This is true because as soon as new evidence is taken the old findings are necessarily superseded; findings are not findings when they rest upon only a part of the evidence, and to satisfy rule 46½ new findings must be made. Thus Rule 45 at most does no more than vest final discretion in this court as to whether new evidence shall be taken at all. . . .[48]

In admiralty cases a finding of seaworthiness is usually a finding of fact and the Supreme Court ordinarily will not, just as in other cases, review the concurrent findings of fact of the two lower federal courts.[49] However, negligence and unseaworthiness are not equivalent. In *Royal Mail Lines, Ltd. v. Peck*,[50] a case involving an action by a stevedore against a ship and indemnity over by the ship against the stevedoring company employing the plaintiff, there was a jury verdict as to the negligence of the ship to the injured stevedore. The trial court then made a finding of fact as to the unseaworthiness of the ship and denied the indemnity claim against the stevedoring company which was based on a contractual obligation for its employees to perform work in a proper manner. The court commented that "a finding of negligence is neither a substitute foundation for, nor a finding of unseaworthiness."[51] Therefore the case was remanded for further findings on the claim for indemnity.

2. Negligence and Unseaworthiness.

Although not always necessary, it is certainly a better practice to state the basic facts rather than conclusory facts in the findings. In *Ramos v. Matson Navigation Co.*,[52] the plaintiff, a cook, alleged that laundry bags were irregularly and improperly piled so that one fell upon him, causing injury to his back. In filing his claim he charged that the vessel was unseaworthy in that the stowage of the laundry was unsafe and, accordingly, he was not provided with a safe area in which to work. Secondly, he charged negli-

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46 348 U.S. 19 (1954).
47 *Id.* at 20.
48 126 F. 2d at 996.
49 See Mahnich v. Southern Steamship Co., 321 U.S. 96 (1943).
50 269 F. 2d 857 (9th Cir. 1959).
51 *Id.* at 860.
52 316 F. 2d 128 (9th Cir. 1963).

gence under the Jones Act based upon the same facts. The trial court made the somewhat general findings of seaworthiness and lack of negligence on the part of the ship's owners, agents or employees. It also made a finding of fact that the libelant was an unreliable and untrustworthy witness.

On appeal the libelant contended that the findings were nothing more than conclusions. The appellate court stated that a finding as to negligence or unseaworthiness is one of fact and would not be upset unless clearly erroneous. But it also stated: "At the same time, we think it better practice for the court to make enough findings as to what actually happened, so that the parties and this court can appraise the ultimate finding as to negligence or unseaworthiness. . . . But for reasons hereafter stated, we do not think it necessary or desirable to do so here."[53]

The reasons were no doubt that the plaintiff was shown to have had a series of accidents aboard various ships, each resulting in a back injury, and that his testimony contained many inconsistencies. Further, he was impeached by a private detective who had watched him mow his lawn and lift the mower over his fence. The court concluded that the trial court simply had not believed the plaintiff either as to how the accident occurred or as to his claimed injuries and that there would be no need to send the case back to have the court tell them so in more detail.

The dissenting judge would have remanded the case for more specific findings as to how the laundry bag was stored, whether it fell, and if so, whether it struck the plaintiff.[54] He relied on a statement made in *Dalehite v. United States*:[55]

> Federal Rules of Civil Procedure, Rule 52(a), in terms, contemplates a system of findings which are "of fact" and which are "concise." The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in hard and complex cases to make a studied effort toward definiteness. Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. Kelley v. Everglades Drainage Dist., 319 US 415, 87 L ed 1485, 63 S Ct 1141, and cases cited. Otherwise, their findings are useless for appellate purposes. *In this particular case, no proper review could be exercised by taking the "fact" findings of "negligence" at face value.* And, to the extent that they are of law, of course they are not binding on appeal. E.g., Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.

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[53] *Id.* at 131.
[54] *Id.* at 133.
[55] 346 U.S. 15 (1952).

340 US 147, 153, 154 and concurring opinion at 155, 156, 95 L ed 162, 167, 168, 169, 71 S Ct 153. (Emphasis added.)[56]

In the *Kelley* case the Supreme Court commented that it was not its function to search the record and analyze the evidence so as to make findings that the trial court had failed to make.[57]

3. Credibility of Witness.

It is proper and sometimes necessary for the court to make a finding as to the credibility of a witness. As we saw in the *Ramos* case,[58] the court found as a fact that the witness was unreliable. That a trial court may reject *uncontradicted* testimony which it finds not worthy of belief is amply supported by a statement made in that case:

> We have long since abjured the notion that a court cannot reject "uncontradicted" testimony that it finds not worthy of belief. (citing cases.) The rule is equally applicable to testimony given by deposition (Lau Ah Yew v. Dulles, 9 Cir., 1958, 257 F. 2d 744, 746), or by stipulation (Tucker v. Brady, 9 Cir., 1962, 305 F. 2d 550, 552). As we said in Tucker, "By the device of refraining from putting (the witness') demeanor to the test, appellant should not be able to render credible as a matter of law that which otherwise might have been disbelieved."[59]

In *Irish v. United States,*[60] the court remanded the case since there was no finding as to the reliability of the witnesses. But, as we noted above in *Griffith v. Gardner*[61] ". . . 'findings of fact' may . . . reflect the ultimate judgment of the court on a mass of details involving not merely trustworthiness of witnesses but other appropriate inferences that were drawn from living testimony which elude proof in a cold appellate record."[62]

4. Bankruptcy.

General Order in Bankruptcy No. 37[63] makes FRCP Rule 52(a) applicable and a bankruptcy court must "find the facts specifically," and make written fiindings of fact and conclusions of law. In *Costello v. Fazzio,*[64] it is pointed out that General Order in Bankruptcy No. 47[65] requires the district court and the appellate court to accept the findings of the referee in bankruptcy unless such are clearly erroneous. But where the findings are based upon conflicting evidence or

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56 *Id.* at 24 n. 8.
57 Kelley v. Everglades Drainage District, 319 U.S. 415, 421-22 (1943).
58 Ramos v. Matson Navigation Co., 316 F. 2d 128 (9th Cir. 1963).
59 *Id.* at 132.
60 225 F. 2d 3 (9th Cir. 1955).
61 196 F. 2d 698 (9th Cir. 1952).
62 *Id.* at 701.
63 11 U.S.C. foll. § 53 (1958).
64 256 F. 2d 903 (9th Cir. 1958).
65 11 U.S.C. foll. §53 (1958).

where the credibility of a witness is a factor the district court and, on appeal, a court of appeals will seldom hold such a finding clearly erroneous.[66]

However, where a referee reaches a conclusion from given facts neither the district court nor the court of appeals is so limited, and in such a situation either court can reach a proper conclusion from the given facts. Where there is a lack of findings of fact supporting the order of the district court, the case must be remanded so that the deficiency can be supplied.[67] In *In the Matter of Cesari*,[68] there was an ultimate finding that section 67d(3) of the Bankruptcy Act,[69] dealing with voidable transfers, was applicable. On appeal the court pointed out that to sustain this ultimate finding it was necessary that the referee make subsidiary findings showing that the transfer fell within all the conditions set out under section 67d(3).[70] So here again we see that the findings must be explicit enough to enable the reviewing court to determine the ground on which the conclusions were reached.

In *Perry v. Baumann*,[71] a petition for an agricultural composition, there were several motions made to dismiss on several grounds. The trial court entered an order dismissing the proceeding but it did not indicate which of the several motions was granted nor on what ground the dismissal was ordered. The appellate court, holding FRCP Rule 52(a) applicable, remanded with directions to find the facts and make conclusions of law prior to the entry of judgment.

A person aggrieved by an order of a referee may file for a petition of review by a judge under section 39(c) of the Bankruptcy Act.[72] Section 2(a)(10) of the act provides that courts of bankruptcy (District Courts) shall have jurisdiction to "consider records, findings and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings."[73]

As we said above, General Order 47 requires the referee to submit his findings of fact and conclusions of law in his report. However, the same order also states: *"The judge after hearing may adopt a report or may modify it or may reject it in whole or in part or*

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66 256 F. 2d at 908.
67 See Kline v. Rancho Montana de Oro Inc., 263 F. 2d 764 (9th Cir. 1959).
68 217 F. 2d 424 (7th Cir. 1954).
69 11 U.S.C. § 107 (1958).
70 217 F. 2d at 427.
71 122 F. 2d 409 (9th Cir. 1941).
72 11 U.S.C. § 67 (1958); as amended II U.S.C. (Supp. II, 1960); for a general analysis see 2 COLLIER, BANKRUPTCY § 39.16 (14th ed. 1959).
73 11 U.S.C. foll. § 11 (1958).

may receive further evidence or may recommit it with instructions." (Emphasis added.)[74] Notwithstanding the above language, the scope of review of the referee's findings involves an analysis of the type of testimony upon which the referee based his findings. If the finding is based on demeanor testimony involving credibility, such must be accorded a high degree of weight. On the other hand, if the findings are based on documentary and other nondemeanor testimony, or on inferences, deductions, or conclusions from uncontradicted, admitted or stipulated fact, the findings are subject to a lesser degree of weight.[75]

The Supreme Court in *Kelley v. Everglades Drainage District*[76] points out that the nature and degree of exactness of the findings depends on the circumstances of the particular case. The case should also be noted for its good discussion of findings in various bankruptcy situations.

5. Master's Report.

Under FRCP Rule 53(e)(1) a master may be required to submit findings of fact and conclusions of law. Also under FRCP Rule 52(a) the findings of the master shall be the findings of the court to the extent that they are adopted by the court. And under FRCP Rule 53(e)(2), in non-jury cases the court shall accept the master's findings unless clearly erroneous. However, it is pointed out in *W.R.B. Corp. v. Geer*[77] that the district court should at some stage of the proceedings determine as a judicial matter that the master's findings meet the "unless clearly erroneous" test and are the product of the correct principles of law.[78] In *W.R.B. Corp.* the appellate court remanded since "a consideration of the record leaves us in doubt that the district judge gave the review of the record and the successor master's report which the law requires."[79]

6. Special Verdicts.

This area was covered above in Section II. However, it should be noted that FRCP Rule 49(a) provides that where the court fails to submit an issue to the jury and where the court itself fails to make a finding, it shall be deemed to have made a finding in accord with the judgment on the special verdict. This rule was applied as early as 1939 in *Hinshaw v. New England Mut. Life Ins. Co.*[80]

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[74] 11 U.S.C. foll. § 53 (1958).
[75] See generally, 5 MOORE, FEDERAL PRACTICE ¶ 53.12 (6) at 2994-95 (2d ed. 1951).
[76] 319 U.S. 415 (1943).
[77] 313 F. 2d 750 (5th Cir. 1963).
[78] *Id.* at 753.
[79] *Ibid.*
[80] 104 F. 2d 45 (8th Cir. 1939).

In that case the plaintiff insurance company petitioned for a declaratory judgment against the administratrix of deceased annuitant to determine the rights under an annuity policy. The defendant cross-complained, alleging fraud and seeking rescission. The jury returned a special verdict in the form of fifteen findings. None of the findings were to the effect that the deceased relied upon any statement made by the plaintiff's agent. Such reliance is a necessary element for actionable fraud.

The trial court found for the plaintiffs, and the defendants on appeal contended that the element of reliance should be presumed. The reviewing court held that since there was no finding to the effect that no fiduciary relationship existed, FRCP Rule 49(a) is applicable. It then concluded that "[I]t will be assumed that the court made a finding in accordance with the judgment."[81] *I.e.* there was no reliance.

7. General Verdict and Interrogatories.

Where there is a general verdict accompanied by answers to interrogatories, the court makes no findings since, under FRCP Rule 49(b) if the answers are consistent with one another but one or more is inconsistent with the verdict, the court may direct a verdict in accordance with the answers, notwithstanding the general verdict, or return the jury for further consideration or grant a new trial; and if the answers are inconsistent with each other and one or more is inconsistent with the general verdict the court may return the jury for further consideration or grant a new trial.

8. Advisory Jury.

FRCP Rule 39(c) provides that in actions not triable of right by a jury the court may try any issue with an advisory jury. Under section II of this article it was pointed out that FRCP Rule 52(a) requires findings of fact and conclusions of law to be made where there is a trial with an advisory jury. It was also noted that the advisory verdict was not binding on the trial court. In *Greenwood v. Greenwood,*[82] the court mentioned that even though such a finding is not binding the trial court may adopt it as its own.[83]

In *Aetna Ins. Co. v. Paddock,*[84] the court stated:

> Some of the findings of the jury may be adopted and others rejected but all findings of the jury must be treated merely as advisory. [Citing case.] The remedy where the court has adopted the findings of a jury is not for a new trial but to require the

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81 *Id.* at 49.
82 234 F. 2d 276 (3d Cir. 1956).
83 *Id.* at 278.
84 301 F. 2d 807 (5th Cir. 1962).

> trial court to make independent findings of fact, enter judgment in accordance with those findings, and appeal therefrom, [Citing case.] Exception to the findings of the jury which are adopted by the court is by motion under Rule 52(b) to set aside or amend the findings.[85]

9. Jurisdiction.

Since the federal court is one of limited jurisdiction, jurisdiction must always be alleged and proved. It follows then that the court should make findings as to the facts which show jurisdiction; for example, in a diversity case, a court should make findings to the effect that the parties are citizens of certain states and that the amount in controversy exceeds $10,000 exclusive of interest. The court should then make a *conclusion* as to jurisdiction based on the facts.

10. Search and Seizure.

Under Rule 41(e) of the Federal Rules of Criminal Procedure[86] "[A] person aggrieved by an unlawful search and seizure may move . . . for the return of the property and to suppress for use of evidence anything so obtained. . . ." The Rule also provides that the judge may receive evidence on any issue of fact necessary to the decision. The Rule does not require findings of fact and conclusions of law. However, the better practice would seem to be that such findings should be prepared since the facts if supported by the evidence would be binding on the appellate court.[87]

11. Habeas Corpus.

Under FRCP Rule 81(a)(2), the Federal Rules apply to appeals on habeas corpus proceedings. In *Holiday v. Johnston*[88] the the Supreme Court pointed out that the trial court and not a commissioner should hear testimony and make findings.[89] In *Wood v. Howard*,[90] a habeas corpus proceeding, the court stated that "while it does not affect the rights of the petitioner in this cause, the district court should have made findings of fact and stated its conclusions of law thereon."[91] The importance of findings in such proceedings is well illustrated in the case of *Von Moltke v. Gillies*,[92] in which the Supreme Court was divided, four justices would have reversed the district court, three justices would have affirmed, and two justices

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85 *Id.* at 811.
86 18 U.S.C. App. (1958).
87 See Nichols v. United States, 176 F. 2d 431 (8th Cir. 1949).
88 313 U.S. 342 (1941).
89 *Id.* at 350-52.
90 157 F. 2d 807 (7th Cir. 1946).
91 *Id.* at 808.
92 332 U.S. 708 (1948).

were of the opinion that the record was inconclusive. Accordingly the case was remanded to the district court with instructions to make explicit findings on the questions of fact.

A prisoner in federal custody may make a motion under 28 U.S.C. Section 2255[93] to vacate, set aside or to correct the sentence. This motion then is in lieu of habeas corpus. The section expressly states: "[U]nless the motions and the files and the records of the case conclusively show that the prisoner is entitled to no relief, *the court shall* . . . grant a prompt hearing thereon, *determine the issues and make findings of fact* and conclusions of law. . . ." (Emphasis added.)

In *Michener v. United States*,[94] the trial court denied defendant's motion under section 2255[95] after a hearing but without making findings of fact and conclusions of law. The appellate court remanded with directions to make findings and conclusions since "the requirement of section 2255, title 28 U.S.C.A., with reference to the making of findings of fact and conclusions of law is similar to that embodied in Rule 52(a), Federal Rules of Civil Procedure. . . ."[96]

12. Injunctions.

Under the requirements of FRCP Rule 52(a), a district court in granting or refusing an interlocutory injunction shall set forth the findings of fact and conclusions of law which constitute the grounds of its action. In *Carpenter's District Council v. Cicci*,[97] the court concluded that this rule is mandatory. In 1962, the Third Circuit in *ICC v. Cardinale Trucking Corp.*[98] made its position, in relation to the necessity of findings, fairly clear. In that case the trial court filed no findings of fact nor did its opinion contain the necessary findings. The court stated:

> . . . it now becomes our duty to state that, in the future, unless the court below makes, either in separate, numbered paragraphs, or in its opinion, in conformity with Rule 52(a), clear and concise statements of the ultimate facts of the case, so that both the appellant and this court are fully apprised of the basis of its judgment, the matter will be forthwith remanded in order that such findings be made.[99]

It should be noted that since a necessary prerequisite for preliminary injunction is irreparable injury, it follows that there must

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93 (1958).
94 177 F. 2d 422 (8th Cir. 1949).
95 28 U.S.C. (1958).
96 177 F. 2d at 424.
97 261 F. 2d 5 (6th Cir. 1958).
98 308 F. 2d 435 (3d Cir. 1962).
99 *Id.* at 437.

be a finding to that effect.[100] A finding of irreparable injury is also a necessity in granting a temporary restraining order. FRCP Rule 65(b) requires that "every temporary restraining order granted without notice shall . . . define the injury and state why it is irreparable and why the order was granted without notice."

13. Contempt.

FRCP Rule 52(a) provides that findings are unnecessary on motions except as provided in FRCP Rule 41(b). But *Jewel Tea Co. v. Kraus*[101] points out that findings are usually appropriate, especially so when a defendant is held on a motion for civil contempt. This is true even though a trial court has a wide discretion in enforcing its decrees. In *Yanish v. Barber*,[102] the court commented that it would be an idle act to remand the case for findings, since although the trial court made none, there was no dispute or contradiction in the record.[103] The court in *American Cyanamide Co. v. Sharff*,[104] although recognizing that FRCP Rule 52(a) was not expressly applicable, stated: "In our opinion the case at bar is one which preeminently requires findings of fact and conclusions of law. . . ."[105] It would seem that here, too, although not expressly required, the better practice would be to include findings of fact and conclusions of law in contempt proceedings.

14. Naturalization Proceedings.

In the area of naturalization proceedings there seems to be a division of opinion. The Ninth Circuit minority rule to the effect that findings are not required under FRCP Rules 52(a) and 81(a)(2) is presented in *Wixman v. United States*.[106] It should be noted, however, that the appellate court in that case was of the opinion that the trial court had indicated its findings in an oral opinion delivered from the bench. Under the majority rule the trial court must make findings where the court examines witnesses but not where the district court merely reviews and adopts an examiner's findings and recommendations.

The majority indicate that FRCP Rule 52(a) is mandatory unless made inapplicable by FRCP Rule 81(a)(2) which provides: "[T]hey [the rules] are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed

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100 See Sims v. Greene, 161 F. 2d 87 (3d Cir. 1947).
101 204 F. 2d 549 (7th Cir. 1953).
102 232 F. 2d 939 (9th Cir. 1956).
103 *Id.* at 947.
104 309 F. 2d 790 (3d Cir. 1962).
105 *Id.* at 798.
106 167 F. 2d 808 (9th Cir. 1948).

to the practice in actions at law or suits in equity: *admission to citizenship,* habeas corpus, quo warranto and forfeiture of property for violation of the statute of the United States." (Emphasis added.)

In *Application of Murra,*[107] the court pointed out that there are two methods by which a petition for naturalization may be disposed of, namely: "(1) the court may act upon the report of an examiner who has conducted a preliminary hearing and who is required to make findings upon which his recommendation is predicated; and (2) a hearing in open court where the witnesses must be examined before the court and in the presence of the court."[108] The court explains that while the naturalization statute requires the examiner to make findings, there is no such statutory requirement on the part of a court where it hears and decides the issues. It logically concludes then that FRCP Rule 52(a) is applicable since there is no other statutory procedure.[109]

But, where a petition has been referred to an examiner and the petitioner does not demand a hearing before the court, there is nothing upon which the district court can predicate findings of fact, and therefore such findings are unnecessary.[110] However, the examiner should make findings in order that the court may act upon his recommendation.

15. Condemnation Cases.

In 1951 FRCP Rule 71A(a) became effective, thereby, making the Federal Rules of Civil Procedure applicable to eminent domain proceedings. FRCP Rule 71A(h) provides that if a commission is appointed, its "findings and report shall have the effect and be dealt with by the court in accordance with the practice, prescribed in paragraph (a) of subdivision (e) of Rule 53." Rule 53(e)(2) provides that "in an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

These two sections were interpreted by the court in *United States v. Certain Parcels of Land in City of Philadelphia.*[111] In that case the appellants objected that the court did not make separate findings of fact and conclusions of law. The appellate court pointed out that findings of fact need not be in any particular form and in this case the commission's reports were expressly adopted by the trial court, a procedure which corresponds with the handling of findings of fact usually employed by masters. It also explained that the review

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107 166 F. 2d 605 (7th Cir. 1948).
108 *Id.* at 606.
109 *Id.* at 607.
110 See Jow Gin v. United States, 175 F. 2d 299 (7th Cir. 1949).
111 215 F. 2d 140 (3d Cir. 1954).

of the commission's reports by the district court is properly a limited one and that since both the trial court and the appellate court must rely on the dead record either court may apply the correct rule of law to the commission's reports.

A more difficult situation is presented where the district court rejects the commission's findings as clearly erroneous and makes findings of its own. In *United States v. Twin City Power Co. of Georgia*,[112] the government contended that the question for the appellate court was whether the findings of the commission were clearly erroneous. The court referred to FRCP Rule 52(a) which provides, in part: "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Applying the *inclusio unius est exclusio alterius* rule of construction, the court concluded that "it would seem to be implied, or to follow, that the findings of a master, to the extent that the court rejects them, are not within the protection of the clearly erroneous rule."[113]

The court further concluded that the questions on appeal under such circumstances are: "1. Whether the district court applied the proper standard in considering the findings; 2. Whether it erred in rejecting the findings of the commission as clearly erroneous; and 3. Whether, in turn, the findings made by the district court are clearly erroneous."[114] Circuit Judge Tuttle, dissenting, thought it was the duty of the majority to state: "we think the commission's findings were clearly erroneous and we would set them aside"[115] rather than the statement made by the majority: "We cannot say that the district court erred in rejecting the commission's findings as clearly erroneous or that the findings of the district court are themselves clearly erroneous."[116]

16. Review of Findings of a Federal Agency.

A district court need not make its own findings when it reviews and approves an agency's findings. In *Dispatch Shops v. Railroad Retirement Board*,[117] the court commented: "Where the question before this court is whether or not the findings of an administrative Board are based on substantial evidence, the court lacks the power to make findings of fact contemplated by Federal Rules of Civil Procedure, [R]ule 52(a). . . ."[118]

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112 253 F. 2d 197 (5th Cir. 1958).
113 *Id.* at 203.
114 *Ibid.*
115 *Id.* at 206.
116 *Id.* at 204.
117 60 F. Supp. 106 (S.D.N.Y. 1945); affirmed, 154 F. 2d 417 (2d Cir. 1946).
118 *Id.* at 108.

IV. How Should Findings Be Prepared?

1. Who Prepares the Findings?

Various judges have suggested that a requirement that both sides submit their proposed findings of fact and conclusions of law before the trial starts would be helpful in the trial of a civil case, particularly a complicated one. If this practice is adopted, under each proposed finding counsel should set forth in supporting the proposed finding: a) the name of the witness, b) a summary of the proposed testimony of the witness, and c) the documents to be offered in support of the finding, attaching copies for the inspection of the court.

Such a practice would seem beneficial in a complex case in fulfilling the purpose of the findings as outlined above. FRCP Rule 52(a) suggests that the court find the facts and state its conclusions of law prior to entering judgment, which is certainly a logical approach. It would appear that if the proposed findings are submitted prior to the receipt of evidence, the court could more easily determine the factual issues while the evidence is quite fresh.

A practice in California and many western states is to ask the lawyers to prepare the findings of fact, conclusions of law and judgment. Judge Skelly Wright states that all the circuits except one have denounced this practice,[119] and quite properly so *if the trial court automatically signs them.* By such a practice a court would shun its duty of primary responsibility of fact finding. As Judge Wright pointed out, the winning counsel is going to state the case for his side as strongly as possible, which is only natural under the advocate system.[120] However, it is proper to have the lawyers submit their findings; but the judge should study them, pick and choose, modify, insert his own views and language and, if necessary, completely revise them or send them back for revision with instructions as to what he wants. Local Rule 7(a), Southern District of California requires counsel for the successful party to prepare findings and conclusions within five days.

2. Must the Findings of Fact and Conclusions of Law Be Separately Stated?

FRCP Rule 52(a) requires a separate statement of findings of fact and conclusions of law. However, as pointed out in *Walker v. Lightfoot,*[121] commingling will not ordinarily result in reversal un-

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119 Proceedings for Newly Appointed United States District Judges 166 (1963).
120 *Ibid.*
121 124 F. 2d 3, 5 (9th Cir. 1941).

less an appellant shows prejudice. Also, the courts will not reverse because of the failure to comply literally with the provisions of FRCP Rule 52(a) if the findings, though found in the opinion of the court or under the heading "Findings of Facts or Conclusions of Law," are sufficiently comprehensive and pertinent to the issues so as to provide a basis for decision.[122] Improperly including a finding as a conclusion or vice versa is not always fatal. In *Central Ry. Signal Co. v. Longden*,[123] an action for breach of fiduciary duty in the diversion of a "corporate opportunity," the court commented that the district court's finding with respect to corporate ratification and laches, which was included in its conclusion of law, was as binding, though improperly termed a conclusion of law, as if it were included in the findings of fact. Since it was actually a finding, the error was immaterial.[124]

If there is any doubt as to whether an item is a finding or a conclusion, it would seem advisable to include the item under both findings and conclusions. For example, "negligent" could be a finding or a conclusion or both. In *Gill v. United States*,[125] the court said: "That respondent was negligent was not found as a fact, but as a conclusion of law, is of no significance, for negligence is a mixed question of law and fact and a finding as to it may properly be labeled either a 'finding of fact' or a 'conclusion of law'."[126] The important thing is that there is sufficient evidence to support a finding of negligence no matter how it is labeled.

It should also be noted that conclusions of law may incorporate citations of cases or text as authority. It is often desirable to insert in the conclusions citations of a controlling authority, particularly in a close case. Such a practice should be most helpful to a reviewing court. However, as pointed out by Judge Wright: "[E]vidence should not be included in your findings of fact and conclusions of law. There should be raw facts when the trial judge feels they will be helpful in showing the basis for his determination. There should be intermediate facts; there should be ultimate facts. There should be no evidence."[127]

That statement is in line with one made in *Carr v. Yokohama Specie Bank, Ltd.*:[128]

> [T]he federal rule relating to findings of a trial court does not require the court to make findings on all facts presented or to

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122 See Alger v. United States, 171 F. 2d 667 (7th Cir. 1948).
123 194 F. 2d 310 (7th Cir. 1952).
124 *Id.* at 320.
125 184 F. 2d 49 (2d Cir. 1950).
126 *Id.* at 54.
127 *Supra* note 116, at 165.
128 200 F. 2d 251 (9th Cir. 1952).

> make detailed evidenciary findings; if the findings are sufficient to support the ultimate conclusions of the court they are sufficient. [Citing case.] Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence. . . . [Citing cases.][129]

The need for explicity is well illustrated in *Welsh Co. of California v. Strolee of California*,[130] a patent infringement case, in which the lower court was reversed because the findings were too broad and conclusory. The court, relying on *Dalehite v. United States*,[131] stated: "They do not reveal the 'basic facts on which the district court relied.' "[132] Also since the expert testimony was quite important the court referred to the lack of any findings with respect to the reliability of the witnesses.[133]

3. May the Opinion Contain the Findings and Conclusions?

FRCP Rule 52(a) was amended in 1946 to provide ". . . if an opinion or memorandum of decision is filed, it will be sufficient *if the findings of fact and conclusions of law appear therein.*" (Emphasis added.) The notes of the advisory committee on the amendment to the rules state: "Consequently they (findings of fact and conclusions of law) should be part of the judge's opinion and decision, either stated therein or stated separately. . . . But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no need for over-elaboration of detail or particularization of facts. . . ." The cases tend to show that the courts have given this part of the rule a broad interpretation.

In *Trentman v. City and County of Denver, Colorado*,[134] the trial court did not dictate into the record either the findings of fact or the conclusions of law. Neither did it file formal written findings of fact and conclusions of law, but it did file a written opinion which contained them. The court found that a footnote to the opinion of the trial court was in substance a finding of fact and that it must be considered as such. The appellate court commented: "[W]hile the opinion may not have been as complete as might have been

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129 *Id.* at 255.
130 290 F. 2d 509 (9th Cir. 1961).
131 346 U.S. 15 (1953).
132 Welsh Co., 290 F. 2d at 510.
133 *Id.* at 512.
134 236 F. 2d 951 (10th Cir. 1956); *cert. denied*, 352 U. S. 943 (1956).

desired in respect to the making of findings of fact, we think it is wholly unnecessary to remand the case for the making of additional findings."[135]

In *Stone v. Farnell*,[136] regarding a fraudulent sale of realty, a finding of negligence was essential. The district judge, however, did not submit such a finding in his findings of fact and conclusions of law. But, fortunately for the appellee, the trial court submitted a memorandum opinion containing statements about which the appellate court said: "Although the trial judge's statements are somewhat conclusionary in nature, they should be liberally construed, and in that context we feel that they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision."[137]

In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,[138] the appellant requested that the case be remanded for more specific findings. The action was a proceeding involving applications of terms of a contract between the union and employer. The trial court ordered the question to be submitted to arbitration. The company complained that the findings were too incomplete for adjudication in the reviewing court. The appellate court, acknowledging that the trial court had not set out its findings in numbered paragraphs, dismissed this contention on the ground that the district court's opinion contained sufficient material to proceed to the adjudication of the case.

However, it should be noted that even though findings may appear in the opinion, if there is a direct conflict between formal findings and the findings in the opinion, the formal findings will govern.[139]

V. Should Counsel Be Advised of the Basis of the Decision?

There should be no question that the formal findings should reflect the facts as honestly found. In some courts the judge will literally "sew up" a party by finding facts in such a way as to negate an appeal. By fitting the facts too well established legal principles there is no doubt that a trial judge could keep his batting average of reversals to a minimum due to the "clearly erroneous doctrine." But, is such a practice in keeping with the high standard of responsibility

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135 *Id.* at 953.
136 239 F. 2d 750 (9th Cir. 1956).
137 *Id.* at 755.
138 283 F. 2d 93 (3d Cir. 1960).
139 See Plastino v. Mills, 236 F. 2d 32 (9th Cir. 1956); Osaka Shosen Kaisha, Ltd. v. Angelos, Leitch and Co., Ltd., 301 F. 2d 59 (4th Cir. 1962).

that the judiciary faces in fact finding? Circuit Judge Frank in *United States v. Forness*[140] made some pertinent comments in this area:

> The correct finding, as near as may be, of the facts of the law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as faulty as one which results from the application of the "wrong" legal rule to the "right" facts. The latter type of error, indeed, can be corrected on appeal but the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are "clearly erroneous." Chief Justice Hughes once remarked, "an unscrupulous administrator might be tempted to say 'let me find the facts for the people of my country, and I care little who lays down the general principles.'" That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The Judiciary should at least measure up to the same standards.[141]

The wiser course of action is for the judge to advise counsel of the basis of his decision either orally from the bench, by a memorandum of decision, or by a written opinion. If counsel are to assist in preparing findings, this gives them directions as to how to proceed. The best time to determine facts is when the evidence closes, not on submission. The facts are usually clearly in mind at the close of the evidence. If the court is in doubt as to the application of the law to the case then it should find the facts from the bench and let the lawyers brief the applicable law. And, let the chips fall where they may.

VI. Can Findings Be Amended?

Under FRCP Rule 59(a) in a non-jury action a court may open the judgment, take additional evidence, amend the findings of fact and conclusions of law or make new ones and direct the entry of a new judgment. Such a motion to amend or alter the judgment should be served within ten days of the entry of judgment under FRCP Rule 59(e). FRCP Rule 62(b) also grants discretion to the trial court to stay the proceedings pending the disposition of a motion for amendment to the findings or for additional findings. Finally,

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140 125 F. 2d 928 (2d Cir. 1942).
141 *Id.* at 942.

FRCP Rule 73(a) provides for the tolling of the running of the time for appeal where the above motions are timely.

VII. What Is the Effect of Findings on Appeal When the Issues Decided Are on Written Evidence?

A question that has caused some confusion is whether a circuit court is bound by a trial court's findings, unless clearly erroneous, where the fact issues are decided on written evidence alone. Two divergent views have been formulated in answer to the question. The late Judge Frank and Professor Moore espoused the rule that in a case where the record was entirely documentary, the "clearly erroneous" rule did not apply and that a reviewing court could draw inferences and conclusions as easily as a trial judge. On the other hand Judge Charles Clark, drafter of FRCP Rule 52(a), and Professor Wright, editor of "Baron and Holtzoff,"[142] hold a contrary view.

The case of *Lundgren v. Freeman*[143] has an excellent discussion on this problem. It points out that FRCP Rule 52(a) incorporates the type of review that previously was had in equity cases and that "nothing in the history of review of equity cases or of law cases tried without a jury suggests that the appellate court ever decides issues of fact in the first instance, even where it considers itself full qualified as the trial judge to do so."[144] Because of this, it concludes that the "Clark" view is favored by history. The court states: "[W]e may not substitute our judgment if conflicting inferences may be drawn from the established fact by reasonable men, and the inferences drawn by the trial court are those that could have been drawn by reasonable men."[145] The opinion goes on to say that "Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court . . . . Rule 52(a) explicitly clearly applies where the trial court has not had an opportunity to judge of the credibility of witnesses."[146]

The *Lundgren* case, after citing cases supporting the "Clark" view and the "Frank" view, points out that a recent Supreme Court case, *Commissioner of Internal Revenue v. Duberstein*,[147] strongly sug-

142 Federal Practice and Procedure, (1950).
143 307 F. 2d 104 (9th Cir. 1962).
144 *Id.* at 114.
145 *Id.* at 113.
146 *Id.* at 113-14.
147 363 U.S. 278 (1960).

gests that the "Clark" view as to review of findings based on undisputed facts is the correct one. The court commented:

> The Supreme Court found that the question of whether there has been a gift, for income tax purposes, is a question of fact, and not a question of law; and the "clearly erroneous" test applies even though it seems the basic facts are undisputed . . . . A finding of fact, to which the clearly erroneous rule applies, is a finding based on the "fact finding tribunal's experience with the main springs of human conduct."[148]

However, where the evidence before the trial court is entirely written, the appellate court may make a finding of fact based on the uncontroverted evidence where the trial court omitted to do so.[149]

VIII. Is Failure to Make a Finding Always Fatal?

The case of *Yanish v. Barber*[150] goes far in supporting the trial judge who fails to make a finding. The case has been extensively cited, and holds: 1. It is not the function of the court of appeals to make findings of fact which a trial court should have made. 2. But not every case where there is a failure to make findings must be sent back to the District Court. 3. Reversal is not demanded "if a full understanding of the question presented may be had without aid of separate findings." 4. Another exception exists where the record considered as a whole does not present a genuine issue as to any material facts.

We cite the decision not because of its author (District Judge James M. Carter) but because it illustrates instances where a reversal could be avoided where there is a lack of findings. Judge Heely dissented and criticized the trial judge for not making a finding and wound up with what is probably a correct statement— "It has remained for my associates to attempt laboriously a making of such a finding for him, in effect converting this appellate tribunal into a trial court."[151]

Conclusion

The purpose of this article has not been to sermonize but rather to stress the importance of "fact-finding." In retrospect then we would like to emphasize several of the key areas.

Of primary importance are the purposes served by the findings of fact. They assist the trial court in the adjudication process. They serve other courts where the issues of *res judicata* or estoppel by

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148 Lundgren, 307 F. 2d at 115.
149 See Kostelack v. United States, 247 F. 2d 723 (9th Cir. 1957).
150 232 F. 2d 939 (9th Cir. 1956).
151 *Id.* at 949.

judgment are involved. Here, it would be well to keep in mind the need for preciseness. Lastly, they inform the reviewing court of the basis of the judgment, keeping in mind here the requirement of explicitness.

We saw above that all the circuits except the Ninth have denounced the practice of having counsel prepare the findings. Here, we cannot agree with the majority. Much of the court's valuable time can be saved by having counsel submit findings. Counsel may suggest findings a court may have missed. Finally, if the court conscientiously studies them prior to adoption or modification, they in actuality become those of the court.

Careless fact-finding or "sewing up" by fitting the facts to legal principles can negate an appeal due to the "clearly erroneous" doctrine. Because of this, the necessity for diligence and integrity on the part of the fact-finder should be obvious.

We also saw the divergent views as to whether a reviewing court is bound by a trial court's findings, unless clearly erroneous, when the issues are decided on written evidence. The "Clark" view advocates the rule that the trial court's findings are binding. The "Frank" view espouses the rule that a reviewing court could just as easily make its own conclusions. The difficulty in following this last theory is that it leaves no single fact-finding tribunal. The trial court's findings should be binding or ultimately the Supreme Court becomes a trial court.

Finally, we have seen that the failure to make findings is not always fatal. In *Yanish v. Barber*,[152] the court stretched to make a finding that should have been made by the trial court. However, least this case becomes too consolatory, we reiterate the statement made in *ICC v. Cardinale Trucking Corp.*:[153] "[U]nless the court below makes, . . . in conformity with Rule 52(a), clear and concise statements of the ultimate facts of the case, . . . the matter will be forthwith remanded in order that such findings be made."[154]

In concluding then it should be said that this phase of the law is not unlike any other, in that, THERE IS NO BLACK OR WHITE.

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[152] *Ibid.*
[153] 308 F. 2d 435 (3d Cir. 1962).
[154] *Id.* at 437.